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DECISIONS" AND THE "AMERICAN REPORTS,"

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN.

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CASES
IN THE
SUPREME COURT
OF
ALABAMA.

LIDE v. PARK.

[135 Ala. 131, 33 South. 175.]

WOMAN—Husband and Wife—Nonjoinder of Husband.—If power to foreclose a mortgage is bestowed on a wife before her marriage, she has power to execute it afterward without her husband's co-operation. (p. 18.)

HUSBAND AND WIFE—Adverse Possession by Him of Her Lands.—The trust relation of a husband toward his wife's statutory estate ceases upon her death, and if he and those claiming under him continuously occupy her land, thereafter claiming it as their own for ten years, they acquire a perfect title, free from any trust. (p. 18.)

TRUSTS.—The Statute of Limitations begins to run against the right of an heir to enforce a constructive trust in favor of his ancestor at the same time that it begins to run against the ancestor. (p. 19.)

HUSBAND AND WIFE—Statutory Trusteeship—Adverse Possession.—If a husband in foreclosing a mortgage on his wife's land, and while acting as her representative with her knowledge, purchases the land for her, but takes a deed in his own name, this constitutes a repudiation by the husband and wife of the statutory trusteeship between them, and if he and those claiming under him continuously occupy such lands, claiming them as their own for ten years thereafter, they acquire a perfect title, free from any trust. (p. 19.)

TRUSTS—Limitations.—The right to enforce a constructive trust is barred in two years, unless there are special circumstances justifying greater delay. A delay of twenty years in beginning the action constitutes gross laches. (p. 19.)

Action by an heir of a married woman to enforce a constructive trust in her favor growing out of a sale of lands under a power contained in her mortgage. The property thus sold was conveyed to her husband by the purchaser at the fore-

closure sale. Judgment for the defendants and plaintiff appealed.

G. MacDonald, J. Weatherby and O. C. Mauer, for the appellant.

W. M. Blakely, for the appellees.

¹³⁶ HARALSON, J. The sales under the mortgages were attended by no secrecy, but were openly made, after due advertisement of the same, at the places they were advertised to take place, and the deeds from the mortgagees to the purchaser, Robert Park, in full execution of the foreclosures, were very soon thereafter—on the 20th of January, 1879—duly recorded in the probate office. Indeed, from the averments of the bill it would appear ¹³⁷ that Robert Park acted for the mortgagees and purchased the property for the purpose of afterward conveying the same to the said Howard Park. The latter was the owner of the Limuel Park and Charles McDade mortgages, and acted for his wife, Janie, with her knowledge and consent in the foreclosures. The power to foreclose her mortgage having been bestowed upon her, before her marriage, however, she was capable, afterward, of executing the power alone, without her husband's co-operation: *Hardin v. Darwin*, 66 Ala. 61; *Gridley v. Wynant*, 23 How. (U. S.) 500. In all this there appears to have been no conduct on the part of Howard Park, his wife, Janie or of Robert Park, such as would taint the sales with illegality.

The relation of Howard to his wife's statutory estate, if he continued to occupy such relation toward her after the foreclosure of the mortgages, necessarily ceased at her death, on the 28th of May, 1878. Since that time, and since the foreclosure sales, he and those claiming possession under him, have continued to occupy and claim said lands as their own, and if he and they thus continued to hold for ten years, they had a perfect title in law and equity, free from any trust whatever: *Brackin v. Newman*, 121 Ala. 311, 26 South. 3.

The only violation of any trust complained of is that alleged to have been committed by said Howard, aided by his said wife, Janie, in the purchase of said lands under said mortgages. Whatever may be said of his conduct in this respect, it is certainly true that the effect of what was done was to vest the legal title in him, subject only to the right of his wife seasonably expressed, to repudiate his action, and to ask a

court of equity to declare the purchases made to be for her benefit; and, if entitled to do this, after she had executed her deed to the purchaser at the foreclosure sale, she could only have done so by offering to do equity by paying back to him the amounts paid out by him in the purchases with interest, and other lawful charges thereon. She died, as stated, on the 28th of May, 1878, without ever having sought to disaffirm these transactions, and was thus prevented to do so afterward. There was ¹²⁸ no express trust between the complainant and the said Howard, and the only one that could be said, in any event, to exist between them, was a constructive trust, arising by operation of law, and this he seeks by his bill to enforce. It is as the heir of said Janie, and not otherwise, he claims. Whenever the statute of limitations began to run against her, it did as to him.

The bill makes a plain case of repudiation by her and her husband of the statutory trusteeship between them, and shows the assertion of a title by him under his purchases at said mortgage sales, and the conveyances by the mortgagees to him, in hostility to the world. When this was done, in open repudiation of any claim or right of complainant, as a remainderman, to these lands, complainant had a right to resort to a court of equity to protect his interests, if he had any, and to compel the grantee, Howard Park, to respect his original trust. "A trustee of an express trust, purchasing at his own sale, commits an open and conclusively prejudicial breach of his trust, yet his purchase discharges the express trust and converts him into a constructive trustee, of which character the *cestuis que* trust may avail themselves by a proceeding in equity seasonably begun—within two years under our rulings, unless there be special circumstances justifying greater delay": *Robinson v. Pierce*, 118 Ala. 275, 295, 72 Am. St. Rep. 160, 24 South. 948, and authorities there cited; *Haney v. Legg*, 129 Ala. 619, 87 Am. St. Rep. 81, 30 South. 34; *Brackin v. Newman*, 121 Ala. 311, 26 South. 3. The complainant is not shown to have been under any legal disability to sue at the time of the alleged breach of trust, and, from aught appearing, he might have filed his bill in 1878 or, at the latest, in 1879, to claim and protect his interests. If it be said that he did not know of this repudiation of his rights in those years, it does appear that in 1879, by due diligence he might have ascertained the fact. The deeds that disclosed it were of record in the probate court in January, 1879. This bill was

not filed until the 13th of May, 1898, and was barred by the lapse of time, to say nothing of the question of laches, or any right he may have had originally to recover.

Affirmed.

Title by Adverse Possession, as between husband and wife is considered in the monographic note to *Gafford v. Strauss*, 18 Am. St. Rep. 113-115. The possession of land by a husband as trustee, for the use and benefit of his wife, is not adverse to her, even after he has obtained a divorce: *Meacham v. Bunting*, 156 Ill. 586, 47 Am. St. Rep. 239, 41 N. E. 175.

INGE v. BOARD OF PUBLIC WORKS.

[135 Ala. 187, 38 South. 678.]

MUNICIPAL CORPORATIONS—Injunction at Instance of Taxpayers.—Municipal authorities may be enjoined at the suit of a taxpayer from issuing illegal warrants or scrip, misappropriating public funds, creating improper debts, or abusing corporate powers. (p. 22.)

MUNICIPAL CONTRACTS.—A provision in a city charter that certain contracts shall be let to the lowest responsible bidder, is mandatory, and a compliance with its provisions is essential to the validity of such contracts. (p. 24.)

MUNICIPAL CONTRACTS—Lowest Responsible Bidder.—The determination of who is the lowest responsible bidder for a municipal contract rests, not in the exercise of an arbitrary unlimited discretion of the officer or board awarding the contract, but upon the exercise of a bona fide judgment, based upon facts tending reasonably to support such determination. (p. 24.)

MUNICIPAL CONTRACTS—Fraud—Lowest Bidder.—In the absence of fraud or gross abuse, courts will not interfere with the exercise of discretion by administration boards or officers in their determination of who is the lowest responsible bidder for a municipal contract. (p. 25.)

MUNICIPAL CONTRACTS—Lowest Bidder—Presumption.—When the action of a board in letting a municipal contract is directly assailed on the ground that it was not let to the lowest responsible bidder, it cannot be presumed from the mere acceptance of a bid by such board that the latter, in the exercise of its judicial discretion, after due consideration of all bids, determined such one as being the lowest responsible bid. (p. 25.)

MUNICIPAL CONTRACTS.—Additional Stipulations contained in a municipal contract awarded to one who is not the lowest responsible bidder, and which were not embraced in the published notice for bidding, though of advantage to the city, if they constitute a material charge, and therefore a departure from the basis of bidding and become an element of consideration in determining who is the lowest and best bidder, will invalidate the contract entered into. (p. 26.)

MUNICIPAL CONTRACTS—Assumption of Responsibility by Contractor.—A municipal paving contract under which the contractor assumes "all risk of damages to property, along or near the line of work," is void as tending to increase the amount bid for the contract and the burden to be borne by the taxpayer and abutting owners. (p. 27.)

MUNICIPAL CONTRACTS—Alien or Convict Labor.—A stipulation in a municipal paving contract against the employment by the contractor of alien or convict labor renders the contract void, as tending to increase the cost of the work, and as being against the interests of the taxpayer and abutting property owner. (p. 28.)

CONSTITUTIONAL LAW—Street Improvement.—A provision in a city charter for the assessment against property owners of the costs of street improvements to be measured by the "special benefits accruing by reason of said paving or improving, and in no case to exceed four dollars per front foot," does not violate a constitutional provision that "no municipality shall make any assessment for the costs of street paving in excess of the increased value of such property by reason of the special benefits derived from such improvements." (p. 29.)

MUNICIPAL CONTRACTS—Street Improvements—Presumption.—If no work has been done under a municipal contract, and it does not appear what will be the amount of the assessment for such work when made, it will not be presumed that the assessment when made will exceed the amount of the constitutional limitation. (p. 30.)

MUNICIPAL PAVING CONTRACTS are not rendered invalid by the fact that the authority granted by the legislature for street paving involves a considerable outlay; and that in the event of a failure to collect the assessments against abutting property it would have to be met out of the general revenues of the city. (p. 30.)

E. L. Russell and Fitts, Stouts & Armbrecht, for the appellants.

B. B. Boone and R. H. & N. R. Clarke, for the appellees.

194 DOWDELL, J. The bill in this cause was filed by Richard Inge and others, appellants here, as taxpayers of the city of Mobile, and abutting property owners on certain named streets of said city, included in the paving contracts, which are made an exhibit to the bill, and which were entered into on September 6, 1902, between the board of public works of the city of Mobile and the Southern Paving and Construction Company, a body corporate. The bill assails the validity of said contracts and seeks to have the same decreed null and void. The cause was heard before the chancellor on demurrer to the bill, and motion to dismiss the same for want of equity, and from his decree sustaining the demurrer and motion, and dismissing the bill, the present appeal is prosecuted.

In our consideration of the question raised we do not propose to follow counsel into all of the phases presented ¹⁰⁰ in arguments, oral and written, but prefer to lay down the principles which we think control, and state our conclusions in as brief a manner as practicable.

In the outset, we think it may be safely stated as a general proposition that a taxpayer may seek the aid of a court of equity and relief by injunction where the municipal authorities are about to issue illegal warrants or scrip, or to misappropriate public funds, or to abuse corporate powers: 1 Dillon on Municipal Corporations, sec. 504; 2 Dillon on Municipal Corporations, secs. 914, 921. So also may courts of equity, on bills filed by taxpayers, enjoin the improper creation of debts: 2 Dillon on Municipal Corporations, sec. 916.

There were two contracts entered into between the board of public works and the Southern Paving and Construction Company, one for paving certain named streets with vitrified brick, and the other for paving certain other named streets with asphalt. The alleged infirmities averred in the bill common to both contracts are: 1. That the contracts contained improper stipulations imposing upon the contractor a responsibility and liability for damage to persons and property beyond his liability for torts in his own business, or growing out of the nature of the work contemplated; 2. That the contracts contained improper restrictions upon the kind of labor, that might be employed by the contractor; and 3. That the provision of the charter of the city of Mobile regulating the assessments against abutting property owners for the improvements of the streets is different from and in conflict with, the provisions of the new constitution of the state, prescribing a system of assessment.

It is furthermore alleged in the bill that the contract for the asphalt paving is invalid for the additional reasons: 1. That the contract was not awarded to the "lowest responsible bidder," as required by the charter of the city of Mobile; 2. That the contract improperly contains a provision requiring the contractor to keep the pavement in repair for a long term of years; and 3. That the contract contained a material provision concerning the price as to future paving in the city, and which was not contemplated in the competitive bidding. The bill, therefore, for these several and distinct ¹⁰⁰ grounds, challenges the validity of the contracts, and prays that the same may be annulled, and also prays for an injunction.

While the demurrer purports in its caption to be the bill in its entirety, the several assignments or grounds are specifically directed to particular parts of the bill. The bill as a whole is not questioned by any ground of demurrer for deficiency in statement or failure of averment of facts. It is quite clear, we think, that if the contracts or contract are invalid for any one of the causes alleged in the bill, then the bill would not be wanting in equity.

The first assignment of the demurrer is to that part of the bill which relates to and avers the invalidity of the contract for the asphalt paving. The ground of demurrer is stated as follows: "They [respondents] demur to so much thereof as charges that the asphalt paving contract therein mentioned was not awarded to and made with the lowest responsible bidder therefor, upon the ground: That the bill shows that the board of public works did sufficiently determine the bid upon which said contract was awarded to be the lowest responsible bid therefor, and fails to show that in the exercise of its discretion to so determine, said board was guilty of fraud or misconduct." The second assignment of the demurrer also relates to the asphalt paving contract, and is stated as follows: "And defendants demur to so much of said bill as alleges that said board failed to adjudicate that the bid for the said asphalt paving contract, made by said Southern Paving and Construction Company and accepted by said board, was the lowest responsible bid therefor, upon the grounds: 1. That it appears in and by said bill that said board did in fact sufficiently so determine; 2. That it appears in and by said bill that said board accepted said bid and awarded said contract upon the same, and that such facts constitute a sufficient determination by said board that the same was the lowest responsible bid." The third assignment likewise relates to the asphalt paving contract, and is stated as follows: "3. And the defendants demur to so much of said bill as alleges the offer made ¹⁸⁹⁷ by the counsel of the Southern Paving and Construction Company and the inclusion of said offer in the written contract for asphalt paving, all as alleged in the ninth paragraph of the bill, upon the grounds: 1. That said offer and the contract made thereon did not operate to relieve said company from any of its obligations to the city of Mobile covered by its bid, but was an additional burden upon the company, and the same do not tend to establish that said bid was not that of the lowest responsible bidder; 2. That it does not appear by the bill

that said offer and the contract made thereon were in any way to the prejudice of complainants."

Section 75 of the charter of the city of Mobile (Acts 1900-01, p. 2391), under which the board of public works derives its authority and power to make the contracts in question, provides that such contracts shall be let to the "lowest responsible bidder" after advertising for bids, and that "said board shall have no power to pledge the credit of the city except as herein provided." The provision that the contract shall be let to the lowest responsible bidder is mandatory, and this seems to be emphasized by the further provision, that the "said board shall have no power to pledge the credit of the city except as herein provided." It is plainly a duty imposed by the law upon those on whom the power to contract is conferred, and a compliance with its requirements is essential to the validity of the contract. It is a general rule that a provision of this kind is mandatory, and unless the requirements imposed by the statute are complied with, the contract is rendered invalid: *McCloud v. Columbus* (Ohio), 44 N. E. 95; *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96; *Parr v. Greenbush*, 72 N. Y. 463, 471; *People v. Board of Improvement*, 43 N. Y. 231; *City Imp. Co. v. Broderick*, 125 Cal. 139, 57 Pac. 776; *McBrien v. Grand Rapids*, 56 Mich. 95, 22 N. W. 206; *Brady v. New York*, 20 N. Y. 312; *Brown v. New York*, 63 N. Y. 239; *McDonald v. Mayor*, 68 N. Y. 23, 23 Am. Rep. 144; *Mazet v. Pittsburg*, 137 Pa. St. 548, 20 Atl. 693; *State ex rel. Shaw v. Trenton*, 49 N. J. L. 339, 12 Atl. 902; *People ex rel. Coughlin v. Gleason*, 121 N. Y. 631, 25 N. E. 4.

¹⁹⁸ In the letting of public contracts to the lowest responsible bidder, the duty of the officer is not merely ministerial, but partakes of a judicial character, requiring the exercise of discretion. A discretion, however, which should always be exercised to the end of subserving the public interest, and never in the interest of the bidder. In deciding upon the responsibility of bidders it is the duty of the board or officers not only to take into consideration the pecuniary ability of bidders to perform the contract, but also to ascertain which ones, in point of skill, ability and integrity would be most likely to do faithful, conscientious work, and to fulfill the terms of the contract. "The determination of who is the lowest bidder, with the qualification of responsibility, rests not in the exercise of an arbitrary, unlimited discretion of the officer or board awarding the contract, but upon the exercise of a bona

side judgment, based upon facts tending reasonably to the support of such determination": See notes to case of *State v. Richards*, 50 Am. St. Rep. 489 et seq., where authorities are collected, with comments by Mr. Freeman on the subject. After determining from these considerations who are responsible bidders and who are not among those bidding, separating the responsible ones from the irresponsible, it becomes a matter of the amounts bid, and the law imposes the plain duty of selecting the lowest bid in amount. Of course, it is to be understood that the bid is to be made in compliance with the notice and specifications calling for bids. In the absence of fraud or gross abuse, the courts will not interfere with the exercise of discretion by administration boards or officers in their determination of who is the lowest responsible bidder. But in awarding the contract, it ought to appear that the contract has been by the board, in the exercise of its judgment and discretion, let to the lowest responsible bidder. And whatever may be the presumption to be indulged in favor of its action in this respect, when the contract is let to one whose bid is not the lowest in amount, where its action is not assailed, it is quite clear, that when its action is assailed, and it is directly charged that the letting was not to the lowest ¹⁸⁹⁹ responsible bidder, it will not be presumed on demurrer, which is a confession of the facts stated in the bill, from the mere acceptance of the bid by the board of him to whom the contract is awarded, that the board, in the exercise of its judicial discretion, after due consideration of all bids, determined such one to be the lowest responsible bidder.

The bill in the present case distinctly avers that the Southern Paving and Construction Company, to whom the contract was let, was not the lowest bidder for the asphalt paving, but that the Green River Asphalt Company was the lowest bidder for that contract, and that said latter company was a responsible bidder. It is further charged in the bill that said board of public works never "adjudicated" who was the lowest responsible bidder for the asphalt paving, as was their duty under the statute, but arbitrarily awarded the contract to the Southern Paving and Construction Company, whose bid was more than two thousand dollars in excess of the bid of the Green River Asphalt Company, the lowest responsible bidder. Taking these allegations to be true, which must be done on demurrer, the bill clearly makes a case of a failure on the part of the board of public works to comply with the mandatory

provision of the statute requiring the contract to be let to the lowest responsible bidder. The demurrer going to this part of the bill was not well taken, and should not have been sustained.

The charter of the city of Mobile provides that publication must be made "in such newspapers or other periodicals in the United States or elsewhere as said board may direct," calling for bids on the contracts to be let. This, of course, required that there should be some rule or standard by which all bids were to be measured, the purpose of this requirement being of a twofold nature: In the first place, by competitive bidding, to secure the lowest reasonable price for the articles furnished or services to be performed, and in the next place to prevent anything like favoritism on the part of the officers, and to secure fairness in the bidding. The basis of the bidding and the contract entered into should ^{must} be the same, for otherwise the very object and purpose of the law in calling for competitive bidding might be thwarted. "To require the bids upon one basis and award the contract upon another would, in practical effect, be an abandonment of all bids": *Wickwire v. City of Elkhart*, 144 Ind. 305, 43 N. E. 218; to the same effect, *People v. Board of Improvement*, 43 N. Y. 229; *Shaw v. City of Trenton*, 49 N. J. L. 339, 12 Atl. 902. Any material departure in the contract awarded from the terms and conditions upon which the bidding is had renders the contract, in a sense, a private one. To permit such in the awarding of public contracts by public officers would be to open wide the door for favoritism, and defeat the thing which the law intended to safeguard in requiring the contracts to be let upon bids made on advertised specifications. It is unimportant whether the additional stipulation contained in the contract awarded to one, who is not the lowest responsible bidder, be in itself an advantage to the city or not, if it constitutes a material change, and, therefore, a departure from the basis of the bidding, and becomes an element or consideration in the determination of who is the lowest and best bidder, it will invalidate the contract entered into. The bill alleges that the contract entered into with the Southern Paving and Construction Company contained conditions as to future paving, which were not embraced in the published notice for bidding, and that the stipulations and agreements on the part of the Southern Paving and Construction Company, as to such future paving, induced the letting of the contract to said com-

pany, in disregard of the fact that the Green River Company was the lowest responsible bidder on the advertised basis. This being true, would authorize a bill in equity, by an abutting property owner and taxpayer.

Considering the alleged infirmities averred in the bill as common to both contracts entered into with the Southern Paving and Construction Company, the first of these charges is based on the stipulations as to the responsibility of the contractor contained in the fourteenth section of the contract. The contention being, that in requiring ²⁰²¹ the contractor to assume liability for damages to person and property, put upon the contractor a burden that tended to swell the cost of the work in the bids under the call. Section 14 is as follows: "The contractor shall be responsible for all loss or damage, if occasioned through neglect, omissions or failure on his part, or that of his agents or employes, to take such precautions as would prevent the same; he shall assume all risk of damages to any portion of his work, to fences, trees, buildings, pipes, conduits, railway tracks or other public or private property along or near the line of the work, and of any accident resulting in damage or injury to persons or animals." That portion of said section which places upon the contractor the assumption of "all risk of damages . . . to fences, trees, buildings, pipes, conduits, railway tracks or other public or private property along or near the line of the work," whether construed separately, or in connection with the rest of the section, imports more than a provision against the negligence of the contractor. We think the plain purpose and intention of this provision was to take away from the city and put upon the contractor the duty of paying for all damages done to property "along or near the line of the work," although necessary to a proper performance of the contract. As for instance, the cutting of roots of trees along or near the line, necessary to be done in carrying out the contract of paving, whereby the trees are destroyed, resulting in damage to the owner. This is a liability which properly rests upon the city. To require the contractor to assume the risk of such damages would naturally tend to increase the amount of his bid for the contract, the result of which would be to increase the burden to be borne by the taxpayer, to say nothing of the increase of the proportionate part of the burden to be borne by the abutting property owner. In *Blochman v. Spreckles*, 135 Cal. 662, 67 Pac. 1061, under a contract containing a liability clause somewhat

similar to the one here, the court held the contract void because the tendency of the requirements was to make the work cost more. It was there said: "The law does not authorize a municipality to escape its liability by shifting it to ²⁰²² the shoulders of the contractor, and in attempting to do so it imposed conditions that would naturally tend to increase the cost of the work."

The stipulation in the contracts against the employment by the contractor of alien or convict labor presents a question which has received consideration in a number of cases in the courts of the country. This condition was contained in the specifications, which formed the basis of the bids called for. It narrowed the field for the employment of labor, and was a restriction upon the contractor that naturally tended to make him increase the price of his bid. Such a limitation is directly opposed to the interest of the taxpayer, who is entitled to have the work done at the lowest cost. The authorities are generally agreed that such a provision invalidates the contract. The following cases discuss the principle here involved and contain citations of other authorities: *People v. Coler*, 166 N. Y. 1, 82 Am. St. Rep. 605, 59 N. E. 716; *Baker v. Portland*, 5 Saw. 566, Fed. Cas. No. 777; *People v. Warren*, 13 Misc. Rep. 615, 34 N. Y. Supp. 942; *Holden v. City of Alton*, 179 Ill. 323, 53 N. E. 556.

A court of equity is the only forum to which the taxpayer could resort to protect himself against the illegal contract. He would clearly have no standing in a court of law. How may these appellants, mere taxpayers, get the ear of a court of law in these matters? The city might plead the invalidity of the provision, but the bill in this case avers that the board and said company pretend that said contracts are valid and are about to perform them, and the board to pay out the city's money for such performance.

It is insisted by the bill that those sections in the act of March 5, 1901 (Acts 1900-01, secs. 85, 86, p. 2397), which authorize the board to pave the streets of the city of Mobile, are void, because in conflict with section 223 of the present constitution. Section 223 reads as follows: "No city, town or other municipality, shall make any assessment for the costs of sidewalks or street paving, or for the cost of the construction of any sewers against property abutting on such street or sidewalk so paved, or drained by such sewers, in excess of the increased value of such property by reason of the special ²⁰²³

benefits derived from such improvements." That portion of the statute of March 5, 1901, which is here urged as being in particular offensive to the section of the constitution above set out, is as follows: "The amount assessed against such property or property owner to be measured by and in no case to exceed, the special benefits accruing to said property or property owner by reason of said paving or improving, and in no case to exceed four dollars per front foot measured on all the streets, alleys or public places on which the property has a front which have been paved or improved." It will be observed that the provision of the constitution is a limitation on the amount that can be assessed against the property owner. That is the amount assessed shall not exceed the increased value of such property by reason of the special benefits derived from such improvements. Whatever meaning may be given, or construction put on, the words "special benefits" used in the provision of the constitution and in the statute, we think it plain that the constitutional provision contains no restriction as to the standard by which the assessment shall be measured, except that it shall not exceed the "increased value of such property by reason of the special benefits derived from such improvements." If the amount of assessment against such property owner be made in accordance with the measure provided in the statute, that is, by the "special benefits accruing to said property or property owner by reason of said paving or improving," and does not exceed the increased value of such property by reason of the special benefits derived from such improvement, wherein can it be said that the constitutional provision is violated? There is clearly room for the statutory provision for assessment within the limitation fixed by the constitution. Section 85 of the act of March 5th provides that no estimate of the cost of paving chargeable to abutting property owners can be made until after the paving is completed. In the present case no work has been done under the contract, consequently the board has done nothing that it is prohibited by section 223 of the constitution. There are no averments in ²⁰⁴ the bill to show what will be the amount of the assessment when made. It cannot be assumed that the assessment when made under the measurement fixed by the statute, will exceed in amount the limitation put by the constitution.

There is no merit in the question raised by the bill, that the authority granted by the legislature to pave the streets of

the city involves a considerable outlay, and in the event of a failure to collect the assessments against the abutting property it would have to be met out of the general revenues of the city. The powers and duties of municipal corporations are created and defined by the legislature, except in so far as they are specifically fixed by constitutional provisions: 20 Am. & Eng. Ency. of Law, 2d ed., 1139. These are matters peculiarly within the control of the legislature, when not restricted by constitutional provision, and the courts have no right to interfere.

It follows from what we have said in the foregoing opinion that the decree of the chancellor sustaining the motion and dismissing the bill for want of equity must be reversed and a decree here rendered overruling the motion. The decree sustaining the demurrers will be modified to the extent of sustaining the demurrers which are numbered 6 and 7, and overruling demurrers numbered 1, 2, 3, 4 and 5, and, as modified, will be affirmed. The appellee will pay the costs of appeal of this court and of the lower court.

In part reversed and rendered, and in part modified and affirmed.

Public Contracts.—In letting public contracts to the lowest responsible bidder, the officer intrusted with this duty has a discretion to determine the question of who is such bidder: See the monographic note to *State v. Rickards*, 50 Am. St. Rep. 489-497, on who are responsible bidders, and how to enforce their rights. Letting a contract to the lowest bidder implies equal opportunities to compete at the bidding. And a contract entered into by the acceptance of a bid for public work tendered in pursuance of an advertisement limiting the right to bid to persons employing, or who will in the future employ, only union labor, is void: *State v. Toole*, 26 Mont. 22, 91 Am. St. Rep. 886, 66 Pac. 496. See, also, *Adams v. Brennan*, 177 Ill. 194, 69 Am. St. Rep. 222, 52 N. E. 314; *People v. Coler*, 166 N. Y. 1, 82 Am. St. Rep. 605, 59 N. E. 716.

Contracts for Public Work.—A municipal ordinance requiring a contractor for street improvements to file a bond guaranteeing the work for one year from injury from ordinary use is unauthorized, increases the burdens of the property owner, and renders the contract and assessment void: *Alameda etc. Co. v. Pringle*, 130 Cal. 226, 80 Am. St. Rep. 124, 62 Pac. 394. A city has no authority to incorporate in a street paving contract a condition that the contractor shall keep up repairs for five years: *Portland v. Bituminous Pav. Co.*, 38 Or. 307, 72 Am. St. Rep. 718, 52 Pac. 28.

A Taxpayer may Sue to Restrain the unlawful payment of public moneys: *Northern Trust Co. v. Snyder*, 113 Wis. 516, 89 N. W. 460, 90 Am. St. Rep. 867, and cases cited in the cross-reference note thereto.

WESTERN RAILWAY OF ALABAMA v. MILLIGAN.

[135 Ala. 205, 33 South. 438.]

MASTER AND SERVANT—Negligent Act of Superintendent. If a superintendent of employes, while exercising an act of superintendence, playfully tickles, punches, or pushes an employé, thus causing him to injure himself, such negligent act is not an act of superintendence nor one for which the master is liable. (p. 32.)

G. P. Harrison, for the appellant.

Hill & Hill, for the appellee.

²⁰⁵ McCLELLAN, C. J. The theory upon which this case was tried and upon which there was verdict and judgment ²⁰⁷ for the plaintiff, Milligan, was that the railway company is responsible for the act of Cunningham, its alleged superintendent, in playfully punching or pushing Milligan in the side with a small stick when he told the latter to brush off the table of the machine which was constituted in part of knives set in its center and at the time rapidly revolving, that Milligan was "goosey," as he expresses it, or ticklish, and that the light punch or push in his diaphragm so upset him as to cause him to throw his hand among the knives, by which it was cut off. We are not of opinion that this act of Cunningham, assuming that he had superintendence intrusted to him in respect of having Milligan to brush off the table and that the act was done while he was in the exercise of such superintendence, was an act of superintendence for the consequences of which under the employer's liability act the company is liable. There is no pretense that the act was intended or calculated to further the work Cunningham had directed Milligan to do. It bore no sort of relation to that work, but was a mere casual pleasantry, or act of fun-making on the part of Cunningham toward Milligan, as one man would tickle another to make him jump or laugh spasmodically. It is testified that Cunningham knew that Milligan was "goosey" or ticklish—given to ridiculous gyrations when he was pushed or punched or touched; and the men there in the shops were in the habit, more or less, of touching or pushing him to see him jump. It was for this, and not in connection with the work he was directed to do, that Cunningham touched him on the occasion in question (if indeed he touched, or punched, or pushed, him at all, which is positively denied by Cunnig-

ham and several other apparently credible witnesses). That if Cunningham was guilty of any negligence in the premises it lay in this extraneous act, the evidence shows beyond controversy. That this was not an act of superintendence, we are entirely clear. That a negligent act, although committed by one intrusted with superintendence by the common employer, and while in the exercise of such superintendence, is not an act for which the employer is responsible ²⁰⁶ when it is not an act of superintendence under the statute, is clear upon reason and is settled by the authorities: Reno Employer's Liability Acts, sec. 59; Roberts and Wallace on Duty and Liability of Employers, 265-267; Dresser's Employer's Liability, sec. 62.

This whole case turns upon the question we have been considering: Whether Cunningham's alleged act of pushing, or punching, or touching. Milligan, while the latter was about to brush off the table upon which the knives were fixed was an act of superintendence. Reaching the conclusion that this was not an act of superintendence, and that of consequence the defendant was not responsible for it, our further inevitable conclusion is that the city court erred in refusing to give the affirmative charge requested by the defendant. It is unnecessary to discuss other rulings of the court bearing upon this subject—on demurrers, in the general charge given of the court's own motion and upon requests for special instructions—further than to say that they, too, were erroneous in so far as they proceeded upon the theory that the defendant would be liable for this act of Cunningham if he had superintendence intrusted to him and the act was committed while he was in the exercise of such superintendence.

Reversed and remanded.

Acts of a Servant for which his master is not liable are discussed in the monographic note to *Goodloe v. Memphis etc. R. R. Co.*, 54 Am. St. Rep. 71-93. A master is not answerable for the results of a practical joke perpetrated by his servants on a stranger, wholly outside the course of their employment: *Canton Cotton Warehouse Co. v. Pool*, 78 Miss. 147, 84 Am. St. Rep. 620, 28 South. 523.

ROQUEMORE v. DENT.

[135 Ala. 292, 33 South. 178.]

INSURANCE—Death of Beneficiary.—If a husband takes out a policy of insurance on his life in favor of his wife and children, "their executors, administrators, and assigns," the death of the wife before that of her husband terminates her interest in the policy. (p. 33.)

INSURANCE—Life—Construction of Policy.—If a life insurance policy is made payable to such children of the assured as may survive him, the beneficiaries under the policy are all of the surviving children of the assured as a class, and include those born after the issuance of the policy, and all of those by a second, as well as by a first wife. (p. 34.)

J. M. Chilton, Harmon, Dent & Weil and C. H. Roquemore,
for the appellants.

Watts, Troy & Caffey, for the appellees.

DOWDELL, J. We concur in the conclusions of the learned judge who tried this case. The new policies which were issued upon the surrender of the old were in substitution of the latter. The wife of the assured and his children were made the beneficiaries under the old; under the new or substituted policies the insurance was made payable to named trustees for "such of his [assured's] children as might survive him." The old policies were issued in 1870 and 1871. The wife died in 1882, and before her husband. Under the statute, sections 2733 and 2734 of the Code of 1876, her interest terminated with her death: *Tompkins v. Levy*, 87 Ala. 263, 13 Am. St. Rep. 21, 6 South. 346; *Friedman v. Fennell*, 94 Ala. 570, 10 South. 649. The new policies were issued after the death of the wife. Under this substitution no substantial change was made as to the beneficiaries. The new policies were made payable to trustees, but the quantum of interest to the beneficiaries remained the same. The employment of the words, "executors, administrators, or assigns," in the beneficiary clause of the policy does not differentiate this case from that of *Tompkins v. Levy*, 87 Ala. 263, 13 Am. St. Rep. 31, 6 South. 346, where the words employed were, "heirs, executors or assigns."

There is no reason why the rule of law in respect to testamentary bequests to children payable in futuro should not

apply to policies of insurance taken by the father for the benefit of children. In either case he is actuated by the promptings of natural love and affection, and with the same desire and purpose in both instances to make provision for his children after his ²⁹⁷ death. In the former, that is in a testamentary bequest payable to children as a class, it would not be questioned but that the class would open to let in after-born children to participate in the bequest, and without any distinction between after-born children of a second and a first wife. The application of this rule to insurance taken by the father for his children is supported both by reason and authority: *Thomas v. Leake*, 67 Tex. 471, 3 South. 703; *Ricker v. Charter Oak Ins. Co.*, 27 Minn. 197, 38 Am. Rep. 289, 6 N. W. 771.

The action of the court in sustaining the exceptions to the register's report upon fees and compensation was not unauthorized under the evidence, and we are not disposed to disturb the decree on this question.

We find no error in the record, and the decree of the city court will be affirmed, both as to direct and cross appeals.

A Gift to Children as a Class, by a testator, may be participated in by a posthumous child: See the monographic note to *Thomas v. Thomas*, 73 Am. St. Rep. 415; *McLain v. Howald*, 120 Mich. 274, 77 Am. St. Rep. 597, 79 N. W. 182; In *Ricker v. Charter Oak Life Ins. Co.*, 27 Minn. 193, 38 Am. Rep. 289, 6 N. W. 771, a man procured a policy of insurance on his life, payable to his wife, if living, otherwise to his children. The wife died leaving children. The insured had then paid all the premiums ever required. Afterward he remarried and had another child, surrendered the policy, and took a paid-up policy for the benefit of his second wife. This was held invalid as against his children, and all the children of both marriages were held entitled to share.

PRATT LAND AND IMPROVEMENT CO. v. McCLAIN.

[135 Ala. 452, 33 South. 185.]

DURESS.—To Authorize the Cancellation of a Conveyance for duress upon the grantor, the conveyance must have been procured solely by duress, independently of false promises. (pp. 35, 36.)

FRAUD.—Cancellation of Conveyance for.—Before cancellation can be decreed for fraud practiced in the procurement of a deed, the bill must aver facts from which fraud is the legal result. Mere averments of conclusions are insufficient to raise the issue of fraud. It is also essential to allege and prove that the defendant participated in the fraud or had notice of it, actual or constructive, before paying for the land. (p. 36.)

FRAUD.—Vendor and Purchaser.—In the absence of peculiar circumstances calling for disclosures, as where some confidential or fiduciary relation exists between the parties, a purchaser, though having superior judgment of values, does not commit fraud merely by purchasing without disclosing his knowledge of value. (p. 36.)

HUSBAND AND WIFE.—Conveyance by Wife in Payment of Husband's Debt.—Although the statute impliedly forbids a conveyance of a married woman's property as security for her husband's debt, such conveyance may be made in absolute payment thereof. (p. 38.)

LACHES, Being Defensive Matter, need not be negated by bill in equity seeking cancellation of a deed. (p. 38.)

W. J. Grubb, for the appellant.

⁴⁵⁵ **SHARPE, J.** By this bill complainant seeks the cancellation of two deeds—one executed by her and her husband conveying her land to defendant Martin, the other executed by Martin conveying the same land to the defendant corporation. Allegations were made of the husband's vicious temperament, of vicious conduct exhibited by him toward complainant to induce her execution of the deed to Martin, of fears engendered in her by that conduct and of false promises by him to allow complainant to use the purchase money of the land for the comfort of herself and children, and it is charged "that moved by these fears, and in part these promises of comfort for herself and children, she consented to sign the said deed." These averments would not warrant the granting of relief upon the theory that complainant's conveyance was procured by duress, for, apart from the question of how the defendant might be affected by the husband's exercise of coercive influence, that influence to afford a ground for avoiding the deed must of itself have impelled the execution of the deed, and

non constat the alleged misconduct of the husband without his mere promises and the expectation on complainant's part of receiving the purchase money, would not have had such effect.

Before cancellation can be decreed for fraud practiced ⁴⁰⁰ in the procurement of complainant's deed the bill must aver facts from which fraud is the legal result, the rule being that averments of conclusions are insufficient to raise an issue of fraud: *Mountain v. Whitman*, 103 Ala. 630, 16 South. 15; *Little v. Sterne*, 125 Ala. 609, 27 South. 972, *Warren v. Hunt*, 114 Ala. 506, 21 South. 939. Furthermore, it is essential to be shown by averment as well as proof that defendants participated in the fraud, or had notice of it, actual or constructive, before paying for the land: *Rogers v. Adams*, 66 Ala. 600; *Moses v. McDade*, 58 Ala. 211; *Moog v. Strang*, 69 Ala. 98.

There are averments to effect that defendant Martin "is the active agent" of the defendant corporation; that complainant, though living in the vicinity, did not know her property was rapidly increasing in value by reason of improvements in the nearby city, and that "this fact was also carefully concealed from her by her said husband and said Joe Martin purposely, as she believes and charges, in order that they might obtain from her as they did obtain by fraud and coercion and deceit the deed," etc. It is observed that in these averments, apart from the mere conclusion that Martin obtained the deed by fraud, nothing more is charged against Martin than that he did not inform complainant of the value of the conditions affecting the value of her land. Whatever moral or ethical duty may have rested on Martin to furnish complainant such information, he is not shown to have been under the legal obligation to do so. Ordinarily, when there are no peculiar circumstances calling for disclosures, as where some confidential or fiduciary relation exists between the parties, a purchaser, though having superior judgment of values, does not commit fraud merely by purchasing without disclosing his knowledge of value.

Elsewhere the bill refers to the husband's bad habits, and ill-treatment of his family, and in that connection complainant alleges "she believes that the said Joe Martin had often heard of this overbearing conduct of her husband, and knowing his vicious temperament and dissolute life, and that the said Joe Martin had great influence ⁴⁰⁷ over her said husband, and no doubt, as your oratrix believes, used such influence to effect and perpetrate the fraud upon your oratrix

by obtaining the said deed." This charges nothing material. Complainant's belief is not an issuable matter or a matter giving rise to an inference of fraud.

Complainant further charges "that said consideration named in said deed was never paid, but, as she is informed and believes, about two hundred and fifty dollars was paid to her said husband, largely by an old account due from her said husband to said Joe Martin; that even the said four hundred dollars was an inadequate price for the property, and the whole transaction was a fraud on your oratrix, and a deprivation of her rights by the tyranny and oppression of her husband of which the said land company had notice through the said Joe Martin, who procured and obtained said deed for the purpose of putting it into the lists of the property of said corporation. Your oratrix further charges that the said Joe Martin either knew, or had facts to put him on inquiry at the time her said husband delivered him the said deed, conveying or attempting to convey her said interest as aforesaid, that the said Fred A. McClain was a man of dissolute habits and he was in the habit of tyrannizing over your oratrix, or that the said Joe Martin knew of facts which would have put him upon inquiry whether she had been imposed upon and forced by her said husband to execute said deed, and knowing as he did that it was a fraud upon your oratrix's rights to pay her said husband for said land by an old account, and in a less sum, nearly one-half less, than was named in said deed, and knowing also that the said land, so being conveyed, was at that time worth at least, to wit, forty or fifty dollars an acre, and was daily enhancing in value, and that such sale as was then being made was in fraud of her rights, and taking advantage of her situation and her ignorance in the premises, and that such conduct on his part should render such conveyance null and void in his hands, and in the possession of those who are his associates in the Pratt Land and Improvement Company."

⁴⁵⁸ Here again fraud is alleged as a conclusion, as is also notice of the fraud. The facts relied on as imputing constructive notice to defendants should have been stated so that their effect, as imparting notice or not, could have been determined by the court, and so as to inform defendants of what they were called on to disprove. That the husband was dissolute and was tyrannical toward complainant did not indicate that complainant was unwilling to make the trade, or that her husband favored it to an extent which would lead him to prac-

tice a fraud upon her, and, therefore, Martin's knowledge of the husband's disposition was not of itself sufficient to put him on inquiry respecting the alleged wrongdoing of the husband, if he was not otherwise in complicity with that wrong.

For nonpayment of purchase money the remedy is not by cancellation of the deed. The bill is not appropriate to enforce payment for the land, and apparently such is not its purpose. The mere fact that the debt of the husband was paid by the sale does not make the conveyance void. Though the statute impliedly forbids a conveyance of a married woman's property as security for her husband's debt, such conveyance may be made in absolute payment of such debt: *Giddens v. Powell*, 108 Ala. 621, 19 South. 21; *Hubbard v. Sayre*, 105 Ala. 440, 17 South. 17.

If the bill could be considered as sufficiently charging fraud against Martin, it would still want averments to bind the defendant corporation by acts of his or on account of notice to him. The averments that the corporation is composed of him and others, and that he is the active agent, apparently have reference to Martin's relations to the company as they were when the bill was filed, and do not indicate that those relations existed when he bought and transferred to the company, nor does the averment that he "obtained the deed for the purpose of putting it into the list of the property of said corporation" show that he was then acting for and in behalf of the corporation.

For the defects to which we have referred the bill was subject to the demurrer.

⁴⁵⁹ The doctrine of laches is founded on the inequity of allowing a party claiming a right to avoid or affirm a transaction, to unnecessarily hold the right in abeyance, either to be enlightened by subsequent happenings as to how he will elect, or so that he will acquire an undue advantage over the other party by reason of changed conditions. Hence what delay in bringing suit short of the statutory limitation, will constitute laches is usually to be determined from what has occurred since the transaction involved, rather than from mere lapse of time. If the status of these parties or of the property has altered by reason of delay in filing this bill, that fact is not apparent from the bill, and laches being defensive matter, need not be negatived by the bill: *Scruggs v. Decatur Land Co.*, 86 Ala. 173, 5 South. 440. That complainant has waited before suing for nearly three years would not of itself pre-

clude relief, if apart from that consideration the case presented were such as to call for relief: See *First Nat. Bank v. Nelson*, 106 Ala. 535, 18 South. 154; *Shorter v. Smith*, 56 Ala. 208; *Scrugg v. Decatur Land Co.*, 86 Ala. 173, 5 South. 440.

The decree appealed from will be reversed, and one will be here rendered sustaining the demurrers to the bill.

Reversed, rendered and remanded.

The Subject of Duress is considered in the monographic notes to *Hatter v. Greenlee*, 26 Am. Dec. 374-378; *Mayor v. Lefferman*, 45 Am. Dec. 158-162; *Thorn v. Pinkham*, 30 Am. St. Rep. 337-339. To avoid a deed on the ground of duress per minas, the threats must be such as to strike with fear a person of common firmness and constancy of mind. Duress by mere advice, direction, influence, and persuasion is not recognized in law: *Barrett v. French*, 1 Conn. 354, 6 Am. Dec. 241. For recent cases on duress, see *Gorringer v. Read*, 23 Utah, 120, 90 Am. St. Rep. 692, 63 Pac. 902; *Barrett v. Mahnken* 6 Wyo. 541, 71 Am. St. Rep. 953, 48 Pac. 202; *Beath v. Chapoton*, 115 Mich. 506, 69 Am. St. Rep. 589, 73 N. W. 306; *Wolf v. Bluhm*, 95 Wis. 257, 60 Am. St. Rep. 115 70 N. W. 72.

PRESLEY v. WEAKLEY.

[135 Ala. 517, 33 South. 434.]

SURETYSHIP—Liability.—An action at law cannot be maintained against a surety on the bond of an executor, administrator, or guardian, until there has been, in a separate proceeding, a judicial ascertainment of the fact and extent of the principal's liability, and the rendition of a judgment against him. The act which fixes the liability of the surety is, not the act of misfeasance or malfeasance of the principal, but the rendition of a judgment or decree against him (p. 40.)

SURETYSHIP—Guardian's Bonds—Statute of Limitations.—If a guardian dies before final settlement of his guardianship, or before rendition of a judgment or decree against him, no case can arise, either in law or equity, falling within the terms of a statute fixing six years as a bar to actions against sureties of guardians for any misfeasance or malfeasance whatever of their principal. (p. 40.)

SURETYSHIP—Guardian's Bonds—Limitations.—The death of a guardian terminates his trust and fixes the period from which the time for suing the sureties must be computed, and if a longer time than that prescribed by statute elapses before a bill is filed against the sureties for an accounting, without anything to excuse the delay, such bill cannot be maintained. (p. 41.)

Action against the sureties of a guardian for an accounting brought eight years after the death of such guardian, who died

without having made any final settlement of his guardianship. Judgment for the sureties, and the complainant appealed.

N. L. Miller, for the appellant.

J. M. Gillespie, for the appellees.

519 **SHARPE, J.** By section 279 of the code six years is made a bar to "actions against the sureties of executors, administrators or guardians for any misfeasance or malfeasance whatever of their principal, the time to be computed from the act done or omitted by their principal which fixes the liability of the surety." This provision first became the law by adoption of the Code of 1852, **520** prior to which there was no statutory bar to actions of the kind mentioned. A settled principle prevailing before as well as since that enactment is that an action at law cannot be maintained against the surety on the bond of an executor, administrator or guardian until there has been in a separate proceeding a judicial ascertainment of the fact and extent of the principal's liability; but such an ascertainment when had, is, in the absence of any defense personal to the surety, such as fraud, non est factum or perhaps some others, binding upon the surety, notwithstanding his absence as a party to that proceeding. Hence it is considered that the act which fixes the liability of the surety within the meaning of the statute is, not the act of misfeasance or malfeasance of the principal, but the rendition of a judgment or decree against the principal: *Fretwell v. Mc-Lemore*, 52 Ala. 124; *Rivers v. Flinn*, 47 Ala. 471; *Wright v. Lang*, 66 Ala. 389; *McDowell v. Jones*, 58 Ala. 25; *Adams v. Jones*, 68 Ala. 117; *Martin v. Tally*, 72 Ala. 23; *Street v. Henry*, 124 Ala. 153, 27 South. 411. "This rule," this court declared in *Adams v. Jones*, 58 Ala. 25, with reference to a guardian's bond, "is plain and simple and is too well established both by authority and in sound reason to be now abandoned." The death of the principal cannot except a case from the rule, for such an event cannot so fix the surety's liability as to subject him to an action at law. For this assumed reason and the further expressed reason that the surety is not bound by any judgment or decree against the personal representative of his principal, it was said in *Martin v. Ellery*, 70 Ala. 326, "there is no remedy which can be pursued against the surety of an executor or administrator after the death of the principal, other than by bill in equity. There can be, after the death of the principal, no judicial ascertainment of his liabil-

ity which would be evidence against the surety; and without it no action at law on the bond could be maintained." It results from the construction the statute has received that where, as in the present case, the principal has died before the rendition of a judgment or decree against him, no case can arise ⁵²¹ either at law or in equity which will fall within the terms of the statute. But the question remains whether complainant's equitable remedy as against the sureties on her guardian's bond has been extinguished by force of the maxim, "*Vigilantibus non dormientibus aequitas subvenit*." "In the application of this maxim, "Courts of equity often refuse to grant relief in cases to which the statute of limitations does not strictly apply, and adopt a period in which their aid may be sought similar to that prescribed in analogous suits at law": *Askew v. Hooper*, 28 Ala. 634; *Montgomery Light etc. Co. v. Lahey*, 121 Ala. 131, 25 South. 1006. Where, as here, the case is of exclusively equitable jurisdiction the equity court is not bound to the analogies furnished by the statute of limitations, but in the absence of special circumstances to induce an enlargement or restriction of time for suit, that limitation is ordinarily adopted in determining what time should be allowed for that purpose; 19 Am. & Eng. Ency of Law, 154. In *Harrison v. Heflin*, 54 Ala. 552, the bill was filed more than twenty years after the death of an administrator and sought to enforce the obligation of his bond against the estate of a deceased surety. The court, while holding the remedy barred by lapse of time, declined to adopt the period prescribed by the statute we are considering as affecting the bar, but a reason expressed in the opinion for so declining was that the statute was passed after the cause of suit had ripened and applied only to causes of action accruing after it became operative. From this it is inferable that had the statute preceded the cause of suit, it would have been influential in fixing the bar. The statute is an expression of public policy, and as such is proper to be looked to by courts of equity in determining the proper limit of time to be ordinarily allowed for holding sureties, in silent jeopardy of their bonds.

The death of complainant's guardian terminated his trust and fixed the period from which the time for suing the sureties must be computed: *Harrison v. Heflin*, 54 Ala. 552. Thereafter about eight years passed before the bill was filed, and so far as it discloses without anything to excuse the delay. In conformance with the spirit and ⁵²² policy of the statute of limitations, it must be held that such unexcused delay is in

itself sufficient to preclude complainant from obtaining the relief now sought against the sureties and justifies the dismissal of the bill as to them.

Affirmed.

Before an Action on the Bond of an executor, administrator, or guardian can be maintained, the liability of the principal must, ordinarily, be fixed: See the monographic note to *Commonwealth v. Stub*, 51 Am. Dec. 529-534. It is held that a suit in equity to establish the extent of liability and charge the sureties of a guardian therewith may be maintained, although proceedings for an accounting have not been had against the guardian, if by reason of his death in another state, leaving no estate, such accounting is impossible or impracticable: *Otto v. Van Riper*, 164 N. Y. 536, 79 Am. St. Rep. 673, 58 N. E. 643.

A Guardian is Discharged, within the meaning of a statute providing that no action shall be maintained against the sureties on his bond, unless commenced within four years from the time the guardian is discharged, whenever the guardianship is effectively determined and brought to a close, either by the removal, resignation, or death of the guardian, or otherwise: *Perkins v. Chaney*, 114 Mich. 567, 68 Am. St. Rep. 495, 72 N. W. 595.

BAKER v. SELMA STREET AND SUBURBAN RAILWAY COMPANY.

[135 Ala. 552, 33 South. 685.]

MUNICIPAL CORPORATIONS—Streets—Additional Servitude.—An electric street railway is not per se either a public or a private nuisance, nor is it a new servitude imposed upon the land for which the owners of the fee are entitled to compensation or to an injunction to restrain its construction. (p. 43.)

STREET RAILWAYS—Right to Enjoin Construction or Operation of.—To entitle an abutting property owner to an injunction against the construction and operation of an electric street railway, he must aver and prove that it will constitute a nuisance in fact, and that he will suffer special injury different in kind from that sustained by the general public. (p. 45.)

STREET RAILWAYS—Construction—Damages—Remedy.—An abutting property owner who suffers damage by the improper construction of an electric street railway or by its negligent or unskillful operation, has an adequate remedy at law. (p. 45.)

Pettus, Jeffries & Partridge, for the appellants.

Mallory & Mallory and A. D. Pitts, for the appellee.

550 HARALSON, J. It is not averred in the bill, or denied, that the defendant company was regularly and legally incorporated.

The demurrer to the bill as amended questions the complainant's right to maintain it, on the ground that 550 it does not appear that complainants or either of them will be damaged by the construction and operation on Union street between Selma and Dallas streets, of defendant's street railway, in any manner in which they have a right to complain.

The bill avers that part of Union street between Dallas and Selma streets is occupied solely for residences and dwellings; that that part of Union street is extremely narrow, to wit, sixty feet; that the dwelling and residence of complainant, Joseph M. Baker, is near to the west side of said Union street, between said points, being about six feet from said street; that said house as it now stands, has stood for many years, to wit, twenty years; that the stable of complainant, Mary Baker Parrish, is near said street, and her residence is, to wit, about fifty feet from said street and as it now stands has stood for many years, to wit, for twenty years; that the sidewalks on each side of said street take up about twelve feet; that said company is proceeding to erect poles near the edge of the sidewalks, from which wires, to operate the road, are to be strung, which "will materially obstruct said street as a highway for wagons, carriages, drays and other vehicles, for which purpose it has been and is now used by the public, and thereby constitute a public nuisance in said street"; that the noise, dust and vibration caused by the running of the cars over and upon said street and the danger of injury and damage to property of complainants, in ingress and egress to and from their stables, outhouses and dwellings by the same, will render said property undesirable for residence or dwelling property, and will greatly diminish the value of the same in, to wit, the sum of five thousand dollars. These seem to be conclusions of the pleader. Such objections have all been made the subject of judicial investigation and decision. Mr. Booth, in his work on Street Railways, section 82, states the doctrine that: "A street surface passenger railway constructed at street grade in the usual manner and operated by animal power is not per se a public or a private nuisance, nor is it a new servitude imposed upon the 551 land for which the owners of the fee are entitled to compensation." The same principle applies to such roads when operated by electricity. As to this, the author says: "After

full consideration of the various objections raised to the use of electricity, every court of last resort to which the question has been submitted has held that the electric street railway does not constitute a new servitude, and that the use of this motive power when duly authorized does not entitle abutting owners to compensation": Booth on Street Railways, sec. 83; Joyce on Electric Law, sec. 341. "Streets and highways," says Mr. Joyce, section 278, "are dedicated to the use of the traveling public, and street railways, which are for the purpose of facilitating travel, impose no additional burden upon the abutting owner, and are a public use." The same author, section 335, in speaking of the difference between horse and electric railways, says: "The following facts have been presented to the courts in various cases, for holding that electric street railways are an additional burden—that poles and wires are erected in the streets, constituting an exclusive possession of the same, so far as the space occupied is concerned; that the wires are dangerous to the life and safety of the traveling public; that loud and unpleasant noises result, such as the buzzing sound produced while the car is in motion, and by the sounding of the gong, and that on account of the speed of the car there is much more danger than in horse street railways. . . . They are all doubtless true to some extent." He proceeds then to show, by the adjudications on the subject, that they are, so far as the right of the owner of the fee to complain is concerned, without merit, on the ground that such uses are no more than the drawing of any other vehicle on the streets. They all create noise, dust and vibrations, and are attended with some danger to life and property; but such uses are legitimate and within the original dedication of streets for the benefit of the public: Joyce on Electric Law, secs. 36-341; Birmingham etc. Co. v. Birmingham Ry. etc. Co., 119 Ala. 141, 142, 24 South. 502; Baker v. Selma etc. Ry. Co. 130 Ala. 474, 30 South. 464.

⁵⁶² In the case of Birmingham etc. Co. v. Birmingham Ry. etc. Co., 119 Ala. 141, 24 South. 502 this court said: "It has been adjudicated with practical unanimity throughout the country for many years that street railways operated by horse power, though the cars were confined to fixed tracks built upon the surface of the street for their special use, were, so far as the right of the owner of the fee to complain was concerned, no more than the drawing of any other carriage or vehicle upon the streets, and were, therefore, legitimate uses of the streets,

which the municipality was authorized to permit without violating any right of the owner of the fee. . . . The electric railways, such as we are now considering, are a comparatively recent development, yet, as is of common knowledge they have practically superseded all systems of street railway enterprise (saving the cable systems in the larger cities), and their nature and modes of construction and operation, as affecting or not the legitimate use of streets within the implied contemplation of the dedication, have been subjects of frequent adjudications by court of last resort in this country; and it may be said that there is almost unanimity in the adjudications that such uses are legitimate uses of streets, by the permission of municipalities, without any right of the owner of the fee to compensation." Many authorities are collated to support the text: *Baker v. Selma St. etc. Ry. Co.*, 130 Ala. 474, 30 South. 464.

The bill shows that the company had the consent and authority of the municipality of the city to construct its line and operate its cars on Union street; and if it be conceded that the charter of the company did not designate that portion of said street between Selma and Dallas streets, upon which they propose to lay their track, erect poles and operate their line of road, the complainants suffered no injury of which they can complain.

If such alleged obstructions as complainants set up to enjoin the construction and operation of this road are held to be sufficient to that end, it would be difficult for any such line to be built and operated in any city or town.

To entitle the complainants to an injunction against ~~such~~ the construction and operation of this road, it was incumbent on them to show by averments that it would be a nuisance in fact, and that they would suffer a special injury different in kind from that sustained by the general public: 1 *High on Injunctions*, secs. 762, 827, 828; *First Nat. Bank v. Tyson*, 133 Ala. 459, 91 Am. St. Rep. 46, 32 South. 144.

If complainants suffer damage caused by improper construction or negligent or unskillful operation of the road, they have their remedy, and defendant would be liable in damages: *Booth on Street Railways*, sec. 97. The bill is obviously without equity, and we have been unable to discover wherein the court erred in sustaining the demurrer to it.

Affirmed.

Public Nuisance.—A private individual cannot sue in his own name to abate or restrain a common nuisance, unless he sustains

special injury different from that of other members of the community: *State v. Stark*, 63 Kan. 529, 88 Am. St. Rep. 251, 66 Pac. 243; *First Nat. Bank v. Tyson*, 133 Ala. 459, 91 Am. St. Rep. 46, 32 South. 144.

The Operation of Street Railways does not impose an additional servitude upon a public street: *San Antonio etc. Ry. Co. v. Limberger*, 88 Tex. 79, 30 S. W. 533, 53 Am. St. Rep. 730, and cases cited in the cross-reference note thereto; *Doane v. Lake St. etc. Ry. Co.*, 165 Ill. 510, 56 Am. St. Rep. 265, 46 N. E. 520. It is otherwise if the railway is for the transportation of merchandise as well as passengers: *Chicago etc. Ry. Co. v. Milwaukee etc. Ry.*, 95 Wis. 561, 60 Am. St. Rep. 136, 70 N. W. 673.

IVY COAL AND COKE COMPANY v. ALABAMA COAL AND COKE COMPANY.

[135 Ala. 579, 33 South. 547.]

TROVER—Measure of Damages.—In trover to recover for the mining and conversion of coal on the land of another, where neither the trespass nor the conversion is willful or intentional, the measure of damages is the value of the coal as it lay in the mine immediately after its severance from the realty, with no deduction for the value of the defendant's labor in effecting the severance. (p. 47.)

A. London and J. London, for the appellant.

Smith & Smith, for the appellee.

See McCLELLAN, C. J. Action of trover by the Alabama Company against the Ivy Company for the mining and conversion by the latter company of coal on or out of the land of the former. The acts of the defendant cutting or "knocking down" the mineral, and converting it were done in the belief that the land, the coal in it and consequently the coal after it was severed belonged to it. Neither the trespass nor the conversion was willful or intentional, but each was at most merely inadvertent; and we may assume further for the purpose of this appeal, without, however, so deciding, that the defendant was guilty of no negligence in the premises, though it is quite difficult to conceive how one person could go upon and appropriate the minerals in a tract of land belonging to another in the mistaken belief that the land is his own without some negligence of inquiry in respect of the true ownership. But there was, as we have said, no willful or intentional wrong, and, as

we assume, no negligence on the part of the defendant. Upon the case thus stated and assumed the sole question for our consideration is as to the measure of the damages the plaintiff is entitled to recover. The plaintiff's position is that it should be awarded the value of the coal as it lay in the mine after it had been cut, or knocked down, and thereby severed from the realty. The contention of the defendant is that the damages should be measured by the value of the coal in and as part of the realty, and that the recovery should be for the difference in the value of the land before and after the coal was removed. The former position, that of the plaintiff, is logical and sound. Trover does not lie for damages to land. This action could not be maintained for the deterioration in the value of plaintiff's land resulting from coal being taken out of it. The gist of the action is the injury the plaintiff suffered by being deprived of coal which had been severed ⁵⁵³ from his land and had become personalty. This coal was as much plaintiff's chattel and his property in every sense as if itself had severed it, and the defendant had subsequently taken possession of it and converted it; and it is to our minds wholly illogical to say to a plaintiff in such a case that the property was wholly his, that it was the same value to him as if he had himself dug it from the earth or purchased it from its owner, and that in actions of trover the whole theory of the law is to give to the owner at least the value of his property that has been converted, yet because the defendant has committed the wrong of digging out this coal, his further wrong of converting it to his own use shall operate to deprive the plaintiff of the value of his coal. Some courts have so held, however. In England, what we hold to be the true rule—that the plaintiff is entitled to the value of the coal immediately upon its severance, with no deduction for the value of defendant's labor in effecting the severance—was declared in *Martin v. Porter*, 5 Mees. & W. 351. There seems to have been a departure from this case in *Wood v. Morewood*, 43 Eng. Com. L. 810, but there also seems to have been a reaffirmance of it in *Morgan v. Powell*, 3 Ad. & E. 278; and the house of lords adopted the rule of *Wood v. Morewood*, 43 Eng. Com. L. 810, rather than that of *Martin v. Porter*, 5 Mees. & W. 351, in the case of *Livingstone v. Rawyards Coal Co.*, 5 App. Cas. 25; but this was on a Scotch appeal, a fact which detracts from the decision as a precedent in the common-law action of trover. In this country the doctrine contended for by the defendant was first declared by the

supreme court of Pennsylvania, in *Forsyth v. Wells*, 41 Pa. St. 291, 80 Am. Dec. 617, but that case came under criticism and explanation in the subsequent one of *Lyon v. Gormley*, 53 Pa. St. 261, from which latter case it seems clear that that court, as then constituted, would have broadly affirmed the doctrine contrary to that declared by a bare majority of the judges in *Forsyth v. Wells*, 41 Pa. St. 291, 80 Am. Dec. 617, but for the existence of that case. On the other hand, there are many cases which will be found cited on appellee's brief as reported, which maintain unequivocally the rule that in ⁵⁸⁴ the action of trover on facts such as we have here, the plaintiff is entitled to recover the value of the coal as it lay in the mine when and after it had been severed from the realty; and this is the doctrine which has been declared by this court. In the case of *White v. Yawkey*, 108 Ala. 270, 54 Am. St. Rep. 159, 19 South. 360, the precise question was presented with reference to trees severed through a mistake by one from the lands of another. The conflict of authority to which we have adverted was referred to in the opinion, the question was considered upon authority and principle, and the true measure of damages was declared to be "the value of the property immediately after severance, when it becomes a chattel, with the interest thereon." This declaration was not a dictum in that case. It was necessary to the decision of the sole question presented for review, namely, whether the trial court erred in refusing to allow the defendant to prove as a basis for damages the value of the logs immediately after severance, the plaintiff contending that he was entitled to recover their value at another point to which they had been transported, the market place for them or point nearer and more accessible to the market than the place at which they were felled. This case has been more than once referred to with approval by this court: *Warrior Coal etc. Co. v. Mabel Min. Co.*, 112 Ala. 624, 20 South. 918; *Birmingham etc. R. R. Co. v. Tennessee etc. R. Co.*, 127 Ala. 137, 28 South. 679; and we should now declare it to be the law, even if this court were not committed to it.

The judge of the city court, sitting without a jury, correctly assessed plaintiff's damages in accordance with the rule laid down in *White v. Yawkey*, 108 Ala. 270, 54 Am. St. Rep. 159, 19 South. 360, and judgment was rendered accordingly. It must be affirmed.

Trespass in Mining.—Although the value of coal may be increased by mining and removing it to the surface by the labor of the

wrongdoer, the owner is entitled to its full value in its severed condition, and the trespasser can take no advantage for his labor, notwithstanding the mining was done by mistake: *Donovan v. Consolidated Coal Co.*, 187 Ill. 28, 79 Am. St. Rep. 206, 58 N. E. 290.

THOMPSON v. NEW SOUTH COAL COMPANY.

[185 Ala. 680, 24 South. 31.]

STATUTE OF FRAUDS—Defense of—Demurrer.—If the contract relied upon is shown by a bill for specific performance, the defense that it is obnoxious to the statute of frauds may be set up by demurrer. (p. 50.)

STATUTE OF FRAUDS—Contract by Agent.—Unless an agent is lawfully authorized in writing, any contract made by him as agent for his principal with respect to the sale of lands is void under the statute of frauds. (p. 50.)

STATUTE OF FRAUDS—Contract of Agent—Memorandum.—If an agent makes an unauthorized contract for the sale of land, and a check is given reciting that it is "part payment on coal lands," without specifying the particular lands, the check is not a sufficient memorandum of the sale to take the contract out of the operation of the statute of frauds. (p. 51.)

STATUTE OF FRAUDS.—The Only Parol Contract for the Sale of Lands not Void under the statute of frauds is where part or the whole of the purchase money is paid, and the purchaser is put into possession by the seller. (p. 52.)

STATUTE OF FRAUDS—Part Payment of Purchase Money does not alone take a parol contract for the sale of lands out of the operation of the statute of frauds. (p. 52.)

STATUTE OF FRAUDS—Sale by Agent—Part Payment of Purchase Money.—Acceptance of money as part payment of the purchase price of lands, with full knowledge that it is paid on account of an attempted, but unauthorized and void sale by an agent, does not by itself estop the principal from asserting the invalidity of the contract under the statute of frauds. (p. 53.)

Leadbeater & Johnston, for the appellant.

Walker, Tillman, Campbell & Walker, for the appellee.

633 **TYSON, J.** The bill in this cause seeks the specific performance of a contract for the sale of lands alleged to have been entered into between complainant and the respondent, New South Coal Company, and to have their rights in and to the lands adjudged superior to the claim of the respondents, Cornwell and Lopez, under and by virtue of a certain lease, executed by the New South Coal Company to Ellis Brothers and assigned by Ellis Brothers to Cornwell and Lopez. It is

clear from the averments of the bill that complainant predicates all his ⁶³⁴ rights against Cornwell and Lopez upon his right to have the alleged contract between him and respondent coal company declared binding and efficacious. No other or independent equity is asserted or attempted to be enforced against them. So, then, the question is, Do the facts alleged show a right to specific performance of the alleged contract against the coal company? If they do not, confessedly the complainant is not entitled to any relief whatever.

One of the objections taken to the bill by demurrer interposed by the coal company, which was sustained, is that the alleged contract upon which the complainant relies is void under the statute of frauds. The contract relied on by complainant is shown by the bill, and if, as shown, it is obnoxious to the statute of frauds, that defense may be appropriately set up by demurrer. Indeed, "a demurrer is the more appropriate mode of taking advantage of it": *Bolling v. Munchus*, 65 Ala. 558; *Phillips v. Adams*, 70 Ala. 373; 3 *Mayfield's Digest*, 847, sec. 336. What is that contract? It is an agreement made with one J. A. Montgomery, who alone subscribes it, not as the agent or representative of anyone, but as an individual, and that, too, without authority as shown by the letter referred to in it, which is also made an exhibit to the bill, even if it be conceded that McFarland, the writer of it, was authorized by the coal company to write it. It cannot be doubted that if the contract with Montgomery was made with him as the agent of the coal company and that he undertook by that instrument to bind that company, that in order to do so he must have been "lawfully authorized in writing." And unless he was so authorized, any contract made by him as agent for his principal with respect to a sale of the lands is void under the statute of frauds: *Code*, sec. 2152; *Linn v. McLean*, 85 Ala. 250, 255, 4 *South. 777*; *Johnson v. Jones*, 85 Ala. 286, 4 *South. 748*; *Hutton v. Williams*, 35 Ala. 503, 76 *Am. Dec. 297*.

Doubtless for the purpose of avoiding the force and effect of the statute, the estoppel alleged in the bill is pleaded. Indeed, it could have been pleaded for no other purpose, except to give effect to the contract by ⁶³⁵ way of ratification of the act of Montgomery, the alleged agent of the coal company, in the making of it. The facts relied upon to constitute the estoppel may be stated to be these: That the check which complainant delivered to Montgomery as the cash payment was payable to the coal company, and after being sent with the contract to

and received by that company was indorsed by it and the money collected upon it and retained. One theory seems to be that the indorsement of the check was a sufficient subscription by the coal company of the contract, within the purview of the statute. Of course, if this be sound, the retention by the defendant of the money collected upon it is of no consequence. If it be true that the indorsement by the company of its name across the back of the check was the equivalent of its subscription of the contract under the statute, this made the contract its in fact—just as though it had affixed its name at the bottom of it, and there would be no need for the invocation of the doctrine of estoppel. But we do not think that the check was any part of the contract itself, although it may have been attached to it. They are not only separate and distinct pieces of paper, but separate and distinct obligations. The check was a sequence to the contract, and constituted no part of it. It was nothing more than the payment of a part of the purchase money after the terms of the contract had been fully agreed upon, reduced to writing and signed by Montgomery. It came into existence necessarily after the contract had become a completed executory one. Indeed, the dates of the two papers show this to be so.

The fact that the check was attached to the contract did not make it a writing containing any part of the negotiations leading up to and resulting in the contract, and, therefore, does not bring the case in that category of cases in which several writings containing the negotiations between the parties culminate in an agreement of sale: *White v. Breen*, 106 Ala. 159, 19 South. 59. There is nothing on its face that shows it was given in part payment for the particular lands described in the alleged contract. It is true it does contain the words "part payment on ^{the} coal lands," but what lands are there referred to would have to be ascertained by resort to parol evidence which, of course, could not be done. It is, therefore, not in and of itself a sufficient memorandum of the sale of the lands within the requisites of the statute, if it be conceded that the indorsement by the coal company of the check is a subscription within the meaning of the statute: *Nelson v. Shelby Mfg. etc. Co.*, 96 Ala. 515, 38 Am. St. Rep. 116, 11 South. 695.

Having shown that the alleged contract was void on account of being obnoxious to the statute of frauds, and that the indorsement of the check did not import validity into it, and was not in and of itself a sufficient memorandum of sale, we

shall next consider the question, Did the acceptance of the check, the collection of the money upon it and its retention as purchase money, upon which, of course, may be predicated a verbal promise on the part of the coal company to make the sale, have the effect of avoiding a compliance with the statute? In other words, does the fact of the payment alone of a portion of the purchase money bring the parol contract of sale within the exception prescribed by the statute? The statute requires that "every contract for the sale of lands, tenements or hereditaments, or of any interest therein, except leases for a term not longer than one year, unless the purchase money or a portion thereof, be paid and the purchaser be put in possession of the land by the seller" must be "in writing and subscribed by the party to be charged therewith, or some other person by him thereunto lawfully authorized in writing." It will be noted that not only the payment of the purchase money or a portion thereof is necessary, but that the purchaser be put in possession by the seller, in order to come within the exception. Speaking to this point, it was said, in *Heflin v. Milton*, 69 Ala. 357: "The present statute contains an exception of the only parol contract for the lease or sale of lands which can be withdrawn from its operation. The exception is, when the purchase money or a portion thereof is paid and the purchaser put in possession by the seller. The two facts must concur—the payment ^{of} of the purchase money or a part thereof and the placing of the purchaser in possession. The one without the other—the possession without paying part or the whole of the purchase money, or paying the purchase money or any part thereof without letting into possession—will not satisfy the requirements of the statute. The introduction of exceptions to the statute of frauds, the departure from its letter and policy by courts of equity, to prevent parties through fraud from escaping performance of contracts they were in sound morality bound to perform, was much regretted. . . . The purpose of the present statute is the exception of the parol contract for the lease or sale of lands, which can be withdrawn from its general words. No other can be introduced or recognized by judicial decision." In the concluding part of the opinion it is further said: "There must be a contract or agreement in writing, or a note or memorandum thereof in writing, subscribed by the party to be charged, or by his agent thereunto lawfully authorized in writing, or the concurring acts of part performance expressed in the statute, to avoid its operation. If there be not,

however strong may be the parol evidence that the contract was made, that it was assented to and accepted, the party is not bound and cannot be charged. There can be no relaxation of the requisitions of the statute without introducing the mischief intended to be avoided": See, also, *Manning v. Pippen*, 95 Ala. 537, 11 South. 56; *Nelson v. Shelby Mfg. Co.*, 96 Ala. 515, 38 Am. St. Rep. 116, 11 South. 695. There is no pretense that the complainant was ever put in possession of the land.

The remaining question to be determined is whether the acceptance of the money with full knowledge that it was paid on account of the attempted sale by Montgomery estops the coal company from asserting the invalidity of the contract. In *Clanton v. Scruggs*, 95 Ala. 279, 283, 10 South. 757, 758, it is said: "One party to an invalid executory agreement is not entitled to hold the other party to the agreement just as if it had been originally valid, because the latter has received the benefit of a part performance by the former. The fact that one of the parties to such an agreement has acted on the faith ~~ess~~ of its validity does not raise up an estoppel against the other party to deny that it is binding on him. A mere breach of promise cannot constitute an estoppel in pais. . . . An executory agreement which is void under the statute of frauds cannot be made effectual by estoppel, merely because it has been acted on by the promisee, and has not been performed by the promisor. . . . Such a rule of estoppel would take the sting out of the statute of frauds, and defeat its manifest purpose."

In *White v. Levy*, 93 Ala. 484, 9 South. 164, Justice McClellan, speaking to this proposition, says: "To admit the doctrine elaborated in argument, that defendant is estopped to set up the statute of frauds here, because, while his contract was not in writing, yet he did promise to occupy the premises as tenant for the term commencing November 1, 1889, and failed to notify plaintiff to the contrary, the consequence being that she lost opportunity to secure another tenant, would be to utterly destroy the statute. It is directed against this class of promises, entailing in most instances just this character of detriment to the promisee. The position is wholly untenable."

This principle was fully and distinctly recognized in *Nelson v. Shelby Mfg. etc. Co.*, 96 Ala. 515, 38 Am. St. Rep. 116, 11 South. 695, where the purchaser, who had not been put into possession, was allowed to recover back the purchase money he had paid to the seller. Had the seller in that case, who ac-

cepted the purchase money from the plaintiff, been estopped to invoke the defense of the statute of frauds, by reason of that fact, it is entirely clear that a recovery could not have been had by the plaintiff. Indeed, the main ground upon which his right to do so was placed, was that his vendor had not subscribed a note or memorandum in writing within the requirements of the statutes, and, therefore, the contract, being void, by the very terms of the statute, neither party was bound by it. The contract being unenforceable either at law or in equity the vendor was deemed to have money which in equity and good conscience belonged to the plaintiff: See, also, ^{see} Hicks v. Swift Creek Mill Co., 133 Ala. 411, 91 Am. St. Rep. 38, 31 South. 947; Junkins v. Lovelace, 72 Ala. 303; Browne on the Statute of Frauds, 5th ed., sec. 461.

The decree sustaining the demurrer must be affirmed.

The Statute of Frauds, when and how it may be pleaded, is considered in the monographic notes to Jordan v. Greensboro Furnace Co., 79 Am. St. Rep. 648-658; Hotchkiss v. Ladd, 86 Am. Dec. 684-688. The title to lands will not pass by or under a contract with an agent, unless he has a written authority: Alabama etc. R. R. Co. v. South etc. R. R. Co., 84 Ala. 570, 5 Am. St. Rep. 401, 3 South. 286. Part performance may take a contract to convey land out of the statute of frauds: See Pike v. Pike, 121 Mich. 170, 80 N. W. 5, 80 Am. St. Rep. 488, and cases cited in the cross-reference note thereto. If part of the purchase price is paid and the vendee put into possession, the contract may rest in parol: Merrell v. Witherby, 120 Ala. 418, 23 South. 994, 26 South. 974, 74 Am. St. Rep. 39, and cases cited in the cross-reference note thereto. But it is held that payment of the purchase money alone is not sufficient: Nelson v. Shelby Mfg. Co., 96 Ala. 515, 38 Am. St. Rep. 116, 11 South. 695. The memorandum, in order to satisfy the statute, must, among other things, contain a sufficient description of the land to render it susceptible of being identified: Kopp v. Reiter, 146 Ill. 437, 37 Am. St. Rep. 156, 34 N. E. 942.

CASES
IN THE
SUPREME COURT
OF
COLORADO.

CAIRNES v. CAIRNES.

[29 Colo. 260, 68 Pac. 233.]

DIVORCE—Alimony to Pay Traveling Expenses of Wife.—If a nonresident wife sued for divorce desires to come to the state to make a defense, the court should require the plaintiff to deposit in court a sum sufficient to pay her expenses from her home to the state, to be paid on her arrival here. (p. 57.)

DIVORCE—Provision for Wife Pendente Lite.—If the plaintiff is unable to make reasonable provision for his wife during the pendency of the suit against her for divorce, the suit should be abated until he is able to do so. (p. 57.)

DIVORCE—Citizenship of the Plaintiff—Naturalization.—A statute declaring that no person shall be entitled to a divorce in the state, unless he has been a bona fide resident and citizen thereof for one year prior to the commencement of the action, does not preclude an unnaturalized plaintiff of foreign birth from maintaining an action, if he has come to the state in good faith for the purpose of making it his home, and has there resided for the time designated, and does not maintain a domicile or exercise a right of citizenship in any other state. (p. 58.)

DIVORCE—Pleading not Sufficiently Informing Defendant of the Cause of Action Relied on.—Evidence of the refusal of the defendant to cohabit with plaintiff should not be admitted under a complaint which merely charges her with desertion on the day on which she actually left plaintiff's home, especially when such evidence, when connected with other testimony, must prove a want of chastity on her part. Such complaint does not give her reasonable notice of the character of the offense sought to be proved against her. (p. 59.)

Warwick H. Downing, for the plaintiff in error.

Thomas, Bryant & Lee, for the defendant in error.

²⁶¹ **STEELE, J.** The plaintiff and defendant were married in the Dominion of Canada on June 26, 1895. In the fall

of that year the plaintiff came to Colorado, and on the 20th of July, 1898 filed his complaint in the county court of Jefferson county, asking for a divorce from the defendant upon the ground of desertion. The complaint contains the following allegation: "That on or about the thirty-first day of July, A. D. 1895, the defendant, disregarding the solemnity of her marriage vow, willfully deserted and absented herself from the plaintiff without reasonable or any cause, and ever since said day has and still continues so to willfully and without reasonable cause desert and absent herself from the plaintiff, so that the plaintiff alleges that the defendant has willfully and without reasonable cause deserted and absented herself from the plaintiff for the period of more than one year immediately prior to the commencement of this action."

After service of the summons, the defendant appeared and asked for temporary alimony and counsel fees. The court granted her motion and allowed her the sum of forty dollars. The defendant filed her answer, denied the allegations of the plaintiff's complaint, denied that plaintiff was a resident or citizen of Colorado, alleged that the plaintiff had deserted her, and asked that the cause be dismissed. Upon ^{24th} the trial it appeared that the plaintiff had declared his intention of becoming a citizen of the United States, during the year 1897. It further appeared upon the trial that the defendant left the home of the plaintiff in Canada on the 31st of July, 1895. The plaintiff was permitted to testify, over the objection of the defendant, that the defendant had refused to perform her duty as a wife from the date of their marriage. The defendant stated in her deposition that she had given premature birth to a child during the summer of 1895.

There are thirty-four assignments of error. The only ones we will consider are those which relate to the granting of alimony, the citizenship of the plaintiff and the refusal of the court to sustain the objection to the testimony of plaintiff to matters which occurred prior to the thirty-first day of July, 1895.

The question of temporary alimony rests largely in the discretion of the trial court, and the ruling of the court should not be disturbed unless there is abuse of that discretion. The defendant resided in the Dominion of Canada. The sum of forty dollars appears to us to be entirely inadequate to enable her to properly defend the suit. As it was, the defendant was required to expend the sum of sixty dollars for the taking of

depositions, was not present at the trial, and was not able, therefore, to pay, with the money allowed by the court, her counsel fees or all the costs that she incurred. But we think we should not disturb the verdict because of this ruling of the court, for the reason we have indicated. The court undoubtedly took into consideration the circumstances of the parties and allowed what, in his opinion, was a just sum to the defendant. In this connection it may be well to state, however, that ~~and~~ when a husband desires the luxury of a divorce from his wife, he should be compelled to pay the expenses of his wife pending the litigation; and in cases where the wife is a non-resident of the state, if she desires to come to the state of Colorado to make a defense, she should be given an opportunity to do so, and the courts should require plaintiff to deposit in court a sum sufficient to pay the expenses of the wife from her home to the state of Colorado, to paid to her upon her arrival here within a reasonable time, with such additional sum as may be necessary to properly defend the suit. And in case the plaintiff is unable to make reasonable provision for his wife during the pendency of the suit, the suit should be abated until he is able to do so.

Section 6 of the act authorizing this proceeding is in part as follows: "No person shall be entitled to a divorce in this state unless such person shall have been a bona fide resident and citizen of this state for one year prior to the commencement of the action, which fact shall be proven by the evidence of at least one credible witness other than the plaintiff." The law is well settled that one cannot be a citizen of a state unless he is a citizen of the United States; and it is urged by the defendant that the plaintiff, being a citizen of the Dominion of Canada, is not entitled to a divorce. In the restricted sense, a citizen of a state is a citizen of the United States domiciled in a state; and the defendant urges that the legislature intended to use the word "citizen" in this restricted sense. We cannot agree with this contention of counsel. At the time of the enactment of this law, persons were in the habit of coming to Colorado for the sole purpose of obtaining divorces and the legislature, to prevent this evil, enacted the statute ~~now~~ in question. And we are of the opinion that the legislature did not intend that the word "citizen" should be used in its restricted sense, but in the more general and approved sense, that of one who has in Colorado a fixed habitation and a permanent residence without any present intention of removing therefrom. And we are

satisfied that by this enactment the legislature did not intend to deny to persons who are not citizens of the United States access to our courts in this character of cases. We are therefore of the opinion that one who is an actual resident of Colorado, who has come to Colorado in good faith for the purpose of making this his home, and who does not maintain a domicile in any other place nor exercise the right of citizenship elsewhere, and has abandoned his former home, is entitled, after a year's residence here, to obtain a divorce in our courts upon proving the facts necessary to entitle him to a decree.

We are confirmed in our opinion that this was the intention of the legislature by a consideration of the facts which would be likely to occur if the construction insisted upon by the defendant were adopted. The only purpose, as we observed, the legislature had in requiring residence and citizenship here was to prevent the use of our courts by persons of other places coming here and residing temporarily for the sole purpose of obtaining a divorce. Yet, if the construction placed upon the act by the defendant were adopted by the court, it would result in denying to many actual and bona fide residents of this state access to our courts for the purposes of divorce until one year after they had become citizens of the United States, and this without regard to the length of time they had been residents of this state. A man ²⁸⁵ who, on the day he arrived here from Canada, declared his intention of becoming a citizen of the United States, would be required to remain here for the period of six years before he would be entitled to maintain an action in our courts, and this without regard to the good faith of his residence. A woman expecting to gain citizenship through her husband, would be required to wait six years or more after her husband's desertion before she would be entitled to the relief which the law gives other persons. But upon the native born would probably fall the greatest burden. The statute requires bona fide residence and citizenship to be established by some witness other than the plaintiff. In the case of a native born it requires proof of birth, and there are so many people residing in Colorado who would probably be unable, without great expense and inconvenience, to prove the fact of their birth, that we are satisfied the legislature did not use the word "citizen" in the sense contended for.

Again, by our constitution, men and women of proper qualifications are entitled to hold any office in the gift of the people of the state if they have declared their intention of becoming

citizens of the United States, and we cannot believe that the legislature intended by the use of this word, in view of all these facts, to deny to persons not citizens the right to sue for divorce in our courts.

The act itself would appear to warrant the construction we have suggested. "Which fact shall be established by the evidence of some credible witness other than the plaintiff" is the language of the act. Considering the grammatical construction of the act, it would seem that the legislature did not intend that more than one fact should be established when it ²⁰⁰⁰ required the bona fide residence and citizenship to be proven. We are therefore of the opinion that the objection of the defendant upon the ground that the plaintiff was not a citizen of the state of Colorado was properly overruled.

But we think the case must be reversed for the reason that the defendant has not had an opportunity to properly defend or explain very material statements made by the plaintiff concerning her conduct. These statements of the plaintiff involved not only desertion but moral turpitude as well. If the plaintiff's testimony is correct, the defendant was not only unchaste, but she may have been guilty of adultery. He testified that upon their wedding night, and at all other times, she denied him his marital privileges. The complaint charges the defendant with desertion on or about the 31st of July, 1895; it appears from the testimony that this is the day upon which the defendant left the plaintiff's home, and there was no intimation anywhere in the pleadings that the plaintiff intended to rely upon the refusal of the defendant to permit cohabitation, as supporting the charge of desertion. These matters were permitted to be given to the jury with all the disgusting details, and undoubtedly had a very prejudicial effect upon the defendant's cause. She was not advised in any way that the plaintiff would undertake to prove and establish her unchastity, under the garb of a charge of desertion; and, while it may be true, as contended by counsel for the plaintiff, that the refusal of the defendant, such as charged, constituted desertion, when the defendant alleged the desertion as having taken place on the 31st of July (which was the very day upon which defendant left his home) she had a right to believe that he expected ²⁰⁰⁷ to rely upon the actual leaving at the time as constituting the desertion. In one of the affidavits filed, the defendant alleged that she and the plaintiff matrimonially cohabited after the 31st of July, 1895; the plaintiff denied that he had matrimonially

cohabited with the defendant "after the 31st of July, 1895." The inference to be drawn from such a denial is that prior to July 31, 1895, he did cohabit with the defendant; at least, it was sufficient for her to believe and understand that the plaintiff did not expect to charge her inferentially with unchastity and, perhaps, adultery. We do not insist that parties are required to prove acts committed upon the date laid in the complaint, but where the date of the complaint will give notice of a fact, one should not be permitted in his testimony to detail facts of which the other party has had no notice, which have occurred prior to the date alleged in the complaint, particularly when the facts detailed are facts which, if given, will be prejudicial to the defendant's cause. The plaintiff knew, prior to the bringing of the suit, that the defendant claimed to have been pregnant, and if his testimony in this respect is true, he was not responsible for her condition. The plaintiff then was entitled to a divorce on other grounds than that charged in the complaint, and when he charged desertion on the 31st of July, 1895, being the day on which the defendant left his home, he must be held to have waived the right to present the facts constituting desertion before that time, unless upon due notice the defendant had an opportunity to deny them.

We are satisfied that by permitting this testimony to be given, the rights of the defendant were prejudiced, and that the court committed error in allowing ²⁹⁵ the plaintiff to testify to such facts; and for the reasons assigned, the judgment will be reversed.

The Question of Alimony, whether it shall be allowed at all, and its amount, is generally considered to be in the discretion of the court, and its allowance will not be disturbed in the absence of an abuse of such discretion: See the monographic note to *Methvin v. Methvin*, 60 Am. Dec. 679; *Bardin v. Bardin*, 4 S. Dak. 805, 46 Am. St. Rep. 791, 56 N. W. 1069; *Eickhoff v. Eickhoff*, 29 Colo. 295, post, p. 64, 68 Pac. 237. It may include an amount sufficient to enable the wife to pass the winter in a tropical climate when her health demands this: Note to *Methvin v. Methvin*, 60 Am. Dec. 680.

PEOPLE v. DISTRICT COURT OF LAKE COUNTY.

[29 Colo. 277, 68 Pac. 224.]

INJUNCTION—Title to Office.—The title to an office cannot be tried by injunction. A court of equity is without jurisdiction to issue an injunction to compel the plaintiff to be admitted to a public office, or, if he claims to be a member of a board, to prevent the other members from refusing to admit him where he does not hold a certificate of election. (p. 63.)

PROHIBITION Against Enforcing an Injunction.—If a court of equity grants a mandatory injunction to require a county board to admit complainant as a member thereof, it acts beyond its jurisdiction, and a writ of prohibition should issue to prevent further action on the part of such court. (p. 63.)

Charles Cavender and John A. Ewing, for the petitioners.

James Glynn, for the respondents.

275 CAMPBELL, C. J. In the district court of Lake county, John J. Quinn, claiming to be a member of the board of county commissioners of that county, under appointment by the governor to fill a vacancy which, under our statute, continued his term till the next general election, and until the election and qualification of his successor, brought his action in equity against the other four members of the board and Warren F. Page, who also claimed title to the same office, to restrain the board from recognizing and seating Page as a member thereof in place of plaintiff, and to enjoin Page from attempting to act, as one of its members by virtue of a certificate of election which he held from the proper canvassing board certifying that at the next general election held after Quinn's appointment Page had been duly elected as his successor. A temporary writ of injunction was granted without notice to the defendant, and a motion was made to dissolve it. Before the hearing upon that motion, plaintiff asked leave of court to file a supplemental complaint, which in substance averred that since the filing of the original complaint the defendant members **276** of the board had agreed and conspired together to refuse to recognize the plaintiff as a member or to allow him to participate in its proceedings, and to deprive him of his rights as a member; and, in pursuance thereof, passed a resolution that until the question of who was entitled to a seat in the board was determined, neither he, the plaintiff, nor Mr. Page would

be recognized; and further alleging that the board, in carrying out its resolution, refused to allow him to participate, or avail himself of any of his privileges as a member. In addition to the relief prayed for in the original complaint, he asked that a temporary mandatory injunction be issued commanding his associates on the board to admit him to membership and treat him as a member until the title to the office should be determined in a proper action.

Upon a hearing of the motion to dissolve the temporary writ, which was contemporaneous with a hearing of plaintiff's application for leave to file the supplemental complaint, the court refused to dissolve the temporary writ, and, without previous notice to defendants, issued a temporary mandatory writ commanding the board to admit plaintiff to its membership and to allow him to participate in all its proceedings and receive the emoluments of his office, until the further order of the court in the premises.

The defendants thereupon filed a petition in this court, setting forth the facts above recited, for a writ of prohibition to restrain the district court from proceeding further in the action there pending. A rule to show cause was issued, and in response thereto the respondents in this proceeding have filed a demurrer to the petition on the ground that such facts do not entitle the plaintiff to the writ.

²⁵⁰ The only question here is whether the district court has jurisdiction in the action there pending to hear and determine the questions in issue. For, if such jurisdiction exists, it had, and has, the power to make a wrong, as well as a right, decision. The inquiry, then, is, not whether the plaintiff or the opposing claimant has the better right to the office in dispute, with that we have nothing to do, but it is: May the title or right to a public office be determined by injunction?

The mere statement of the case shows that the district court, in the character of action before it, was entirely without jurisdiction in what it has already done, and also lacks the power to decide the question which the plaintiff really seeks to have adjudicated. While plaintiff Quinn protests that he is not endeavoring to have the title to the office which he claims determined in that proceeding, yet in the very nature of things the district court could not take a step in the case without entering upon an investigation of that very question. That a court of equity has not jurisdiction to try a disputed title to a public office is too clear for argument. That determination can be

made only in an action in the nature of quo warranto, or in an election contest, as prescribed by statute. What must the district court necessarily decide before it can grant even a temporary writ? Certainly, it must investigate and determine either as matter of fact or law, that at least a prima facie case of the right to the office is shown to be in the plaintiff. To this extent, therefore, there would be a decision that he had the better right to the office, and upon a final hearing, either upon a demurrer to the complaint, or upon a trial of the facts if the issue upon them is made, the court, before it can issue a permanent injunction, must ²⁸⁵¹ necessarily hold that the plaintiff's title is superior to that of his adversary. This cannot be done in an equitable action. Some of the authorities which are cited, it is true, declare that, in certain circumstances, where a certificate of election is held by a claimant to an office, he may have a writ of mandamus to place him in it as against a predecessor in office who, whether holding by election or appointment, claims that he is still entitled to hold because the election, for some reason, is invalid, and that in favor of such certificate holder, an injunction has been granted, pending decision of title in quo warranto, when such relief is necessary to protect public property, conserve great public interests, or prevent irreparable injury. But no well-considered case can be found where such relief has been given to one not holding the certificate of election against the holder thereof, under facts such as this record discloses.

It is altogether clear, that the district court was also entirely without jurisdiction to issue the temporary mandatory injunction, because no notice to the defendant was given; and it is equally clear that, for the reasons already given, jurisdiction was lacking to grant either that or the temporary restraining order issued upon the filing of the original complaint.

The only authority which seems to be in favor of plaintiff's contention is the case of *Guillotte v. Poincy*, 41 La. Ann. 333, 6 South. 507. That is a Louisiana case which, in some of its material facts, may be distinguished from the case at bar, but if it is authority for plaintiff's contention here, it stands alone, and we decline to follow it. It may be justified under the statutes and civil procedure existing in Louisiana, where the distinctions between law and equity and their respective remedies are not observed, but it is contrary to the ²⁸⁵² authorities in jurisdictions where such distinctions prevail, some of which, among many others that might be cited, are here given: *People*

v. McClees, 20 Colo. 403, 38 Pac. 468; State v. Mayor of Kearney, 28 Neb. 103, 44 N. W. 90; Cochran v. McCleary, 22 Iowa, 75; Neeland v. State, 39 Kan. 154, 18 Pac. 165; Gilroy's Appeal, 100 Pa. St. 5; Updegraff v. Crans, 47 Pa. St. 103; Hulsemann v. Rems, 41 Pa. St. 396; Neiser v. Thomas, 99 Mo. 224, 12 S. W. 725; State v. Aloe, 152 Mo. 466, 54 S. W. 494; Smith v. Myers, 109 Ind. 1, 58 Am. Rep. 375, 9 N. E. 692; Delahanty v. Warner, 75 Ill. 185, 20 Am. Rep. 237; Sheridan v. Colvin, 78 Ill. 237; Dickey v. Reed, 78 Ill. 261; Moulton v. Reid, 54 Ala. 320; Ex parte Wimberly, 57 Miss. 437, 444; 2 High on Injunctions, 2d ed., sec. 1312; McCrary on Elections, 4th ed., sec. 317; 1 Spelling on Injunctions, 2d ed., sec. 620; Peck v. Weddell, 17 Ohio St. 271; State v. Sherwood, 15 Minn. 221, 2 Am. Rep. 116; State v. Churchill, 15 Minn. 455; People v. Miller, 16 Mich. 56; State v. Governor, 25 N. J. L. 331; State v. County Clerk of Passaic, 25 N. J. L. 354; State v. Oats, 86 Wis. 634, 39 Am. St. Rep. 912, 57 N. W. 296; Supervisor etc. v. O'Malley, 46 Wis. 35, 50 N. W. 521; People v. Head, 25 Ill. 325.

The rule to show cause is sustained, and the writ heretofore issued is made permanent.

Writ allowed.

The Title to Public Office cannot be tried in equity. If this is attempted in a suit by injunction, a writ of prohibition will issue to prevent the court from proceeding: Arnold v. Henry, 155 Mo. 48, 78 Am. St. Rep. 556, 55 S. W. 1089; State v. Van Beek, 87 Iowa, 569, 43 Am. St. Rep. 397 54 N. W. 525; monographic note to Fletcher v. Tuttle, 42 Am. St. Rep. 236, 237.

EICKHOFF v. EICKHOFF.

[29 Colo. 295, 68 Pac. 237.]

AN APPEAL or Writ of Error Lies From a Judgment for Temporary Alimony. (p. 66.)

DIVORCE—Alimony—Discretion of the Court.—The allowance to a complainant for temporary alimony of fifty dollars per month and two hundred and fifty dollars attorneys' fees and twenty-five dollars suit money is not excessive where she is in indigent circumstances and the defendant is worth fifty thousand dollars. (p. 66.)

DIVORCE.—The Allowance of Alimony Pendente Lite Depends on the Existence of the Marriage Relation, and, unless this

appears *prima facie*, alimony should not be awarded, but it should be allowed if a *prima facie* case is established. (p. 67.)

ALIMONY Pendente Lite.—The Existence of the Marriage is not Put in Issue so as to Prevent the Allowance of Alimony by the using in evidence as an affidavit of a paper prepared and intended to be, but not in fact filed as, an answer in the cause. (p. 67.)

ALIMONY.—Where a Marriage De Facto is Admitted and the Parties in Good Faith Cohabit as Husband and Wife, and the legal proposition presented is debatable and one concerning which able courts have disagreed, and which has not been determined in the jurisdiction where the question is raised, the court will not decide it upon an application for alimony pendente lite, and if such court grants such application for alimony, its action will not be reviewed by the supreme court on an appeal from the order where such review requires the decision of the validity of the marriage. (p. 68.)

ALIMONY Based on Marriage De Facto.—If a statute provides for divorce on the ground that the husband or wife had a husband or wife living at the time of the marriage, and that at all times after the filing of the complaint for divorce, the court may grant upon application alimony and counsel fees pendente lite, alimony may be allowed, though there is some question whether there has been a marriage de jure, provided there is one de facto. (p. 68.)

E. A. Ballard, E. H. Johnson and Ralph W. Smith, for the plaintiff in error.

Thomas W. Lipscomb, for the defendant in error.

T. M. Robinson, *amicus curiae*.

CAMPBELL, C. J. The defendant in error, as plaintiff below, brought her action of divorce against the plaintiff in error, defendant below, alleging cruelty. On the 13th of September, 1897, she filed a petition for temporary alimony, attorney fees and suit money, alleging, among other things, that she is in indigent circumstances, and has no means with which to pay the expenses of the litigation, and that her husband, the defendant, is a man of large means, worth about fifty thousand dollars.

Upon the hearing petitioner presented her proofs and respondent, *inter alia*, read what purported to be a verified answer in the cause. The same was ²³⁹⁷ received by the court as an affidavit, but not as an answer, for it was not filed, nor was any offer then made to file it as an answer, though it was so filed two days thereafter. So we read the record, and such was the reading by the court of appeals when it dismissed defendant's appeal from this same judgment for want of jurisdiction:

Eickhoff v. Eickhoff, 14 Colo. App. 127, 50 Pac. 411. In the affidavit it was alleged that petitioner was formerly the wife of Albert P. Mallaby and obtained a decree of divorce from him in the county court of Arapahoe county, Colorado, on February 27, 1897, which decree prohibited both parties from remarrying within one year; but, notwithstanding such decree, the petitioner induced the respondent on April 1, 1897, to go with her to Cheyenne, Wyoming, and enter into a pretended marriage. That for many years both of these parties resided in Colorado and intended to reside in this state, and never intended to reside in Wyoming or elsewhere than in Colorado; and that petitioner procured said marriage to be performed in order to avoid the laws of Colorado; and he therefore prayed that the pretended marriage might be adjudged null and void. Respondent then offered in evidence the complaint, summons and return thereon, and the decree in **Mallaby v. Mallaby**, which was objected to on the ground that the same was incompetent, immaterial and irrelevant. The objection was sustained and the defendant excepted. Judgment was thereupon, and on September 18th, given in petitioner's favor for temporary alimony in the sum of fifty dollars per month, two hundred and fifty dollars attorney fees, and twenty-five dollars for suit money, and thereto defendant sued out this writ.

1. It was decided in **Daniels v. Daniels**, 9 Colo. 133, 10 Pac. 657, that an appeal from, or writ of error to, a judgment ~~was~~ for temporary alimony would lie. The reason for the rule is just as applicable under the present divorce act of 1893 as it was under the provisions of the Code of 1885, in force at the time that decision was rendered, and the argument of defendant in error that the rule should now be different is not sound.

2. It is contended by plaintiff in error that the respective amounts awarded by the court are excessive and not justified by the evidence. We do not think such contention good. The court did not abuse its discretion in the premises.

3. The principal contention of the plaintiff in error is that, since the allowance of temporary alimony depends upon the existence of the marriage relation and the undisputed facts set up in the so-called answer constitute the pretended marriage of plaintiff and defendant void in law, the relation was not established and the judgment for temporary alimony was erroneous.

The rule for allowing alimony pendente lite is based upon the existence, among other things, of the marriage relation, and

if the showing of all necessary facts is not made to appear at least *prima facie*, the courts should not award it: *Daniels v. Daniels*, 9 Colo. 133, 10 Pac. 657; *Cowan v. Cowan*, 10 Colo. 540, 16 Pac. 215; *Kiefer v. Kiefer*, 4 Colo. App. 506, 36 Pac. 621; *Taylor v. Taylor*, 7 Colo. App. 549, 44 Pac. 675.

But if such a *prima facie* case is established, alimony should be awarded. The complaint in this case sufficiently avers the marriage relation. At the time of the hearing of the petition for temporary alimony that allegation stood admitted. No answer had been filed, or tendered for filing, as such. The court was not supposed to know, or bound to presume, that the answer which was tendered and received ^{was} as an affidavit, would in fact be filed, or that an issue as to the existence or validity of the marriage would ever be tendered. To place the decision affirming the judgment upon this ground alone would be somewhat technical, yet entirely sufficient to uphold that ruling.

In the opinion, as first handed down, it was said that there was no allegation or proof of the identity of Libby B. Mallaby, plaintiff in the county court case, and Elizabeth B. Eickhoff, plaintiff herein. Further examination of the transcript at least casts doubt on the accuracy of that observation. We prefer, therefore, to withdraw the statement and modify the opinion by omitting the reference. Our conclusion, however, was not, nor is it now, at all dependent upon it, but may be put entirely on what follows.

4. But for a more substantial reason this judgment should be affirmed. Where it is clear upon the admitted facts that the marriage averred in a complaint in an action for divorce is void in law, or that the preponderance of the evidence tends to show there was never a marriage *de facto*, a judgment for temporary alimony should not be given, and, if awarded, would be set aside on review. But where, as in the case at bar, a marriage *de facto* is admitted, and the parties in good faith cohabited as husband and wife, and the marriage, though one *de facto*, is said not to be a marriage *de jure*, and where it appears, as here, that the legal proposition presented is a debatable one, concerning which able courts have disagreed and no binding judicial determination has been had in the jurisdiction where the point is raised, we think it should not be decided upon an application for alimony *pendente lite*. Where, as in this case, the trial court has held, as appears to be the case, that the ^{was} marriage alleged by the plaintiff in her complaint was a legal and valid marriage, and the parties have lived together as married per-

sons, we are not disposed upon a review of its judgment for temporary alimony to examine into this controverted question, unless altogether clear as to what our final decision will be. To do so would be virtually a decision of the merits, and that determination we prefer to postpone until the cause comes here, if at all, from the final judgment. *Kiefer v. Kiefer*, 4 Colo. App. 506, 36 Pac. 621, is not against this conclusion. It can be distinguished from the case at bar. There the marriage, while admitted to have been celebrated, was shown not to be in existence at the time of the application for temporary alimony, for the matrimonial bonds had been dissolved by a valid decree of a court having jurisdiction. Here the marriage *de facto* is admitted, but alleged to be void as the result of a decree of divorce dissolving the marriage relation which previously existed between the plaintiff and a former husband, and which prohibited a remarriage of either within one year. In the *Kiefer* case, there could be no question as to the effect of the decree there pleaded, while the effect of this decree as to a marriage out of this state and contrary to the prohibition of the decree, by a party divorced here, has never been determined by a court of review in this jurisdiction.

In *Taylor v. Taylor*, 7 Col. App. 549, 44 Pac. 675, our court of appeals ruled that when the finding of the trial court in a divorce case was that there had been no legal marriage between the parties, alimony *pendente lite* would not be awarded in the reviewing court. The principle announced is authority for the converse of the proposition that when the trial court in such a case finds that there was a legal marriage between the parties, ²⁰¹ its award of temporary alimony should not be disturbed upon a review of the award—merely because the validity of the marriage *de jure* is raised—but that such question should be postponed until the final judgment is brought up, except in such a case as we have mentioned.

Under our divorce statute (Sess. Laws 1893, 236), it is a ground of divorce that the husband or wife had a wife or husband living at the time of their marriage. And by section 9 of the same act it is provided that at all times after filing the complaint for divorce the court, upon application, may grant alimony and counsel fees *pendente lite*. The spirit of this provision is comprehensive enough to cover a case where there might be some question as to whether a marriage was one *de jure*, provided there was a marriage *de facto*. The following authorities seem to be in line with our conclusion: 2 Bishop on

Marriage, Divorce and Separation, sec. 922 et seq.; Vincent v. Vincent, 16 Daly (N. Y.), 534, 17 N. Y. Supp. 497; Finkelstein v. Finkelstein, 14 Mont. 1, 34 Pac. 1090; Lea v. Lea, 104 N. C. 603, 17 Am. St. Rep. 692, 10 S. E. 488.

Such cases as Hite v. Hite, 124 Cal. 389, 71 Am. St. Rep. 82, 57 Pac. 227, where the marriage de facto is denied, holding that the trial court must be satisfied by a preponderance of the evidence that the plaintiff is the wife of the defendant before temporary alimony is awarded, are not in point, under the admitted facts here.

The judgment should be affirmed, and it is so ordered.

Alimony Pendente Lite and expense money will not be allowed a wife in an action for a divorce, if the defendant denies the marriage, until she satisfies the court, by a preponderance of evidence upon the hearing of her motion, that she is his wife: Hite v. Hite, 124 Cal. 389, 71 Am. St. Rep. 82, 57 Pac. 227. A reasonably plain case must be made out. It is not necessary, however, that the marriage be established as conclusively as would be required for the ultimate purpose of the action: Bardin v. Bardin, 4 S. Dak. 305, 46 Am. St. Rep. 791, 56 N. W. 1069; monographic note to Methvin v. Methvin, 60 Am. Dec. 674, 675.

The Amount of Temporary Alimony and expense money pendente lite is in the discretion of the court, and will not be reviewed unless its discretion has been abused: Bardin v. Bardin, 4 S. Dak. 305, 46 Am. St. Rep. 791, 56 N. W. 1069; monographic note to Methvin v. Methvin, 60 Am. Dec. 679.

REID v. PEOPLE.

[29 Colo. 333, 68 Pac. 228.]

ANIMALS—Inspection of on Importation into the State, and Fees Which may be Charged Therefor.—Though animals have been inspected by an inspector of the United States who has issued his certificate showing their good health, they are not thereby exempted from the necessity of a similar inspection by an officer of the state required by its statutes as a condition of their being admitted from a point south of a specified parallel of latitude. (p. 78.)

CONSTITUTIONAL LAW.—Quarantine and Inspection Laws of the State having for their object the health of its citizens or the prevention or suppression of disease among its domestic livestock are within the province of state legislation. (p. 74.)

CONSTITUTIONAL LAW.—Interstate Commerce.—A statute making it unlawful to import into the state within designated days any cattle or horses from south of the thirty-sixth parallel of north latitude unless they have been held at some place north

of such parallel for at least ninety days prior to their importation, and a certificate of health is procured from the state veterinary sanitary board, and requiring the owner to pay the expenses of inspecting such stock, is not void as a regulation of interstate commerce, nor is it in conflict with the animal industry act of Congress, approved May 29, 1884, and the rules and regulations prescribed thereunder. (p. 77.)

INTERSTATE COMMERCE.—The inspection fee required to be paid by the statute of Colorado as a condition of permitting livestock to be admitted from south of a designated parallel of latitude is not an impost, tax, or duty, but merely covers the actual costs of inspection, which is the usual and ordinary method employed to protect the property of citizens of the state. (p. 77.)

Talbot, Denison & Wadley, for the plaintiff in error.

C. C. Post, attorney general, for the people.

334 CAMPBELL, C. J. The plaintiff in error (defendant below) was convicted and sentenced to the county jail for six months for violating the provisions of section 2 of an act of the general assembly of Colorado entitled "An act to prevent the introduction of any infectious or contagious disease among the cattle and horses of this state," approved March 21, 1885: Sess. Laws 1885, p. 335. It reads:

"It shall be unlawful for any person, association or corporation to bring or drive, or cause to be brought or driven, into this state, between the first day of April and the first day of November, any cattle or horses from a state, territory or county south of the thirty-sixth degree parallel of north latitude, unless said cattle or horses have been held at some place north of the said parallel of latitude for a period of at least ninety days prior to their importation into this state, or unless the person, association or corporation owning or having charge of such cattle or horses, shall ³³⁵ procure from the state veterinary sanitary board a certificate, or bill of health, to the effect that said cattle or horses are free from all infectious or contagious diseases, and have not been exposed, at any time within ninety days prior thereto, to any of said diseases. The expense of any inspection connected herewith to be paid by the owner or owners of such cattle or horses."

There is no dispute about the facts. The defendant, as charged in the information, on the 20th of June, 1901, caused to be brought into the county of Arapahoe and state of Colorado, eight hundred and eighty-two head of cattle from the counties of Lubbock and Cochran, in the state of Texas, which are south of the so-called quarantine line fixed by the act, with-

out having held the cattle at some place north of said line for a period of at least ninety days prior to their importation into this state, and also without having procured from any officer or agent of the state veterinary sanitary board of the state of Colorado a certificate, or bill of health, such as is contemplated by the statute.

The sole question is one of law, and that is, whether this act, or more accurately speaking, the section upon which the information is founded, is in violation of subdivision 3 of section 8 of article 1—the commercial clause—or of subdivision 1 of section 2 of article 4—equal privilege of citizens clause—or of subdivision 2 of section 10 of article 1—the import duty clause—of the constitution of the United States, or of the animal industry act of Congress, approved May 29, 1884, and the rules and regulations thereunder prescribed by the secretary of agriculture.

Not the only object of the act of Congress referred to, yet unquestionably one of its chief aims, is the ³³³extirpation of pleuro-pneumonia and other contagious, infectious and communicable diseases of cattle. By section 3 it is made the duty of the secretary of agriculture to prepare such rules and regulations as he deems necessary for the speedy and effectual accomplishment of that general object. But neither exclusive regulation of the subject matter is assumed by Congress, nor entire responsibility for the enforcement of the act cast upon the secretary. Upon the contrary, he was expressly directed to certify such rules and regulations to the executive authorities of each state and territory, and invite them to co-operate in the execution of the act.

Section 6 prohibits absolutely the transportation by rail or boat from one state or territory to another of any livestock affected with any contagious, infectious or communicable disease, and especially the disease known as pleuro-pneumonia, and all persons are prohibited from transporting by private conveyance or driving on foot from one state or territory to another state or territory any livestock, knowing them to be affected with any such disease; but there is a proviso that splenic or Texas fever shall not be considered as within the prohibition of the act as to cattle being transported by rail to market for slaughter, when the same are unloaded only to be fed and watered in lots on the way thereto: Supp. to U. S. Rev. Stats. 435.

On the 10th of December, 1900, the secretary of agriculture, acting under the delegation of power thus conferred, promul-

gated rules and regulations concerning the transportation of cattle, and therein notified all transportation companies and stock owners and others interested that a contagious and infectious disease known as splenic fever existed among ³²⁷ cattle in a certain area in the United States, which includes the counties of Lubbock and Cochran in the state of Texas. Clause 3 of these regulations provides that from and after January 1, 1901, no cattle shall be transported from the area south of the federal quarantine line therein fixed to any portion of the United States north or above the same, except as therein allowed. However, it permits the transportation by rail or boat only of cattle for immediate slaughter, and not otherwise, upon full compliance by the shipper with the specific rules governing the same.

On May 4, 1901, the state veterinary sanitary board of Colorado proclaimed substantially the same regulations, adopted the same quarantine line and required a certificate or bill of health from a state inspector before it was lawful to ship cattle through, or import them into, this state. And on the 6th of May the governor of Colorado, upon representation of the board that contagious or infectious diseases existed in the places specified in the order of the secretary of agriculture, issued his proclamation prohibiting the importation into the state of cattle from such affected localities, without obtaining a certificate from the state board of a bill of health.

The regulations of the secretary, as does the act under which they were issued, expressly recognize that the different states and territories might establish the same, or a different, quarantine line, and that appropriate legislation of the different states and territories of the Union might be passed to enforce within their respective boundaries the federal regulations as well as their own, provided the latter were satisfactory to the secretary of agriculture, and not in conflict with those prescribed by the national authority.³²⁸ It was further contemplated that if a quarantine line should be adopted by any state different from that established under the act of Congress, a modification of the latter might be had, if the secretary deemed it advisable.

On the 18th of June, 1901, when these cattle were shipped, the foregoing regulations of the two governments were in force. The defendant then obtained from the local inspector of the bureau of animal industry at Hereford, Texas, apparently the point of shipment, a certificate that the stock were free from all infectious and contagious disease, and that no Texas fever

infection was known to exist where they had been kept, or on the trail over which they passed. Attached to this certificate and below the officer's signature, was a statement that animals which had been inspected and certified, as these were, by an inspector of the United States bureau of animal industry as free from disease, have the right to go into any state without further inspection, or the exaction of additional fees for the same.

When, two days later, they reached the south boundary line of Colorado, the cattle were inspected by an agent of the state veterinary board of Colorado—against protest of plaintiff in error—but no certificate was furnished to him, because he declined to pay the fee charged to cover the cost of inspection which was required by the specific regulations of the board.

Neither in the act of Congress nor in the rules of the secretary of agriculture is the sweep, extent or limit defined of certificates issued by the bureau of animal industry. But it appears from a letter in the record written by the chief inspector of the national bureau to one of his subordinates that it was incompetent ³³⁹ for a state to charge or collect inspection fees because the same constituted a regulation of interstate commerce, and the efficacy of a certificate of inspection given by one of its officers made unnecessary a certificate from the state authorities. While, of course, due consideration must be given to this interpretation, which the chief inspector says is his conclusion from decisions of the federal supreme court, yet that interpretation is not binding upon the courts till that supreme authority puts the stamp of its approval upon it.

It is the contention of plaintiff in error, as to which the attorney general takes issue, that our statute is a regulation of interstate commerce, because the state inspection fee and the delay in transit incident to such inspection necessarily operate as a burden upon that commerce. And while he is disposed to concede that, in the absence of action by Congress, the state statute might stand, yet since, as he insists, Congress has taken upon itself the entire responsibility of suppressing diseases among domestic livestock, the congressional act, in which authority over the subject matter is exercised, constitutes a regulation of interstate commerce, and therefore state legislation covering the same matter must give way.

To our minds it is clear that the plain intention of Congress was that the national and state governments should work together in preventing the spread of communicable diseases among domestic livestock, and that neither act is, nor was it intended

to be, a regulation of interstate commerce, except possibly indirectly, but primarily each is merely a quarantine or inspection law.

For the purposes of this opinion it may be conceded that, if Congress should assume to itself exclusive ³⁴⁰ jurisdiction over the subjects of quarantine and inspection, and, in pursuance of that design, should pass a general law intended to apply uniformly throughout all portions of the United States and to supplant all state statutes upon the same subject, state laws having the same object in view must give way—at least, so far as there is any inconsistency between them. But where Congress has not assumed to itself complete control, and especially where it has invited the aid and co-operation of the states, regulations prescribed both by it and the states may be enforced, at least so far as they harmonize, and compliance with both must be made, though the subject matter of the legislation be precisely the same.

Unquestionably, quarantine and inspection laws of a state having for their object the health of its citizens, or the prevention or suppression of disease among its domestic livestock, is within the province of state legislation. It comes within the scope of the general police power which the states have never surrendered. While it is true that, under the guise of exerting its police power, the state may not go beyond what is necessary for the protection of its citizens and their property, or to such length as to interfere with, or obstruct, legislation of Congress calculated to regulate interstate commerce, or infringe upon any of the sovereign powers intrusted to Congress, yet, if it keeps within the scope of its authority and prescribes regulations which are reasonably necessary to further the legitimate object aimed at, its acts may be upheld.

The fee for inspecting cattle prescribed by the state veterinary board is only sufficient to cover the cost of inspection, and no greater, and the regulations ³⁴¹ which have been made by the officials of the state are such only as are reasonably necessary to prevent the dissemination of infectious and contagious diseases among domestic livestock. The certificate or bill of health, issued by the agent of the bureau of animal industry at Hereford, Texas, did not do away with the necessity of its holder to obtain the certificate from the officer of our state veterinary board before he brought his cattle into this state. Hereford is several hundred miles from the Colorado border, and two days elapsed after obtaining the certificate there before the cattle reached that line. It may be that these cattle

in the meantime had passed through infected districts, or had become affected with some infectious or contagious disease. But we do not place our decision that our law is valid on what has been done under it. The practical and necessary operation of the act in its enforcement according to its provisions furnishes the true test; that is, what may be, not what has been, done under it. The requirement that a certificate should be obtained from our veterinary board was clearly authorized by the act of Congress and the regulations of the secretary of agriculture. In neither was there any declaration that the state might not exact it, and it would be practically impossible for the state to co-operate with the national authorities in the enforcement of the act of Congress without prescribing some such regulations as these. Indeed, it would be difficult to conceive of any effective co-operation on the part of the state except in some such way as our executive authorities have adopted; and power to them to assist the federal authorities can be conferred only by the general assembly.

²⁴² The precise question before us has not been decided by the supreme court of the United States, but upon principle we think it is clear that the section of our act in question and the regulations made in pursuance thereof are in entire harmony with national legislation, and not in conflict with any provision of the federal constitution. Plaintiff in error cites a number of cases in support of his contention, some of which we proceed briefly to consider.

In *Gulf etc. Ry. Co. v. Hefley*, 158 U. S. 98, 15 Sup. Ct. Rep. 802, it was held that when a federal and a state statute operate on the same subject matter, and prescribe different rules concerning it, and the federal statute is one within the competency of Congress to enact, the state statute must give way. That does not apply here, if for no other reason than that not different but the same rules have been prescribed by both.

A case strongly relied on is *Railroad Co. v. Husen*, 95 U. S. 465. But that was a case wherein it was held that a statute of Missouri which, under the guise of a quarantine regulation, absolutely prohibited between the first day of March and the first day of November in each year, the driving or conveying of any Texas, Mexican or Indian cattle into the state, whether diseased or not, is not a legitimate exercise of the police power of the state, but that it was clearly a regulation of interstate commerce which it was not competent for the legislature

of Missouri to make. And the same is true of the Minnesota statute condemned in *Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. Rep. 862, which virtually prohibited the sale in Minnesota of meats for human food unless the animals were slaughtered in that state.

The following cases, we think, in principle, will sustain the validity of our legislation: *Grimes v. Eddy*, 126 ³⁴³ Mo. 168, 47 Am. St. Rep. 653, 28 South. 756; *Missouri etc. Ry. Co. v. Haber*, 56 Kan. 694, 44 Pac. 632, 169 U. S. 613, 18 Sup. Ct. Rep. 488. Speaking with reference to the Kansas statute similar to ours, the supreme court of the United States in the case last cited says that even if the subject matter of such regulations be one that may be taken under the exclusive control of Congress, and be reached by national legislation, any action taken by the state upon that subject that does not directly interfere with rights secured by the constitution of the United States, or by some valid act of Congress, must be respected until Congress intervenes.

Applying this test to our statute, it is manifest that, even assuming that quarantine and inspection laws may be within the exclusive province of Congress when it chooses to assert its authority, still there is no interference by our act with rights secured by the constitution of the United States or by some valid act of Congress; that Congress itself has not assumed to itself the exclusive control, but has expressly invited the states to co-operate: *Kimmish v. Ball*, 129 U. S. 217, 9 Sup. Ct. Rep. 277; *Patapsco Guano Co. v. North Carolina Board of Agriculture*, 171 U. S. 345, 18 Sup. Ct. Rep. 862; 2 *Tiedeman's State and Federal Control of Persons and Property*, 1042 et seq.

The questions involved here being such as entitle the plaintiff in error to be heard by the supreme court of the United States, we have not deemed it advisable further to prolong the discussion, or to consider at greater length its decisions upon analogous questions. The conclusion which we have reached we think is sound in principle and clearly deducible from the decisions of that august tribunal. In a petition for a writ of habeas corpus before Mr. Justice Hallett, United States district judge for the district of Colorado, wherein the plaintiff in error here sought to be discharged from imprisonment ³⁴⁴ under the sentence imposed in this case, the learned judge denied the writ upon the ground that our statute was valid and that the federal and state acts were merely supplemental quarantine or

inspection laws, both of which might be enforced within the same territory, and that there must be a compliance with both of them.

Our law does not regulate interstate commerce in the sense of that term prohibited by the federal constitution. At most it only indirectly affects it. The equal privileges of the citizens of the several states and territories are not infringed by it, and the inspection fee prescribed by the act is not in any sense an impost, tax or duty, but merely covers the actual cost of an inspection, which is the usual and ordinary method adopted to protect the property of the citizens of the states.

Our conclusion is that the judgment is right, and it is accordingly affirmed.

The Judgment in the Principal Case was upon writ of error to the supreme court of the United States reviewed and affirmed by that court. The opinion of the highest appellate tribunal in which the subject may be considered was as follows:

"The plaintiff in error was convicted in the district court of Arapahoe county, Colorado, and sentenced to confinement for six months in the county jail for a violation of the second section of a statute enacted March 21, 1885, to prevent the introduction of infectious or contagious diseases among the cattle and horses of that state: Colo. Sess. Laws 1885, p. 335.

"The judgment was affirmed by the supreme court of the state, and, the case having been brought here, it is insisted that by the final judgment the accused has been denied a right specially claimed by him under the constitution of the United States.

"This position depends upon the inquiry whether a certain act of Congress, to be presently referred to, has the scope and effect attributed to it by the accused, and, that contention falling, whether the statute under which he was convicted is repugnant to that instrument.

"After reciting that certain infectious and contagious diseases, known as the Texas or splenic fever, Spanish itch, and other diseases of a dangerous and contagious nature, were prevalent among cattle and horses stock in the states and territories south of the thirty-sixth parallel of north latitude, and that it was essential for the protection of the cattle and horses of Colorado to prevent the introduction and spread of all such diseases within that state, the above statute provided:

"Section 1. It shall be unlawful for any person, association, or corporation to bring or drive, or cause to be brought or driven, into this state any cattle or horses having an infectious or contagious disease, or which have been herded, or brought into contact, with any other cattle or horses laboring under such disease, at any time within ninety days prior to their importation into this state.

"Sec. 2. It shall be unlawful for any person, association, or corporation to bring or drive, or cause to be brought or driven, into this state, between the first day of April and the first day of November, any cattle or horses from a state, territory, or county, south of the thirty-sixth parallel of north latitude, unless said cattle or horses have been held at some place north of the said parallel of latitude for a period of at least ninety days prior to their importation into this state, or unless the person, association, or corporation owning or having charge of such cattle or horses shall procure from the state veterinary sanitary board a certificate, or bill of health, to the effect that said cattle or horses are free from all infectious or contagious diseases, and have not been exposed, at any time within ninety days prior thereto, to any of said diseases. The expense of any inspection connected herewith to be paid by the owner or owners of such cattle or horses.

"Sec. 3. Any person violating the provision of this act shall be deemed guilty of a misdemeanor, and shall, on conviction, be punished by a fine of not less than five hundred (500) dollars, nor more than five thousand (5,000) dollars, or by imprisonment in the county jail for a term of not less than six months, and not exceeding three years, or by both such fine and imprisonment.

"Sec. 4. If any person, association, or corporation shall bring, or cause to be brought, into this state, any cattle or horses, in violation of the provisions of sections 1 or 2 of this act, or shall, by false representation, procure a certificate of health, as provided for in section 2 of this act, he or they shall be liable, in all cases, for all damages sustained on account of disease communicated by or from said cattle or horses; judgment for damages in any such case together with the costs of action, shall be a lien upon all such cattle and horses, and a writ of attachment may issue in the first instance without the giving of a bond, and the court rendering such judgment may order the sale of said cattle or horses, or so many thereof as may be necessary to satisfy said judgments and costs. Such sale shall be conducted as other sales under execution': Colo. Sess. Laws 1885, p. 335.

"There was no proof in the case that the particular cattle in question had any dangerous, infectious, or contagious disease. But it did appear that after being kept a long while in Lubbock and Cochran counties, Texas, south of the thirty-sixth parallel of north latitude, these cattle were shipped on the twentieth day of June, 1901, to Denver, Colorado, on their way to their ultimate destination in Wyoming without being first inspected as required by the statute of the former state. The provisions of the Colorado statute were ignored altogether as invalid legislation. Being asked by one of the witnesses whether he had or not allowed the state board of sanitary inspection to inspect the cattle or whether or not he had

procured from the state veterinary sanitary board a certificate or bill of health to the effect that the cattle were free from all infectious or contagious diseases, the defendant said 'that the state board of sanitary inspection, through one of their inspectors, had inspected the cattle against his will and desire, but that he had not obtained from the board any certificate or bill of health whatsoever. But he said that he immediately theretofore had had the cattle inspected by a duly authorized inspector of the bureau of animal industry of the United States, at Hereford, in the state of Texas, and had obtained a certificate from him to the effect that the same were free from any infectious or contagious disease; that the reason he could not get a certificate or bill of health from the state board of Colorado was because he would not pay the expense of such inspection, and because he had opposed such inspection as unnecessary and without any warrant in law.'

"When refusing his assent to the state inspection, Reid showed to the state authorities what he called a 'United States certificate.'

"The certificate was signed by 'Arthur C. Hart, Ass't Inspector, Bureau of Animal Industry.' That officer certified that he had carefully inspected the cattle in question at Hereford, Texas, and found them 'free from Texas or splenic fever infection (*baophilus bovis*), or any other infectious or contagious disease,' and that 'no Texas fever infection is known to exist where they have been kept or on the trail over which they have passed.' Below the signature of the assistant inspector was the following unsigned printed memorandum: 'Animals which have been inspected and certified by an inspector of the United States bureau of animal industry, and are free from disease, have the right to go into any state and be sold for any purpose, without further inspection or the exaction of fees.'

"The above, together with certain published regulations prepared and issued by the bureau of animal industry, was all the evidence in the case.

"The defendant asked the court to instruct the jury:

"That it was unnecessary for the defendant to procure from the Colorado veterinary sanitary board a certificate or bill of health to the effect that his cattle were free from infectious or contagious diseases, and had not been exposed at any time within ninety days prior thereto, to any of said diseases, for the reason that the cattle had previously been inspected, 'according to the statute of the United States in such case made and provided, and according to the rules and regulations pursuant to said statute, promulgated by the department of agriculture, by a duly authorized inspector of the bureau of animal industry of the United States, stationed at Hereford, in the state of Texas, and had been duly certified by such United States inspector to be free from any infectious or con-

tagious disease; and for the further reason that he, the said defendant, then and there exhibited and showed to the said state inspector of Colorado the said inspection certificate of the United States to said cattle'; and,

"That the Colorado statute, approved March 21, 1885, and under which defendant was prosecuted, was repugnant to the provision of the constitution of the United States giving Congress power to regulate commerce among the states, as well as to the provision declaring that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states, and was null and void, as imposing unnecessary and unlawful burdens and restrictions upon interstate commerce.

"The court refused to so instruct the jury, but instructed them that if they believed from the evidence, beyond a reasonable doubt, that the defendant did, on or about the twentieth day of June, 1901, that is, between the first day of April and the first day of November of that year, 'unlawfully bring or drive, or cause to be brought or driven, into the state of Colorado, and into the county of Arapahoe, the cattle as mentioned in the information or any part thereof, from certain counties south of the 36th parallel, north latitude; and that said cattle had not been held therefore at some place north of said parallel of latitude for a period of at least ninety days prior to the importation of said cattle into said state of Colorado; and that the said defendant had not procured from the state veterinary sanitary board of Colorado a certificate or bill of health, to the effect that said cattle were free from infectious or contagious diseases, and to the effect that the same had not been exposed at any time within ninety days prior thereto to any of said diseases; and that then and there the said defendant did refuse and decline to procure, or permit anyone for him to procure, such certificate or bill of health, and did refuse and decline to pay or allow, or suffer or permit anyone for him to pay, the expense of any inspection so as by the act prescribed—then and in that event it is your duty to find the defendant guilty as charged in this information.'

"The contention here of the defendant is substantially that the subject of the transportation of cattle from one state to another has been so far covered by the act of Congress known as the animal industry act of May 29, 1884 (23 Stat. at L. 31, c. 60; U. S. Comp. Stat. 1901, p. 294), that after its passage no enactment by the state upon the same subject was permissible; and that, even in the absence of legislation by Congress, the Colorado statute is invalid, in that, by its natural or necessary operation, it unreasonably obstructs that freedom of commerce among the states which the constitution established. These questions are recognized by the court as of great importance, and have received its most careful consideration.

"Taking up the first branch of the defendant's contention, let us look at the controlling provisions of the above act of Congress, and ascertain whether that statute has the scope and effect claimed for it.

"The statute is entitled 'An act for the establishment of a bureau of animal industry, to prevent the exportation of diseased cattle, and to provide means for the suppression and extirpation of pleuro-pneumonia and other contagious diseases among domestic animals.'

"By the first section the commissioner of agriculture is directed to organize in his department a bureau of animal industry, to appoint a chief thereof, who shall be a competent veterinary surgeon, and whose duty it shall be 'to investigate and report upon the condition of the domestic animals of the United States, their protection and use, and also inquire into and report the causes of contagious, infectious, and communicable diseases among them, and the means for the prevention and cure of the same and to collect such information on these subjects as shall be valuable to the agricultural and commercial interests of the country': Sec. 1; U. S. Comp. Stats. 1901, p. 299.

"By the second section the commissioner is authorized to appoint two competent agents, practical stock raisers or experienced business men familiar with questions pertaining to commercial transactions in livestock, whose duty it shall be, under the instructions of the commissioner, 'to examine and report upon the best methods of treating, transporting, and caring for animals, and the means to be adopted for the suppression and extirpation of contagious pleuro-pneumonia and to provide against the spread of other dangerous contagious, infectious, and communicable diseases': Sec. 2; U. S. Comp. Stats. 1901, p. 300.

"The third section makes it 'the duty of the commissioner of agriculture to prepare such rules and regulations as he may deem necessary for the speedy and effectual suppression and extirpation of said diseases, and to certify such rules and regulations to the executive authority of each state and territory, and invite said authorities to co-operate in the execution and enforcement of this act.' And 'whenever the plans and methods of the commissioner of agriculture shall be accepted by any state or territory in which pleuro-pneumonia or other contagious, infectious, or communicable disease is declared to exist, or such state or territory shall have adopted plans and methods for the suppression and extirpation of said diseases, and such plans and methods shall be accepted by the commissioner of agriculture, and whenever the governor of a state or other properly constituted authorities signify their readiness to co-operate for the extinction of any contagious, infectious, or communicable disease in conformity with the provisions of this act, the

commissioner of agriculture is hereby authorized to expend so much of the money appropriated by this act as may be necessary in such investigations, and in such disinfection and quarantine measures as may be necessary to prevent the spread of the disease from one state or territory into another': Sec. 3; U. S. Comp. Stats. 1901, p. 800.

"In order 'to promote the exportation of livestock from the United States,' the commissioner was directed to 'make special investigation as to the existence of pleuro-pneumonia, or any contagious, infectious, or communicable disease, along the dividing lines between the United States and foreign countries, and along the lines of transportation for all parts of the United States to ports from which livestock are exported, and make report of the results of such investigation to the Secretary of the Treasury, who shall, from time to time, establish such regulations concerning the exportation and transportation of livestock as the results of said investigations may require': Sec. 4; U. S. Comp. Stats. 1901, p. 3183; and that 'to prevent the exportation from any port of the United States to any port in a foreign country of livestock infected with any contagious, infectious, or communicable disease, and especially pleuro-pneumonia,' the Secretary of the Treasury was authorized to take such steps and adopt such measures, not inconsistent with the provisions of the act, as he might deem necessary: Sec. 5; U. S. Comp. Stats. 1901, p. 3183.

"By another section of the act all railroad companies within the United States, or the owners or masters of any steam or sailing vessel, or other vessel or boat, were forbidden to receive for transportation or transport from one state or territory to another, or from any state into the District of Columbia, or from the District into any state, 'any livestock affected with any contagious, infectious, or communicable disease, and especially the disease known as pleuro-pneumonia; nor shall any person, company, or corporation deliver for such transportation to any railroad company, or master or owner of any boat or vessel, any livestock, knowing them to be affected with any contagious, infectious, or communicable disease; nor shall any person, company, or corporation drive on foot or transport in private conveyance from one state or territory to another, or from any state into the District of Columbia, or from the District into any state, any livestock, knowing them to be infected with any contagious, infectious, or communicable disease, and especially the disease known as pleuro-pneumonia; Provided, that the so-called splenic or Texas fever shall not be considered a contagious, infectious, or communicable disease within the meaning of sections 4, 5, 6, and 7 of this act, as to cattle being transported by rail to market for slaughter, when the same are unloaded only

to be fed and watered in lots on the way thereto': Sec. 6; U. S. Comp. Stats. 1901, p. 3184.

"Other provisions of the act are as follows:

" 'Sec. 7. That it shall be the duty of the commissioner of agriculture to notify, in writing, the proper officials or agents of any railroad, steamboat, or other transportation company doing business in or through any infected locality, and by publication in such newspapers as he may select, of the existence of said contagion; and any person or persons operating any such railroad, or master or owner of any boat or vessel, or owner or custodian of or person having control over such cattle or other livestock within such infected district, who shall knowingly violate the provisions of section 6 of this act, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than one hundred nor more than five thousand dollars, or by imprisonment for not more than one year or by both such fine and imprisonment: U. S. Comp. Stats. 1901, p. 3184.

" 'Sec. 8. That whenever any contagious, infectious, or communicable disease affecting domestic animals, and especially the disease known as pleuro-pneumonia, shall be brought into or shall break out in the District of Columbia, it shall be the duty of the commissioners of said District to take measures to suppress the same promptly and to prevent the same from spreading; and for this purpose the said commissioners are hereby empowered to order and require that any premises, farm, or farms, where such disease exists or has existed, be put in quarantine; to order all or any animals coming into the District to be detained at any place or places for the purpose of inspection and examination; to prescribe regulations for and to require the destruction of animals affected with contagious, infectious, or communicable disease, and for the proper disposition of their hides and carcasses; to prescribe regulations for disinfection, and such other regulations as they may deem necessary to prevent infection or contagion being communicated, and shall report to the commissioner of agriculture whatever they may do in pursuance of the provisions of this section: U. S. Comp. Stats. 1901, p. 3184.

" 'Sec. 9. That it shall be the duty of the several United States district attorneys to prosecute all violations of this act which shall be brought to their notice or knowledge by any person making the complaint under oath; and the same shall be heard before any district or circuit court of the United States or territorial court holden within the district in which the violation of this act has been committed': U. S. Comp. Stats. 1901, p. 3185; 35 Stats. at L. 31, 60; U. S. Comp. Stats. 1901, p. 299.

"It may be here stated that by the act of February 9, 1899, the department of agriculture was made one of the executive departments of the government, and placed under the supervision and con-

trol of a secretary of agriculture (25 Stats. at L. 659, c. 122; U. S. Comp. Stats. 1901, p. 285), and that by the act of July 14, 1890, the secretary was vested with all the authority which by the above act of May 29, 1884, was conferred upon the commissioner of agriculture: 26 Stats. at L. 282, c. 707.

"It is quite true, as urged on behalf of the defendant, that the transportation of livestock from state to state is a branch of interstate commerce, and that any specified rule or regulation in respect of such transportation, which Congress may lawfully prescribe or authorize, and which may properly be deemed a regulation of such commerce, is paramount throughout the Union. So that, when the entire subject of the transportation of livestock from one state to another is taken under direct national supervision, and a system devised by which diseased stock may be excluded from interstate commerce, all local or state regulations in respect of such matters and covering the same ground will cease to have any force, whether formally abrogated or not; and such rules and regulations as Congress may lawfully prescribe or authorize will alone control: *Gibbons v. Ogden*, 9 Wheat. 1, 210; *Morgan's S. S. Co. v. Louisiana Bd. of Health*, 118 U. S. 455, 464, 6 Sup. Ct. Rep. 1114; *Hennington v. Georgia*, 163 U. S. 299, 317, 16 Sup. Ct. Rep. 1086; *New York etc. R. R. Co. v. New York*, 165 U. S. 628, 631, 17 Sup. Ct. Rep. 418; *Missouri etc. R. Co. v. Haber*, 169 U. S. 613, 626, 18 Sup. Ct. Rep. 488; *Rasmussen v. Idaho*, 181 U. S. 198, 200, 21 Sup. Ct. Rep. 594. The power which the states might thus exercise may in this way be suspended until national control is abandoned and the subject be thereby left under the police power of the states.

"But the difficulty with the defendant's case is that Congress has not, by any statute, covered the whole subject of the transportation of livestock among the several states, and, except in certain particulars not involving the present issue, has left a wide field for the exercise by the states of their power by appropriate regulations, to protect their domestic animals against contagious, infectious, and communicable diseases.

"An examination of the animal industry act will make this entirely clear. Three distinct subjects are embraced by that act. One is the ascertainment through the agricultural department of the condition of the domestic animals of the United States, the causes of contagious, infectious, or communicable diseases affecting them, the best methods for treating, transporting, and caring for animals, the means to be adopted for the suppression and extirpation of such diseases, particularly that of contagious pleuro-pneumonia, and to collect such information on those subjects as will be valuable to the agricultural and commercial interests of the country. Congress did not assume to declare that 'the rules and regulations' which that department might adopt as necessary 'for the speedy and effectual

suppression and extirpation of said diseases' should have in themselves, or apart from the action of the state, any binding force upon the states. They were to be certified to the executive authority of each state, and the co-operation of such authorities in executing the act of Congress invited. If the authorities of any state adopted the plans and methods devised by the department, or if the state authorities adopted measures of their own which the department approved, then the money appropriated by Congress could be used in conducting the required investigations, and in such disinfection and quarantine measures as might be necessary to prevent the spread of the diseases in question from one state or territory into another. Congress did not intend to override the power of the states to care for the safety of the property of their peoples by such legislation as they deemed appropriate. It did not undertake to invest any officer or agent of the department with authority to go into a state and without its assent take charge of the work of suppressing or extirpating contagious, infectious, or communicable diseases there prevailing, and which endangered the health of domestic animals. Nor did Congress give the department authority by its officers or agents to inspect cattle within the limits of a state, and give a certificate that should be of superior authority in that or other states, or which should entitle the owner to carry his cattle into or through another state without reference to the reasonable and valid regulations which the latter state may have adopted for the protection of its own domestic animals. It should never be held that Congress intends to supersede, or by its legislation suspend, the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed—that 'in the application of this principle of supremacy of an act of Congress in a case where the state law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together': *Sinnot v. Davenport*, 23 How. 227, 243. The certificate given to the defendant by assistant inspector Hart, of the bureau of animal industry, was in itself without legal weight in Colorado. As said in *Missouri etc. R. Co. v. Haber*, above cited: 'While the states were invited to co-operate with the general government in the execution and enforcement of the act, whatever power they had to protect their domestic cattle against such diseases was left untouched and unimpaired by the act of Congress.' Hence, it was decided in that case that the animal industry act did not stand in the way of the state of Kansas enacting a statute declaring that any person driving, shipping, or transporting, or causing to be shipped, driven, or transported into or through that state, any cattle liable or capable of communicating Texas or splenic

fever to domestic cattle should be liable to the person injured thereby for all damages sustained by reason of the communication of said disease or fever, to be recovered in a civil action. We there held that the Kansas statute did nothing more than establish a rule of civil liability, in that state, affected no regulation of interstate commerce that Congress had prescribed or authorized, and impaired no right secured by the national constitution.

"Another subject embraced by the act of Congress related to the exportation from ports of the United States to ports in foreign countries of livestock affected with contagious, infectious, or communicable diseases, especially pleuro-pneumonia; and in relation to that matter the secretary of the treasury was authorized to take such steps and adopt such measures, not inconsistent with the act of Congress, as he deemed necessary. As the present case is not one of the exportation of livestock to a foreign country, it is unnecessary to consider what power, if any, remained with the states, after the passage of the animal industry act, to suppress or extirpate diseases that in fact affected livestock, which it was the purpose of the owners to export.

"Still another subject covered by the act is the driving on foot, or transporting from one state or territory into another state or territory, or from any state into the District of Columbia, or from the District into any state, of any livestock known to be affected with any contagious, infectious, or communicable disease. But this provision does not cover the entire subject of the transporting or shipping of diseased livestock from one state to another. The owner of such stock, when bringing them into another state, may not know them to be diseased; but they may, in fact, be diseased, or the circumstances may be such as fairly to authorize the state into which they are about to be brought to take such precautionary measures as will reasonably guard its own domestic animals against danger from contagious, infectious, or communicable diseases. The act of Congress left the state free to cover that field by such regulations as it deemed appropriate, and which only incidentally affected the freedom of interstate commerce. Congress went no farther than to make it an offense against the United States for any one knowingly to take or send from one state or territory to another state or territory, or into the District of Columbia, or from the District into any state, livestock affected with infectious or communicable disease. The animal industry act did not make it an offense against the United States to send from one state into another livestock which the shipper did not know were diseased. The offense charged upon the defendant in the state court was not the introduction into Colorado of cattle that he knew to be diseased. He was charged with having brought his cattle into Colorado from certain counties in Texas, south of the thirty-sixth parallel of north latitude, without

said cattle having been held at some place north of said parallel of latitude for at least the time required prior to their being brought into Colorado, and without having procured from the state veterinary sanitary board a certificate or bill of health to the effect that his cattle, in fact, were free from all infectious or contagious diseases, and had not been exposed at any time within ninety days prior thereto to any such diseases, but had declined to procure such certificate or have the inspection required by the statute. His knowledge as to the actual condition of the cattle was of no consequence under the state enactment, or under the charge made.

"Our conclusion is that the statute of Colorado as here involved does not cover the same ground as the act of Congress, and therefore is not inconsistent with that act; and its constitutionality is not to be questioned unless it be in violation of the constitution of the United States, independently of any legislation by Congress. The latter question we now proceed to examine.

"Certain principles are well settled by the former decisions of this court. One is that the purpose of a statute, in whatever language it may be framed, must be determined by its natural and reasonable effect: *Henderson v. New York*, 92 U. S. 259, 268. Another is, that a state may not, by its police regulations, whatever their object, unnecessarily burden foreign or interstate commerce: *Hannibal etc. R. Co. v. Husen*, 95 U. S. 465, 472, 531. Again, the acknowledged police powers of a state cannot legitimately be exerted so as to defeat or impair a right secured by the national constitution, any more than to defeat or impair a statute passed by Congress, in pursuance of the powers granted to it: *Gibbons v. Ogden*, 9 Wheat. 1, 210; *Missouri etc. R. Co. v. Haber*, 169 U. S. 613, 625, 626, 18 Sup. Ct. Rep. 488, and authorities cited.

"Now, it is said that the defendant has a right, under the constitution of the United States, to ship livestock from one state to another state. This will be conceded on all hands. But the defendant is not given by that instrument the right to introduce into a state, against its will, livestock affected by a contagious, infectious, or communicable disease, and whose presence in the state will or may be injurious to its domestic animals. The state—Congress not having assumed charge of the matter as involved in interstate commerce—may protect its people and their property against such dangers, taking care always that the means employed to that end do not go beyond the necessities of the case or unreasonably burden the exercise of privileges secured by the constitution of the United States.

"Is the statute of Colorado liable to the objection just stated? Can the courts hold that upon its face it unreasonably obstructs the exercise of the general right secured by the constitution to ship or send recognized articles of commerce from one state to another without interference by local authority? Those questions must be

answered in the negative. The Colorado statute, in effect, declares that livestock coming between the dates and from the territory specified are ordinarily in such condition that their presence in the state may be dangerous to its domestic animals; and hence the requirement that before being brought or sent into the state they shall either be kept at some place north of the thirty-sixth parallel of north latitude for at least ninety days prior to their importation into the state, or the owner must procure from the state veterinary sanitary board a certificate or bill of health that the cattle are free from all infectious or contagious diseases, and have not been exposed to any of said diseases at any time within ninety days prior thereto. As there is no evidence in the case as to the practical operation of this regulation upon shippers of cattle, as it does not appear otherwise than that the statute can be obeyed without serious embarrassment or unreasonable cost, the court cannot assume arbitrarily that the state acted wholly without authority or that it unduly burdened the exercise of the privilege of engaging in interstate commerce. The accused seems to have been content to rest his defense upon such grounds as arose upon the face of the local statute, without reference to any evidence bearing upon the reasonableness or unreasonableness of the particular methods adopted by the state to protect its domestic animals. He seems to have been willing to risk the case upon the simple proposition—based upon the words of the state enactment and upon the act of Congress, reinforced by certain regulations made by the agricultural department—that the local statute was inconsistent with that act, and with the general power of Congress to regulate interstate commerce.

“As, therefore, the statute does not forbid the introduction into the state of all livestock coming from the defined territory—that diseased as well as that not diseased—but only prescribes certain methods to protect the domestic animals of Colorado from contact with livestock coming from that territory between certain dates, and as those methods have been devised by the state under the power to protect the property of its people from injury, and do not appear upon their face to be unreasonable, we must, in the absence of evidence showing the contrary, assume that they are appropriate to the object which the state is entitled to accomplish.

“One other objection to the Colorado statute must be noticed, namely, that it is inconsistent with the clause of the constitution declaring that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. This position is untenable. The statute is equally applicable to citizens of all the states. No discrimination is shown. No privileges are granted to citizens of Colorado that are denied to citizens of other states: *Kimmish v. Ball*, 129 U. S. 217, 222, 2 Int. Com. Rep. 407, 9 Sup. Ct. Rep. 277.

"The principle is universal that legislation, whether by Congress or by a state, must be taken to be valid, unless the contrary is made clearly to appear; and, as the contrary does not so appear, the statute of Colorado is to be taken as a constitutional exercise of the power of the state.

"Perceiving no error in the judgment to the prejudice of the plaintiff under the constitution of the United States, the judgment is affirmed."

The Constitutionality of State Statutes regulating and restricting the importation of livestock, and having for their object the prevention of the introduction within the state of contagious diseases, is considered in the monographic notes to People v. Wemple, 27 Am. St. Rep. 567; Hurst v. Warner, 47 Am. St. Rep. 538, 539.

CLIPPER MINING CO. v. ELI MINING AND LAND CO.

[29 Colo. 377, 68 Pac. 286.]

MINING CLAIMS—Res. Judicata.—The rejection of an application for a patent to a placer mining claim not founded on a decision that the ground is not placer, but merely for the reason that there is not such a showing by the applicant as entitles him to a patent, is not conclusive in a subsequent controversy between him and the person claiming the same ground as part of a lode claim that it is not placer ground. (pp. 92, 97.)

MINING CLAIMS—Right to Enter on Placer to Prospect for Lode Claims.—One may not go upon a prior valid placer location prospecting for unknown lodes and get title to lode claims thereafter discovered within the placer boundaries, unless the placer owner abandons his claim, waives the trespass, or is by his conduct estopped to complain of it. (p. 95.)

APPELLATE PRACTICE.—Upon a Petition for a Rehearing a party is not allowed to raise new questions. (p. 96.)

APPELLATE PRACTICE.—Where a Finding is the Result of Conflicting Evidence, or the record recites that certain evidence was introduced in behalf of the plaintiff tending to establish his claim and certain other evidence on behalf of the defendant to establish his defense, an appellate court will not undertake to determine on which side the preponderance of evidence is. (p. 97.)

MINING CLAIMS.—Mere Proof that Lodes Exist within certain territory, or within the boundaries of a placer mining location, cannot authorize persons to enter within such location after an application for its patent to prospect for and develop a lode claim. Before it can be said that a lode claim is known to exist, there must be actual knowledge as distinguished from supposition or surmise. (p. 98.)

Thomas, Bryant & Lee and Hall & Babbitt, for the plaintiff in error.

John M. Maxwell, John A. Ewing, Charles Cavender, and Walter W. Davis, for the defendants in error.

379 CAMPBELL, C. J. The plaintiff in error (defendant below) owns four lode mining claims, situate in Lake county, called the Capital, Clipper, Congress and Castle lodes, and the defendants in error (plaintiffs below) own the Searl placer mining claim, within the boundaries of which these lode claims are located. The present controversy relates to the territory thus in conflict. The placer was the prior location, and was made in the year 1877. The plaintiff in error having made application in the land office for patent of its lode mines, the defendants in error filed therein an adverse claim, and within the statutory time brought this action in the district court of Lake county to enforce it.

The plaintiffs rely upon a prior location of the conflicting territory as part of their placer claim. The complaint is in the ordinary form in actions of this character. After a general denial of the material allegations of the complaint, the answer sets up four **380** separate defenses, all of which grow out of the following facts, which, in varying language, are set up in each defense.

On the 12th of December, 1877, A. D. Searl and others located the Searl placer, and on the 5th of July, 1878, applied for a patent therefor. Numerous protests were made against it, and on the 10th of November, 1882, an amended application was filed, against which protests were likewise made upon the ground that the same was not placer ground, and was only valuable for lode claims or townsite purposes. The land department ordered a special investigation to ascertain the character of the ground and the good faith of the applicant. The special agent declared that the land was not placer ground, and on the strength of his report a hearing was ordered before the local land office of the district, the result of which was a dismissal of the application, for it was not then made to appear, as a present fact, that the ground was distinctively valuable for mining purposes, or that the applicant had made the improvements required by statute. This ruling was affirmed by the commissioner of the land office, and in turn by the secretary of the interior. Twelve days after the latter's decision the grantors of defendant company entered upon the ground within

the boundaries of the placer location and thereafter located thereon the lode claims in question.

The special defenses sought to be interposed were substantially: 1. That plaintiff was not entitled to recover because, upon the previous application for a patent of the Searl placer, there was a decision of the land department that the ground included within its boundaries was not placer ground, and the attempted location was for that reason void, and such decision ~~was~~ ^{was} res adjudicata of the present controversy; 2. Assuming the existence of a prior valid placer location, nevertheless defendant, prior to the time patent was asked, went upon the placer surface area and made locations of lode claims which were then and theretofore known to exist, and, therefore, in law the same were a part of the unappropriated public domain and subject to location as lode claims.

There was a replication by plaintiffs denying the new and special matters of defense, and upon the issues thus joined, in a trial to the court without a jury, the findings were that the Searl placer was duly located as required by law in the year 1877, and thereafter the annual labor had been performed as the statute provides, and that defendant's grantors had discovered the lode claims within the boundaries and subsequent to the location of the Searl placer. Based upon these findings of fact, the conclusion of law was drawn that a prior location of a placer carries with it the exclusive right of possession of the surface included within the exterior boundaries, and a prospector might not enter thereupon and prospect for, or discover, a lode claim before application for the placer patent is made, unless by abandonment the placer claimant has lost his rights. And there being no evidence of such loss it was accordingly held that the acts of defendant in entering upon the valid subsisting placer location did not initiate any right whatever. Judgment was therefore entered in favor of the owner of the placer location, and to reverse it this writ of error is prosecuted.

1. It is insisted by plaintiff in error that the land department, with which is intrusted the determination of such questions, has declared this placer location void because not on placer ground, and that such ~~was~~ ^{was} determination is decisive of the present controversy. It is unquestionably the law that findings of fact by the land department as to matters within its jurisdiction are conclusive upon the courts whenever a collateral attack is made upon them. They may, in a proper proceeding, be impeached for fraud or mistake, but not in actions

like the present. This rule, however, has no application to the facts in this record. The application for a patent to the placer was rejected, but there was no decision that the ground in question was not placer ground; but merely that, as a then present fact, there was not such a showing by the applicant as entitled him to a patent. Amended applications for a patent of a mining claim are permissible under the practice in the land department. There was no attempt finally or definitely to determine that the ground was not placer ground, or that the location was void, and to that effect are its own decisions, as will be seen by reference to the official reports: 7 Copp's Land Owner, 36; In re Searl Placer, 11 Land Dec. 441; In re Clipper Min. Co., 22 Land Dec. 527.

In the last case, the Secretary of the Interior, in speaking of the contention made in this very case, says: "The judgment of the department in the Searl placer case went only to the extent of rejecting the application for patent. The department did not assume to declare the location of the placer void, as contended by counsel, nor did the judgment affect the possessory rights of the contestant to it": See, also, Clipper Min. Co. v. Searl, 29 Land Dec. 137. Indeed, the question as to the character of the land sought to be appropriated by claimants under the public land laws is reserved—unless under the law referred to some court—and may be passed upon by ^{the} the department until patent issues: Barden v. Northern Pac. R. R. Co., 154 U. S. 288, 14 Sup. Ct. Rep. 1030.

This court, in Beals v. Cone, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948, held that a decision of the land department like the one in question is equivalent to nothing more than a judgment as of a nonsuit, and not conclusive upon the department itself, or upon the parties.

An additional reason why the plea of *res adjudicata* cannot be sustained is that in the former proceeding the parties are not the same as those in the present action.

2. The principal question involved is much more important and difficult of solution. In discussing this feature of the case, it must be considered as established that the Searl placer was an existing valid location at the time of the attempted location of the lode claims. We make this statement as counsel for plaintiff in error themselves admit that such issue was present in the case, and was determined by the trial court upon conflicting evidence, and as bearing upon this point they make no question but that the same was rightly determined. The question, therefore, is presented whether, and if so, in what

circumstances, one may, before application for a patent of a prior valid placer location is made, go upon the same for the purpose of prospecting the ground, and thereafter make a location of a lode claim based on a discovery thereafter and thus made of a vein or lode therein.

In *Aurora Lode v. Bulger Hill etc. Gulch Placer*, 23 Land Dec. 95, it was held by the secretary of the interior that the discovery and location of a placer mining claim establishes in the owner the right to the possession of the superficial area within ³⁸⁴ its boundaries for all purposes connected with, and incident to, the use and operation of the same as a placer mining claim; but that such location does not operate to give the right of possession to known veins or lodes within its limits, or preclude the right of discovery and location thereof by others. It was also held that a judicial award of the right of possession to an adverse placer claimant as against a lode applicant, does not preclude subsequent departmental inquiry upon the allegation of the lode claimant that the placer claim embraced known lodes or veins, where it appears that such question was not at issue before the court for determination by its judgment.

This case was referred to with approval by this court in *Mt. Rosa etc. Co. v. Palmer*, 26 Colo. 56, 77 Am. St. Rep. 245, 56 Pac. 176. In the latter case the facts were that lode claims were known to exist, and were also duly located within the limits of a previously located placer claim before patent of the latter was applied for. A patent for the placer having been issued in such circumstances it was held that, inasmuch as the applicant did not at the time mention the lode claims, or claim them by virtue of lode locations, they were excluded from the grant of his patent. And as it further appeared that the locators of these lode claims went upon the placer ground and made locations upon veins known to exist before the application for patent was made, the conclusion was that the patentee of the placer could not recover possession of the lode claims, for they were properly located. The court said that in making them no right of the placer owner was invaded, and that their validity was not affected by the fact that they were made within the surface boundaries of a prior placer location. For ³⁸⁵ the purposes of the case, it must have been assumed as true that when the entry by the locators of the lode claims was made the lodes themselves were known to exist.

If the facts of the case at bar were the same as those in the *Mt. Rosa* case, we would, under its doctrine, be obliged to re-

verse the judgment; but they are essentially different in at least one particular to which we shall hereafter refer. But before passing to that, we notice the contention of defendants in error that Calhoun etc. Co. v. Ajax etc. Co., 27 Colo. 1, 83 Am. St. Rep. 17, 59 Pac. 607, 618, we have virtually held that one who has made a valid location of a placer claim has for all purposes exclusive right of possession thereto so long as he complies with the law, and that the territory embraced therein is not subject to adverse location by a claimant of the same ground under a subsequent lode location, though the lode is known to exist before application for a patent is made. Our decision in this case was not intended to qualify the doctrine established in the Mt. Rosa case. In the Calhoun case, where a lode location was involved, we were not considering, as was true in the Mt. Rosa case, the kind or extent of possession which follows a valid location of a placer claim. What was said in the Calhoun case was true as applied to a lode claim, for the right of possession of a lode claim includes the entire surface area. In the Mt. Rosa case, however, wherein was defined the rights of a placer claimant, we said that a placer location gives a qualified possession of the ground located—that is to say, it confers upon the owner the exclusive right of possession of the surface area for all purposes incident to the use and operation of the same as a placer mining claim, and all unknown ^{sub} lodes or veins, but does not give the right of possession to known veins within its limits.

It is obvious that the facts of the case do not bring it within the principles laid down in the Mt. Rosa case. If, in the case at bar, the lode claims were known to exist at the time of the entry of defendant's grantors upon the Searl placer, under the decision in the Mt. Rosa case the entry was not unlawful; but if, on the contrary, the veins were then unknown, by the same decision the right of possession of this ground belonged to the owners of the placer location. Their right of possession included these unknown veins and the entry for prospecting was a trespass, and no title could thereby be initiated.

As the evidence was not brought up in the bill of exceptions, we must assume in support of the judgment below that the proof was against the defendant upon this point. Indeed, the specific finding of the trial court that defendant's grantors went upon plaintiffs' prior existing placer location and discovered and located lodes therein, involves the finding that the lodes were unknown at the time of the entry; for if they were known,

they were not discovered by the prospectors, but were already subject to location by them; and if then unknown, the placer owner was entitled to their exclusive possession, and entry upon them by others constituted a trespass and could not initiate title.

Our conclusion, therefore, is that one may not go upon a prior valid placer location to prospect for unknown lodes and get title to lode claims thereafter discovered and located in this manner and within the placer boundaries, unless the placer owner has abandoned his claim, waives the trespass, or by his conduct is estopped to complain of it. If the trial court ³⁸⁷ intended to rule that in no circumstances may one before application for a patent of a placer claim, go upon the ground within its exterior boundaries for the purpose of locating a lode, it went too far; yet as general language in an opinion must be taken in connection with the facts in the particular case, the ruling here should be limited to the facts disclosed by the record, and no prejudicial error was committed. For, under the authorities, a prospector may not enter upon a prior placer location for the purpose of prospecting for, or locating, unknown lodes or veins; and to uphold the judgment we must presume that the evidence before the trial court showed that the veins or lodes upon which defendant's grantors based their locations were unknown when they entered upon the Searl placer for the purpose of prospecting.

The mere fact, then, that the judgment may have been based upon a legal proposition—too broadly stated as a universal rule—that in no case may a location of a lode claim be made within the boundaries of a prior valid placer location—a legal conclusion which, as we have said, is only partially right—is not, under the facts of this case, sufficient to work a reversal; for certainly a lode location may not thus be made except of a known lode. Though a prospector may believe that within the limits of a placer location a lode may exist and by development work be disclosed, he has not the right to enter thereupon for the purpose of exploiting the ground to confirm his belief. The judgment is affirmed.

³⁸⁸ ON APPLICATION TO FILE SUPPLEMENTAL TRANSCRIPT AND
ON PETITION FOR REHEARING.

CAMPBELL, C. J. 1. After the petition of plaintiff in error for a rehearing was presented, it asked leave to file a supplemental record to bring up proceedings in the district

court which occurred subsequent to final judgment, in which, for the first time, alleged errors of that tribunal are called to our attention.

These proceedings were attacked by motions below upon which the rulings were against plaintiff in error. The objections and exceptions thereto were not preserved by a bill, as required by our practice, and for this reason alone they might now be disregarded. But, in addition to this, some of the matters embodied in the supplemental transcript were within the knowledge of plaintiff in error at, and prior to, the trial below, and all of them before the original bill of exceptions was approved and signed by the trial judge, and long before the original transcript was lodged in this court. They were, therefore, as well known to plaintiff in error before the cause was argued and submitted in this court, and before the original opinion was handed down, as they were when this application was made. It is clear that the request should be denied. Our practice precludes a party, upon a petition for a rehearing, to raise new questions: *Lamar Canal Co. v. Amity Land etc. Co.*, 26 Colo. 370, 77 Am. St. Rep. 261, 58 Pac. 600; *Orman v. Ryan*, 25 Colo. 383, 55 Pac. 168; *Water Supply etc. Co. v. Larimer etc. Irr. Co.*, 24 Colo. 322, 51 Pac. 496.

2. The petition for a rehearing is based upon three propositions: (a) The court erred in holding ^{was} that the secretary of the interior in the matter of the protest against Searl's application for a patent did not decide that the ground was not placer ground, and that said judgment of the land department was not conclusive; (b) There was error in holding that, as matter of fact, the evidence in the court below did not show that the lode claims located by the plaintiff in error were known lodes at the time of the location, and that there was further error in holding that a lode location cannot be made within the limits of an existing placer location except upon a known lode or vein; (c) The court misconstrued the effect of the decisions in the cases of *Aurora Lode v. Bulger Hill etc. Placer*, 23 Land Dec. 95, and *Mt. Rosa etc. L. Co. v. Palmer*, 26 Colo. 56, 77 Am. St. Rep. 245, 56 Pac. 176.

(a) We can add nothing under this head to what is contained in the foregoing opinion. No authority is cited and no argument now made which were not before us upon the original hearing. The authorities already referred to clearly refute the position of plaintiff in error. The decision of the land department in the case at bar was precisely the same in prin-

ciple as that considered in the case of *Beals v. Cone*, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948; and plaintiff in error concedes that if this court still adheres to the doctrine of that case, as it does, the present contention falls.

In this connection we may add that, if the position of plaintiff in error is sound, it has no standing in this court; for the first decision ever made by the land department with respect to the mineral character of the Searl placer was in favor of the placer claimant in a contest between him and a town-site claimant: See 7 *Copp's Land Owner*, 36. Such being the first decision of the land department, if, as plaintiff in error contends, it is *res adjudicata* as to ^{the} the mineral character of the placer claim, the controversy is ended, and plaintiff in error cannot reopen that question.

(b) Where in the original opinion it is intimated that plaintiff in error admits that the trial court rightly determined that the Searl placer was an existing valid location at the time of the attempted location of the lode claims, it was not our intention to say that the admission was voluntary, but only that the finding, having been made upon conflicting evidence, under the established rule in this jurisdiction the plaintiff in error, as well as the court, for the purposes of this review, is concluded by it. The transcript does not purport to contain all of the evidence.

The abstract recites that certain evidence was introduced in behalf of the plaintiffs tending to establish their cause of action, and certain other testimony in behalf of the defendant to establish its defenses. In such circumstances we cannot investigate to ascertain on which side the preponderance of the evidence is. Indeed, there has never been any serious contention that the findings of fact of the trial court were not sustained by the evidence.

In the case of *Fannie Rawlings Min. Co. v. Tribe*, 29 Colo. 302, 86 Pac. 284, decided at this term, it was said: "Appellate courts must assume, in the absence of specific and unambiguous findings of fact to the contrary, that the lower court intended to find those facts which are responsive to the issues made by the pleadings, and essential to the judgment rendered." Let this rule be applied to the case at bar. The defendant alleged, and the plaintiffs denied, that the lode claims were known to exist before application for a placer patent. The findings were that the locators of the lode claim had not the right to go upon

the ³⁹¹ territory included within the placer location for the purpose of prospecting and locating lodes. Possibly, we have not hitherto made sufficiently prominent the fact that a patent for the placer was applied for long before an attempt was made to locate the lode claims, the original application in the year 1878 or 1879, the exact date being immaterial. An amended application was made in the year 1882, which was rejected by the secretary of the interior in November, 1890, and it was not until after this last date that the locators of the lode claims made an entry upon the placer location.

It may be true, as counsel for plaintiff in error says, that a belief existed in Leadville that this territory was underlaid with mineral, but, so far as we are able to determine, there does not seem to have been any knowledge of that fact, so far as the territory in controversy is concerned, until after the entry by defendant's grantors. At all events, the application for a placer patent was made eleven or twelve years before the alleged right to the lode claims was initiated. Before it can be said that a lode is known to exist, there must be actual knowledge, as distinguished from supposition or surmise: *Sullivan v. Iron Silver Min. Co.*, 142 U. S. 431, 12 Sup. Ct. Rep. 555. And in order to uphold the judgment we shall assume, as very properly we may, that the trial court, as a matter of fact, found that the lodes were not known to exist until after the application for a patent was made. Indeed, we do not see what other finding could possibly be made when it is considered that the locators of the lode claims did not enter upon the placer claim to prospect until years after its owners had applied for a patent. And for aught that appears to the contrary—which is the contention of defendants in error in argument—the ³⁹² lodes may have been discovered and their existence thus first become known only by sinking a shaft to a depth of several hundred feet beneath the surface, and that the entry by the lode locators was forcible and against the will of the placer claimant.

(c) Counsel insists that we have misconstrued the decisions in the cases of the Aurora Lode and the Mt. Rosa company upon which we commented in the former opinion. We have given attentive consideration to their argument in that behalf and after carefully re-reading the opinions are satisfied that we have not misconceived their effect. In the syllabus of the Aurora case it is said that the location of a mining claim "does not operate to give title or right of possession to veins

or lodes within its limits, or preclude the right of discovery and location thereof by others." This language seems to be taken substantially from what is said in the opinion of the secretary of the interior at page 101 of the official report. The statement, removed from its proper setting, may be broad enough to include unknown as well as known veins or lodes; but, considered, as it should be, in connection with the context, it is clear that the secretary intended it to apply only to known lodes, for he expressly says, in speaking of the general rule if the veins or lodes were "not known to exist at that date (i. e., when patent for placer claim is applied for), the placer patent will carry the title to them."

This can mean nothing else than that, if lodes or veins are not known to exist within the limits of a placer location at the time when patent for the latter is applied for, they belong to the placer claimant, and one may not thereafter make an entry upon the placer claim for the purpose of discovering and locating ^{and} them. But if the decision of the secretary of the interior in this case can, by any canons of construction, be considered authority for the contention of plaintiff in error here, that a prospector may, without restriction, within the limits of a prior valid placer claim, prospect for, and thereafter lawfully locate, lodes not known to exist at the time of the application for a placer patent, its binding effect would seem to be overcome by the decision of the supreme court of the United States in *Bennett v. Harkrader*, 158 U. S. 441, 15 Sup. Ct. Rep. 863, and in many other decisions of that and other courts.

The learned counsel for plaintiff in error were permitted, amici curiae, to file a brief in the *Mt. Rosa* case, and we then had the benefit of their learning and research, and the record in the case at bar was before us when that opinion was prepared by Mr. Justice Goddard. It was with full knowledge of the issues herein and as particularly applicable to the argument of this plaintiff in error made in that case, which is the same as it is here, that the following language found on page 61 was used:

"While we recognize to its full extent the rule that precludes the initiation of a right through a trespass upon the lawful possession of another, we think, under the established facts in this case, appellant is not in a position to invoke its protection. The lodes in question were known to exist prior to the application for patent; and appellant not having taken the

necessary steps to obtain them, they were open to location by others at the time they were located by the grantors of appellee. In making the locations, no right of appellant was invaded, and the validity, therefore, is in no way affected by the fact that they ³⁹⁴ were made within the surface boundaries of a prior placer location."

We then had in mind, as we do now, the distinction between the facts of that case and the case at bar. There it was unquestioned that the lode claims were known to exist within the limits of the placer location before an application for patent for the latter was made. In the case at bar, as we have seen, the findings of fact of the trial court, which upon this review are conclusive upon us, are that the lode claims were not known to exist until long after the application for the placer patent was filed. The distinction is vital and the rule in the two cases is different.

In *Del Monte etc. Co. v. Last Chance etc. Co.*, 171 U. S. 55, 18 Sup. Ct. Rep. 895, the court, in making answer to questions certified to it by the United States circuit court of appeals of the eighth circuit, said that "the lines of a junior lode location may be laid within, upon or across the surface of a valid senior location for the purpose of defining for or securing to such junior location underground or extralateral rights not in conflict with any rights of the senior location." And this answer, plaintiff in error now contends, is authority for its contention to which we have just referred. With this we cannot agree. Mr. Justice Brewer, who wrote the opinion in that case, expressly recognizes the fact that no rights can be initiated as the result of a trespass, and on page 79 of 171 U. S. and page 904 of 18 Sup. Ct. Rep., of the opinion, says that the form in which the question is put excludes any impairment or disturbance of the substantial rights of the prior locator; and he quotes with approval the statement from 1 *Lindley on Mines*, section 363, that "A subsequent locator may not invade the surface territory of his neighbors and include within his boundaries any ³⁹⁵ part of a prior valid and subsisting location. But conflicts of surface area are more than frequent." While the learned judge was speaking of lode claims, the principle is just as applicable to a placer claim to the extent of the surface rights which belong to it. So long, therefore, as lode claims are not known to exist within the limits of the prior placer claim at or before the time of the application for placer patent, it is unlawful for one to go within

its limits for the purpose of prospecting for, and with the hope of discovering and locating, them.

The application to file a supplemental record and the petition for a rehearing are each denied.

Mr. Justice Steele dissents.

Mining Claims.—As to lode claims with placer locations, see *Mt. Rosa Mine etc. Co. v. Palmer*, 26 Colo. 56, 77 Am. St. Rep. 245, 56 Pac. 176; *Cranes v. Gulch Min. Co. v. Scherrer*, 134 Cal. 350, 86 Am. St. Rep. 279, 66 Pac. 487. And as to decisions respecting mining claims as res judicata, see *Beals v. Cone*, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 943.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

SANITARY DISTRICT OF CHICAGO v. RAY.

[199 Ill. 63, 64 N. E. 1048.]

CONSTITUTIONAL LAW.—If a constitution prohibits special legislation in certain enumerated cases, and declares that in all other cases when a general law can be made applicable no special law can be enacted, this declaration is addressed to the legislature alone, and when it concludes that a special law is necessary, its conclusion, except in the cases expressly prohibited, is not subject to judicial review. (p. 103.)

CONDEMNATION PROCEEDINGS.—Constitutionality of Statutes Allowing Attorney's Fees.—A statute allowing attorney's fees to the defendant as costs on the dismissal of a petition by the petitioner is constitutional. (p. 104.)

CONDEMNATION PROCEEDINGS.—Claim for Damages.—When not Barred by.—A judgment condemning land for a sanitary district and fixing the amount of compensation, is not a bar to a subsequent action based on negligence in construction and maintenance, whereby the land was caused to overflow. (p. 105.)

DAMAGES.—Several Actions for.—When Maintainable.—A judgment against a sanitary district for damages to a tenant's crops, caused by the wrongful obstruction of the waters of a river in times of freshet, does not bar a subsequent action by him for damages afterward suffered. (p. 105.)

James Todd, P. C. Haley and W. A. Bowles, for the appellant.

Reynolds & Purkhiser, for the appellee.

64 **CARTER, J.** The appellee obtained a judgment in the circuit court of Will county against the appellant for loss and injury to his crops on forty acres of land which he possessed as tenant, for the years 1897, 1898 and 1899. The action and recovery were based on the alleged negligence of appellant

in constructing what is called the "river diversion" in connection with its drainage canal, whereby the waters of the Des Plaines river were diverted from their original channel and caused to flow through a new channel of insufficient depth and width to carry off such waters, so that plaintiff's adjoining lands overflowed and his crops were damaged. The pleas were, not guilty, freehold in the defendant and former recovery. After the verdict of the jury, which assessed plaintiff's damages at one hundred and eighty dollars, the court heard evidence as to the amount of attorney fees that should be allowed to the plaintiff and taxed as costs in the case, and allowed and taxed as such costs two hundred dollars. Defendant took its appeal to this court on the ground, as it alleges, that the statute purporting to authorize the allowance of such attorney fees is unconstitutional.

The provision is found in section 19 of the "Act to create sanitary districts and to remove obstructions in the Des Plaines and Illinois rivers," approved May 29, 1889: Hurd's Stats. 1899, p. 327. The statute provides that such districts shall be liable for all damages to real estate which shall be overflowed or otherwise damaged by the construction, enlargement or use of any channel, etc., under the provisions of the act, and that in case judgment is rendered against the district for damages the plaintiff shall also recover his reasonable attorney's fees, to be taxed as costs of suit, provided the sixty days' notice in ⁶⁵ writing prescribed by the statute is given before suit is brought. The proper notice was given, but counsel say that the statute is special legislation, and is in conflict with that clause of section 22 of article 4 of the constitution which, after inhibiting special legislation in certain enumerated cases, provides that "in all other cases where a general law can be made applicable no special law can be enacted." Counsel do not claim that any other constitutional provision is violated, but simply say that it is clear that a general law as to attorney fees might have been passed. Counsel overlooked the fact that this court had already decided that this clause of the constitution is addressed to the general assembly alone, and that "when that body has concluded a special law is necessary, except in the cases expressly prohibited, its conclusion is not the subject of judicial review": *Owners of Lands v. People*, 113 Ill. 296; *People v. Thompson*, 155 Ill. 451, 40 N. E. 307. In *Sanitary Dist. v. Bernstein*, 175 Ill. 215, 51 N. E.

720, we held that the eminent domain act of 1897, allowing attorney fees to the defendant as costs upon the dismissal of the petition by the petitioner, is not unconstitutional, as being special legislation, and that trial by jury was not required to ascertain the amount to be taxed as costs: See, also, *Vogel v. Pekoc*, 157 Ill. 339, 42 N. E. 386, and *Opaque Cloth Shade Co. v. Veight*, 161 Ill. 337, 42 N. E. 1075.

As the decision of this question fixes our jurisdiction on this appeal, other questions pressed more earnestly remain for decision. One is, that plaintiff was barred by a former adjudication. In proceedings begun by the sanitary district to condemn a strip of land on which to construct the channel through the tract of which the forty acres in question then formed a part, appellee, his mother and others, who then owned the entire tract, filed a cross-petition claiming damages to lands not taken, including said forty acres, on the ground, as stated in the cross-petition, that the entire tract, consisting of two hundred and fifty acres, was occupied and used as one⁰⁰ farm, and was valuable as a stock and dairy farm and for other farming purposes, and that thirty acres of said farm was underlaid with limestone of great value and which could be quarried at small expense, but by the excavation of the proposed channel or waterway all shipping facilities by railroad or canal would be cut off, and consequently the land not taken would be greatly damaged, etc. The judgment does not show that any damages were allowed for land not taken, and it does not appear from anything in the record that any damages were claimed for any supposed injury to the land in question by subjecting it to overflow. It may be, so far as the record shows, that had the work been done as proposed in the condemnation proceedings no damages by overflow would have resulted. Whether it was done in accordance with any plans and specifications exhibited does not appear; therefore it cannot be said that the question of such damages was, or ought to have been, litigated in that proceeding. This action was based on negligence in construction and maintenance, whereby the land was caused to overflow—a cause of action which the land owner could not anticipate and could not recover for in the condemnation proceedings. It arose subsequently to the condemnation. We are unable to agree with appellant that appellee is barred by the judgment in the condemnation suit: *Ohio etc. Ry. Co. v. Wachter*, 123 Ill. 440, 5 Am. St. Rep. 532. 15 N. E. 279.

It is insisted, next, that the plaintiff is barred by a former recovery in a suit for damages to his crops prior to the year 1897. The judgment in that case was affirmed by the appellate court for the second district in *Sanitary Dist. v. Ray*, 85 Ill. App. 115. The same contention appears to have been made in that case as in this that the judgment in the condemnation suit was a bar to any subsequent recovery, but it was not allowed to prevail. The plaintiff was only a tenant, and did not sue for any permanent injury to the land, but only for the loss of his ^{or} crops, as such losses occurred by reason of the alleged wrongful obstruction to the waters of the river in times of freshets. He could not have recovered for any permanent injury to the land. We see no reason why he could not sue for and recover for each loss as it occurred through appellant's negligence or wrongful act. The case is unlike *Chicago etc. R. R. Co. v. Loeb*, 118 Ill. 203, 59 Am. Rep. 341, 8 N. E. 460, cited by appellant, where it was held that for a permanent injury to property because of the construction of a railroad in close proximity to it, the right to recover all damages, past, present and future, is vested in the person who at the time owns the property, and that a subsequent purchaser cannot recover, but it falls within that class of cases where successive recoveries may be had for successive injuries caused by negligence, as in *Ohio etc. Ry. Co. v. Wachter*, 123 Ill. 440, 5 Am. St. Rep. 532, 15 N. E. 279, *Chicago etc. R. R. Co. v. Schaffer*, 124 Ill. 112, 16 N. E. 239, *Schlitz Brew. Co. v. Compton*, 142 Ill. 511, 34 Am. St. Rep. 92, 32 N. E. 693, and *Ohio etc. Ry. Co. v. Thillman*, 143 Ill. 127, 36 Am. St. Rep. 359, 32 N. E. 529.

The instructions were in accordance with the views we have expressed, and we find no fault with them.

The evidence tended to prove that the defendant excavated the new channel to a greater depth than the old, and threw up embankments on the sides of the channel, but did not make the new channel of sufficient capacity to carry off the water of the river in time of freshets, and by the diversion of such waters caused the land in question to overflow. The land was bottom land, near the river, and was subject to overflow before the channel was changed, but there was evidence tending to prove that such overflow, and consequent injury to crops, etc., were increased by the alleged negligent construction of the new channel, and while it seems, from the record, that it

would not be a wholly unjustifiable inference to draw that the defendant has been charged with losses which would have occurred had the channel remained as ^{was} it was in a state of nature, still we cannot say that the verdict is so clearly against the weight of the evidence as that it should be set aside for that reason.

The judgment must be affirmed.

CONSTITUTIONAL INHIBITION AGAINST SPECIAL OR LOCAL LEGISLATION WHERE A GENERAL LAW CAN BE MADE APPLICABLE.*

- I. Scope of Constitutional Provisions.**
 - a. In General.
 - b. Not Retrospective in Operation.
- II. Prohibition in Enumerated Cases.**
 - a. Inhibition is Absolute.
- III. Necessity of a Special Law.**
 - a. Considered as a Legislative Question.
 - b. Considered as a Judicial Question.
 - c. Rule for Determining Validity of Statute.
- IV. Special Statutes in Particular Cases.**
 - a. When Condemned by the Courts.
 - b. When Upheld as Constitutional.

I. Scope of Constitutional Provisions.

a. **In General.**—It may be conceded that a state legislature, in the absence of any limitation placed upon it by the constitution, has unbounded authority to enact special or local statutes. However, the people, speaking through the organic law, have quite generally seen fit to put a restraint upon the omnipotent power of the legislature in this respect, and various inhibitions against special or local legislation are to be found in the different state constitutions. The one we are here concerned with declares, in effect, that in certain enumerated cases no special law shall be passed, and that in all other cases where a general law can be made applicable, no special law shall be passed.

b. **Not Retrospective in Operation.**—This constitutional provision applies to future, and not to past, legislation. It cannot be given the retrospective effect of repealing, by implication, a prior special statute within the inhibition. Such local or special legislation as was in existence at the adoption of the constitutional provision, and valid when enacted, cannot be held inconsistent with the prohibition against the enactment of special laws on certain specified subjects, and in all other cases where a general law can be made applicable: *Nevada School Dist. v. Shoecraft*, 88 Cal. 372, 26 Pac. 211; *Pecot v.*

*REFERENCE TO MONOGRAPHIC NOTE.

General and special legislature: 21 Am. St. Rep. 780-789.

Police Jury, 41 La. Ann. 706, 6 South. 677; *State v. Tucker*, 54 S. C. 251, 32 S. E. 361.

II. Prohibition in Enumerated Cases.

a. *Inhibition is Absolute.*—Whatever variance of judicial opinion there may be as to who shall judge when a general law can or cannot be made applicable to a given case, it is plain that as to the enumerated subjects the constitutional prohibition is absolute. There is no discretion in regard to the passage of statutes in such cases. And the question whether a statute upon an enumerated subject is within the inhibition of the constitution is for the judiciary, and not for the legislature, to determine. If the legislature attempts to enact these inhibited laws, the courts will declare them unconstitutional: *Knopf v. People*, 185 Ill. 20, 76 Am. St. Rep. 17, 57 N. E. 22; *State v. Des Moines*, 96 Iowa, 521, 59 Am. St. Rep. 381, 65 N. W. 818; *State v. County Court*, 50 Mo. 350, 11 Am. Rep. 415.

III. Necessity of a Special Law.

a. *Considered as a Legislative Question.*—But the law is not so clear concerning the nonenumerated subjects. The constitution, after specifying certain subjects upon which there shall be no special legislation, declares that in all other cases where a general statute can be made applicable, no special statute shall be enacted. Who shall determine in any particular case whether a general law can be made applicable? Probably no authority will deny that the legislature has a sound discretion to decide the question. In other words, the constitution leaves a discretion with the legislature to determine the case in which a special law is necessary: *Boyd v. Bryant*, 35 Ark. 69, 37 Am. Rep. 6; *Little Rock v. Parish*, 36 Ark. 166, 172; *Brown v. Denver*, 7 Colo. 305, 3 Pac. 455; *Bell v. Maish*, 137 Ind. 226, 36 N. E. 358, 1118; *McClelland v. State*, 138 Ind. 321, 37 N. E. 1089; *Pennsylvania Co. v. State*, 142 Ind. 428, 41 N. E. 937; *Francis v. Atchison etc. R. R. Co.*, 19 Kan. 303; *Wichita v. Burleigh*, 36 Kan. 84, 12 Pac. 332; *State v. Sanders*, 42 Kan. 228, 21 Pac. 1073; *People v. Bowen*, 21 N. Y. 517; *Moxier v. Hilton*, 15 Barb. 657; *Terre Haute etc. R. R. Co. v. Cox*, 102 Fed. 825; *Guthrie Nat. Bank v. Guthrie*, 173 U. S. 528, 19 Sup. Ct. Rep. 513. In the last case, Justice Peckham remarks: "Whether a general law can be made applicable to the subject matter in regard to which a special law is enacted by a territorial legislature is a matter which we think rests in the judgment of the legislature itself. That body is specially prohibited from passing any local or special law in regard to certain subjects enumerated in the act [of Congress prohibiting the passage of special laws in the territories]. Outside and beyond that limitation is the provision above mentioned, and whether or not a general law can be made applicable to the subject is a matter which is confided to the judgment of the legislature."

There is one line of decision, comprehending, perhaps, the weight of authority, which does not stop here, but holds that the legislature

is the sole and exclusive judge in determining when a general law will not subserve the purpose as well as a special act, and that the conclusion of the legislature that a special act should be enacted is final and conclusive, and not subject to judicial review: *Davis v. Gaines*, 48 Ark. 370, 3 S. W. 184; *Carson v. St. Francis Levee Dist.*, 59 Ark. 513, 27 S. W. 590; *Owners of Lands v. People*, 113 Ill. 296; *Wilson v. Board of Trustees*, 133 Ill. 443, 27 N. E. 203; *Gentile v. State*, 29 Ind. 409; *State v. Tucker*, 46 Ind. 355; *Vickery v. Chase*, 50 Ind. 461; *City of Evansville v. State*, 118 Ind. 423, 21 N. E. 267; *State v. Kolsen*, 130 Ind. 434, 29 N. E. 595; *Young v. Board of Commra.*, 137 Ind. 323, 36 N. E. 1118; *Mode v. Beasley*, 143 Ind. 306, 42 N. E. 727; *State v. Hitecock*, 1 Kan. 178, 81 Am. Dec. 503; *Board of Commissioners v. Smith*, 48 Kan. 331, 29 Pac. 565; *State v. Lewelling*, 51 Kan. 562, 33 Pac. 425; *Farrelly v. Cole*, 60 Kan. 356, 56 Pac. 492; *Chesney v. McClintock*, 61 Kan. 94, 58 Pac. 993; *State v. County Court*, 50 Mo. 317, 11 Am. Rep. 415; *St. Louis v. Shields*, 63 Mo. 247 (the constitution of Missouri has changed this rule: See *Henderson v. Koenig*, 168 Mo. 356, 68 S. W. 72); *Edmonds v. Herbrandson*, 2 N. Dak. 270, 50 N. W. 970; *McGill v. State*, 34 Ohio St. 228, 247; *Addington v. Canfield*, 11 Okla. 204, 66 Pac. 355; *Smith v. Grayson County*, 18 Tex. Civ. App. 153, 44 S. W. 921; *Travelers' Ins. Co. v. Township of Oswego*, 59 Fed. 58, reversing 55 Fed. 361; *Bathbone v. Board of Commra.*, 83 Fed. 125; *Board of Commra. v. Vandrives*, 115 Fed. 866. The federal courts, in the above cases, considered themselves bound by the local decisions in Kansas construing the constitutional provision of that state, and the case of *McGill v. State*, 34 Ohio St. 228, is repudiated in *State v. Spellmire*, 67 Ohio St. 77, 66 N. E. 619.

The following extracts from different decisions show the extent to which this doctrine is carried: "The constitutional provision is really not prohibitory, but rather cautionary, to the legislature": *Powell v. Durden*, 61 Ark. 21, 31 S. W. 740. "The question whether or not a general law can be made to apply in a case not falling within those specifically enumerated is addressed to the legislature, and not to the courts, and its decision in that respect, involved in the passage of the act, is final, and the courts have no power to revise, reverse, or annul it": *People v. Thompson*, 155 Ill. 451, 40 N. E. 307. "When that body has concluded a special law is necessary, except in the cases expressly prohibited, its conclusion is not the subject of judicial review": See the principal case, ante, p. 102. "The determination of that question by the legislature in enacting the law is final and conclusive upon the courts": *Woods v. McCay*, 144 Ind. 316, 43 N. E. 269. "The determination of the question of applicability is one wholly within the province of the legislature. . . . Its decision in this respect is conclusive, and not subject to be reviewed by the courts": *Board of Commra. v. State*, 147 Ind. 476, 46 N. E. 908.

"Whether an act relating to a subject not enumerated can or cannot be made a general law is a question to be determined exclusively by the legislature, and not by the courts": *Indianapolis v. Navin* (Ind.), 47 N. E. 525. "This court has uniformly held that the legislature has the power, in its discretion, to pass special laws, although adequate general laws upon the same subject might be enacted, and although in fact such general laws have already been enacted and are at the time in full force and effect, and although such special acts might have the effect to limit the operation of existing laws of a general nature then having a uniform operation throughout the state": *Midland Elevator Co. v. Stewart*, 50 Kan. 378, 32 Pac. 83; *Board of Commrs. v. Aetna Life Ins. Co.*, 90 Fed. 222, 228.

b. Considered as a Judicial Question.—This doctrine has not proved entirely satisfactory in some of the states in which it has been adopted. The Kansas court, for example, has said that if the question were a new one, it would incline to the view that the courts should determine in each case whether or not the constitutional provision had been violated: See *Eichholtz v. Martin*, 53 Kan. 486, 36 Pac. 1064. And the rule laid down in the earlier Missouri cases has been abrogated, the constitution of that state now declaring that whether a general law can be made applicable in any case is a judicial question, to be judicially determined without regard to any legislative assertion on the subject: *Henderson v. Koenig*, 168 Mo. 356, 68 S. W. 72. Under this provision legislation has been condemned as special or local where a general law could have been made applicable in *State v. Gritzner*, 134 Mo. 512, 529, 36 S. W. 39; *State v. Walsh*, 136 Mo. 400, 407, 37 S. W. 1112; *State v. Hill*, 147 Mo. 63, 67, 47 S. W. 798; *Ashbrook v. Schaub*, 160 Mo. 107, 60 S. W. 1085. The constitution of Minnesota contains a provision similar to that of the Missouri: See *State v. Minor*, 79 Minn. 201, 81 N. W. 912.

In *Thomas v. Board of Commrs.*, 5 Ind. 4, an early case long since overruled by the Indiana court, as will be seen from a reference to the preceding paragraphs, it was held competent for the courts to inquire whether a general law could be made applicable to the subject matter of a local or special law enacted by the legislature; and the court, having come to the conclusion that a general law could be made to apply to the case under discussion, pronounced the special law in question unconstitutional. This decision was followed in *Ex parte Pritz*, 9 Iowa, 30, 36; *State ex rel. Clarke v. Irwin*, 5 Nev. 111, 125. And in *Pell v. Newark*, 40 N. J. L. 71, 20 Am. Rep. 266, it is held that the courts, and not the legislature, must ultimately determine whether an object can be accomplished by general legislation.

In a later Iowa case, Chief Justice Rothrock says: "There is a very respectable line of authorities in which it is held, under constitutional provisions the same as our own, that a discretion is left

with the legislature to determine when such special laws should be passed. It is declared in some of these cases that this legislative discretion is absolute, and is not subject to review by the courts. We are not prepared to adopt this rule, in this broad and comprehensive sense, when applied to a subject which it is plain is not one of local and special application, but which affects the state at large. But, in a proper case for the exercise of legislative action, the question whether a local law should be enacted should be left with the law-making power to determine. In our opinion, the act under consideration is of this class": *Chicago etc. Ry. Co. v. Independent Dist. of Avoca*, 99 Iowa, 556, 68 N. W. 881. The statute in question was a special act legalizing a tax for school purposes levied in a particular district, after the expiration of the time fixed by law, though at the time the act was passed there were four other school districts in the state, wherein the levies, made at different times from those sought to be validated, were invalid for similar reasons. In *Richman v. Supervisors*, 77 Iowa, 513, 14 Am. St. Rep. 308, 42 N. W. 422, where another special curative statute is drawn in question, Justice Granger remarks: "The fact that the legislature framed the act in question as it did is evidence of its design, and that it believed that the general law could not be made applicable; and we are not justified in disturbing its acts, on constitutional grounds, except where the infraction is clear, palpable, and plainly inconsistent. . . . We may here dispose of the question on the theory, at least that the act is not so clearly obnoxious to constitutional requirements as to justify an interference by us."

The supreme court of California has come to a like conclusion, as will appear from the following extract from *People v. Mullender*, 132 Cal. 217, 64 Pac. 299: "That the act here in question is both local and special is conceded. But that is not conclusive. The language of said paragraph [of the constitution which prohibits local or special laws in all other cases where a general law can be made applicable] plainly implies that there are or may be cases where a local or special act may be wise, salutary, and appropriate, and in no wise promotive of those evils which result from a general and indiscriminate resort to local and special legislation. The constitution submits the question whether a general law can be made applicable in any given case to the judgment of the legislature, to be determined in the light of the evils intended to be avoided, and with its determination upon that question we may not interfere, unless the disregard of the constitutional requirement is clear and palpable."

It is believed that this doctrine is sound. In our opinion, the legislature should have a reasonable discretion to determine when a general law will not meet the exigencies of a particular case, but it should not be the sole judge of the necessity of a special or local law. Judicial inquiry should not be excluded absolutely, and yet the courts

should not interfere to set aside a statute, unless the legislative discretion has been clearly and palpably abused. To give the legislature the exclusive right to determine the question of applicability of a general law is to subvert the theory of our government that the judiciary is to pass upon infractions of the organic law, and pronounce null and void legislative enactments contravening the constitution. Moreover, the constitutional inhibition is not likely to prove very effective if the legislature is to be sole arbiter of the necessity of a special or local statute. To be sure, it may be said that the legislature is as good a judge of the necessities of the case as are the courts. But this argument applies with, perhaps, equal force, in any instance when a judicial investigation into the constitutionality of a statute is made.

c. **Rule for Determining Validity of Statute.**—The principles for determining whether a statute is in violation of the constitutional prohibition will now be given a brief consideration. A law is not constitutional if it confers particular privileges, or imposes peculiar disabilities or burdensome conditions in the exercise of a common right upon a class of persons arbitrarily selected from the general body of those that stand in the same relation to the subject of the law. The legislature may classify, for the purpose of legislation, if some intrinsic reason exists why the law should operate upon some and not upon all, or should affect some differently from others, but this classification must be based upon differences which are either defined by the constitution, or are natural or intrinsic, and which suggest a reason that may rationally be held to justify the diversity in the legislation. It must not be arbitrary, for the mere purpose of classification. The class must be characterized by some substantial qualities or attributes, which render such legislation necessary or appropriate for the individuals of the class. When, however, such a class exists, it may be singled out for legislative consideration, provided the statute extends to and embraces all who are or may be in the like situation or circumstances: *Bloss v. Lewis*, 109 Cal. 493, 41 Pac. 1081; *Kranse v. Durbrow*, 127 Cal. 681, 60 Pac. 488; *Waite v. Santa Cruz*, 89 Fed. 619.

IV. Special Statutes in Particular Cases.

a. **When Condemned by the Courts.**—The following statutes have been declared invalid as violating the mandate of the constitution that the legislature shall enact no special or local law where a general law can be made applicable: A statute requiring cities of fifth class to make an effort to agree with the owners of land sought to be condemned, before instituting condemnation proceedings: *City of Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604; a statute declaring that in cities of the fifth class the courts shall take judicial notice of the municipal ordinances: *City of Tulare v. Hevren*, 126 Cal. 226, 38 Pac. 530; a statute making it criminal for barbers to conduct their

business on Sundays: *Ex parte Jentzsch*, 112 Cal. 468, 44 Pac. 803; *State v. Granneman*, 132 Mo. 326, 33 S. W. 784; and a special statute providing a mode for conducting the election of the directors of mining corporations: *Krause v. Durbrow*, 127 Cal. 681, 60 Pac. 438. Statutes have also been condemned as special, where a general law could be made applicable in *State v. Higgins*, 51 S. C. 51, 28 S. E. 15; *Openshaw v. Halfin*, 24 Utah, 426, 68 Pac. 138; *Union Sewer-pipe v. Connelly*, 99 Fed. 354. All of the above cases are, of course, authority for the proposition that the courts are competent to inquire into the question whether a general law could be made applicable to a case in which the legislature has enacted a special law.

b. *When Upheld as Constitutional.*—The following statutes have been upheld, under the constitutional provision that in certain enumerated cases no special or local statute shall be enacted, and that in all other cases where a general law can be made applicable, no special law shall be passed: A statute creating a new county, and fixing its boundaries: *People v. McFadden*, 81 Cal. 489, 15 Am. St. Rep. 66, 22 Pac. 851; a statute changing the boundaries of a certain county: *Stuart v. Kirley*, 12 S. Dak. 245, 81 N. W. 147; a statute allowing municipal corporations to disincorporate after proceedings prescribed by law: *Mintzer v. Schilling*, 117 Cal. 361, 49 Pac. 209; a statute relating to the location of county seats in counties of more than five hundred square miles, though applying to only one county: *Board of Commrs. v. State*, 147 Ind. 476, 46 N. E. 908; a statute relating to the relocation of county seats, though affecting but a single county: *Mode v. Beasley*, 143 Ind. 306, 42 N. E. 727; a statute limiting the compensation and fees of certain officers in counties of less than three thousand voters: *Clark v. Finley*, 98 Tex. 171, 54 S. W. 343; a statute limiting the fare on street railways to three cents in cities of one hundred thousand or more population: *Indianapolis v. Navin* (Ind.), 47 N. E. 525; a statute regulating the granting of street railway franchises in cities of one hundred thousand: *Smith v. Indianapolis St. Ry. Co.*, 158 Ind. 425, 63 N. E. 849; a special statute to amend a special municipal charter: *Carpenter v. People*, 8 Colo. 116, 5 Pac. 828; *Wiley v. Bluffton*, 111 Ind. 152, 12 N. E. 165; a statute dissolving certain school districts, and attaching them to another to form a graded school: *Ash v. Thorp* (Kan.), 68 Pac. 1067; a statute regulating the salaries of the county clerk and the county treasurer in certain named counties: *Commissioners v. Shoemaker*, 27 Kan. 77; *Harvey v. Commissioners*, 32 Kan. 159, 4 Pac. 153; a statute declaring section lines in certain counties to be public highways: *Hughes v. Milligan*, 42 Kan. 369, 22 Pac. 313; a statute creating two city courts in a certain township, and prescribing their jurisdiction and powers: *In re Greer*, 58 Kan. 268, 48 Pac. 950; a statute establishing a county high school in a certain county: *Eichholtz v. Martin*, 53 Kan. 486, 36 Pac. 1064; a statute authorizing a certain school dis-

trict to issue bonds to build a schoolhouse: *Beach v. Leahy*, 11 Kan. 23; a statute authorizing the board of education of a certain city to issue bonds of its school district, upon a majority vote of the electors, to purchase sites for school buildings, and to erect the buildings: *Knowles v. Board of Education*, 33 Kan. 692, 7 Pac. 561; a statute authorizing drought-stricken counties to issue bonds to purchase grain for seed and feeding teams: *In re House Roll No. 284*, 31 Neb. 505, 48 N. W. 275; a herd law enabling electors, voting by districts, to determine whether they will permit stock to run at large; *Johnson v. Mocabee*, 1 Okla. 204, 32 Pac. 336; and curative statutes (*Kelly v. State*, 92 Ind. 236; *Johnson v. Board of Commrs.*, 107 Ind. 15, 8 N. E. 1), legalizing the act of a board of supervisors in making a special assessment for a ditch: *Richman v. Supervisors*, 77 Iowa, 513, 14 Am. St. Rep. 308, 42 N. W. 422; or legalizing city bonds: *Schneck v. Jeffersonville*, 152 Ind. 204, 52 N. E. 212; or legalizing the defective organization of an independent school district: *State v. Squires*, 26 Iowa, 340.

JACKSON PAPER MANUFACTURING COMPANY v. COMMERCIAL NATIONAL BANK.

[199 Ill. 151, 65 N. E. 136.]

PRINCIPAL AND AGENT.—Authority to Indorse Commercial Paper can be Implied Only when the agent is unable to perform the duties of his agency without the exercise of such authority. In other words, the power of an agent to indorse commercial paper for his principal must be a necessary implication from the express authority conferred upon him. (p. 116.)

NEGOTIABLE PAPER—Agent—Implied Authority of to Indorse.—An agent having general authority to manage his principal's business has by virtue of his employment no implied authority to bind his principal by making, accepting, or indorsing negotiable paper. (p. 118.)

NEGOTIABLE PAPER—Authority to Indorse—When Does not Exist.—A superintendent of a corporation, who is under the direction of its treasurer, and who as such superintendent has charge of the buying of material, and the hiring of men and looking after the manufacture and sale of paper, has no implied authority to indorse a check delivered to him in payment of a debt due his principal. (p. 118.)

PRINCIPAL AND AGENT.—Authority to Collect Debts and Give Discharges Carries no Implication of Authority to indorse a negotiable note. (p. 119.)

PRINCIPAL AND AGENT—Acts of Recognition—Who May not Rely Upon.—Though authority to draw, accept, and indorse bills may be presumed from acts of recognition in former instances, yet those acts must be known to the party setting them up. (p. 120.)

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NEGOTIABLE INSTRUMENTS—Power to Indorse—When not Inferable.—One who sees another opening the mail of a corporation, giving orders to its employes, and countersigning some of its checks, is not justified in inferring that he has authority to indorse checks drawn in its favor. (pp. 120, 121.)

BANKING—Right of Action on Checks.—When the check of a depositor is presented to a banker, it is an absolute appropriation of the amount of the check to the holder, if the deposit is sufficient to pay it, and if payment is refused, the holder may maintain an action against the banker. (p. 121.)

BANKER—Estoppel Against.—A Bank Which Certifies a Check is estopped, as against the holder, to deny that it possesses sufficient funds of the drawer to pay the check. (p. 121.)

BANKING—Paying Check to Person in Possession Without Authority.—The mere fact that an agent of the payee of a check has possession of it, and indorses it to another, who thus gets possession and presents it for payment, does not authorize the banker to make payment of it where the agent had not, in fact, authority to indorse the check. (p. 121.)

PRINCIPAL AND AGENT.—A person dealing with an agent takes the risk as to the extent of his authority, and is bound to inquire into it. (p. 125.)

PRINCIPAL AND AGENT—Burden of Proof.—When a check purports to be indorsed by one as agent of the payee, the burden of proof is on the holder to show authority to make the indorsement. (p. 125.)

Assumpsit upon a check drawn upon the defendant in favor of the plaintiff. The defendant recovered judgment in the trial court, which the appellate court affirmed, and the plaintiff appealed.

Bowen W. Schumacher, for the appellant.

Tenney, McConnell, Coffeen & Harding, for the appellee.

¹⁵² **MAGRUDER, C. J.** The errors, assigned by the appellant and relied on for a reversal of the judgment, are the refusal to admit testimony offered in behalf of the plaintiff, the admission of testimony in behalf of the defendant over the objection of the plaintiff, the refusal to give instructions offered by the plaintiff, the giving of instructions in behalf of the defendant, and the overruling of the motion for a new trial.

¹⁵³ 1. The main question, arising out of the action of the trial court in the admission and refusal of testimony, and in the giving and refusal of instructions, relates to the authority of the superintendent of a manufacturing corporation to indorse a check, made payable to the order of that corporation.

and given in payment of a debt, created by the purchase of goods from the corporation by the drawer of the check.

The appellant was engaged in the manufacture and sale of paper at Jackson, Michigan. In January, 1895, it employed one Charles A. Jackson to act as superintendent of its mill at Jackson, Michigan; and he continued to act as such superintendent from January, 1895, to the latter part of December, 1896, or the 1st of January, 1897. In December, 1896, Jackson went to Chicago to solicit orders for the company, and to make sales of paper for it. J. Herz & Son and E. W. Copelin & Co., paper dealers of Chicago, were customers of the appellant. J. Herz & Son were indebted to the appellant at that time in the sum of between three and four hundred dollars. Jackson went to see J. Herz & Son at their store in Chicago, and settled with them their account with appellant. J. Herz & Son on December 18, 1896, gave to Jackson their check of that date for three hundred and twenty-five dollars and sixty-five cents, payable to the order of the Jackson Paper Manufacturing Company, and drawn upon the Commercial National Bank of Chicago. Jackson took this check to E. W. Copelin & Co. of Chicago, and asked E. W. Copelin to cash it for him. Copelin had done business with the appellant, and had visited the mill of appellant at Jackson, Michigan, and had seen C. A. Jackson there acting as superintendent and manager of the mill. Jackson indorsed the check as follows: "Jackson Paper Mfg. Co., C. A. Jackson, Supt." and turned it over to Copelin. Copelin procured the check to be certified by the Commercial National Bank, upon which it was drawn, and gave Jackson the currency for it. Copelin then indorsed the check over to the American Exchange National ¹⁵⁴ Bank, with which he did business, and deposited it to his credit in the American Exchange National Bank. The check went through the Chicago clearing-house on December 19, 1896, and was paid by the Commercial National Bank on December 21, 1896. The amount thereof was charged to the account of J. Herz & Son, the drawers of the check.

When Jackson thus obtained the money upon the check from Copelin, he did not remit the money to the Jackson Paper Manufacturing Company in Michigan; and the amount thereof was never received by the appellant. The appellant learned nothing of the whereabouts of Jackson until in January, 1897, when it then learned of his death by suicide in New Orleans. About the same time it learned of his collection

of this money from J. Herz & Son through letters received from the latter.

If C. A. Jackson had authority to indorse the name of appellant to the check, so as to transfer good title thereto to E. W. Copelin & Co., then the judgments of the lower courts are correct, but if he had no authority to indorse the check for the appellant, then such judgments are wrong, and the rulings of the court below in the admission and exclusion of evidence and in the giving and refusal of instructions were erroneous.

The evidence is clear and uncontradicted, that Jackson had no express authority from the appellant to indorse checks in its name. Indeed, it is not contended by the appellee that Jackson had any express authority to make any such indorsements, but it is claimed that he had implied authority so to do. The appellee contends that his authority to make the indorsement is to be implied from the nature of his duties as appellant's superintendent and manager, and from his conduct in connection with the business of appellant.

As superintendent of the mill, Jackson was under the direction of Nathan S. Potter, who was the treasurer ¹⁸⁸ and managing director of the corporation. Jackson had charge of the buying of the material, and of the hiring of the men, and looked after the manufacture and sale of paper. He was paid a certain annual salary, and was entitled to a percentage of the net profits of the business in excess of a certain amount. His brother, Gale Jackson, was the bookkeeper of the corporation. Appellant had a president, a treasurer and a secretary, though the president and secretary appeared to take but little active management of the company's business. Sometimes, when Jackson was traveling, he collected money from customers of the appellant, which was charged by his brother, the bookkeeper, to his account, but the testimony tends to show that appellant had no knowledge of these charges until after the death of Jackson. Sometimes, when Jackson was on a trip for the company for the purpose of selling goods, or making collections, he would adjust accounts due to the company. It was not shown that any collections made by him had ever been paid by check, payable to the order of the appellant, except the check here in controversy. It was shown that the letter-head of the Jackson Paper Manufacturing Company had printed at the top of it, not only the names of the president of the company and the treasurer of the company, but also

the name of "C. A. Jackson, Supt." The only person, who had express authority to sign notes for the company, and draw checks for the company, and indorse its paper and checks, was Nathan S. Potter, the treasurer, who, as managing director, had also the general supervision and management of the business. Sometimes, one P. B. Loomis, Jr., the secretary of the company, indorsed Potter's name when he was absent. It appears, also, that Potter sometimes authorized Gale Jackson, the bookkeeper, to indorse checks and drafts in Potter's name for deposit in the People's National Bank of Jackson, Michigan, where appellant kept its account. It is also shown that Jackson sometimes countersigned ¹⁵⁸ checks drawn by appellant upon its own bank, that is to say, he wrote his name across the end of the check over the word "countersign," though this was not done in the case of all checks drawn by appellant upon its bank. The checks, so countersigned by him, were drawn by appellant to pay for purchases, which Jackson would make for the use of the mill; and the object of such countersigning was to show that the amount of the purchase was correct, Jackson having charge of the purchase of material to be used in the manufacture of paper by the appellant. The checks, however, given by the appellant, were all drawn by Potter, the treasurer.

The weight of authority seems to be in favor of the contention of appellant, that authority to indorse commercial paper can only be implied, where the agent is unable to perform the duties of his agency without the exercise of such authority. In other words, the power of an agent to indorse commercial paper for his principal must be a necessary implication from an express authority conferred upon such agent. Wherever such power is implied from the acts of the agent, the acts, subject to such implication, must be acts of a kind like those from which the implication is drawn.

Parsons in his work on Contracts, volume 1, sixth edition, page 62, says: "An agent's acts in making or transferring negotiable paper (especially if by indorsement) are much restrained. It seems that they can be authorized only by express and direct authority, or by some express power which necessarily implies these acts, because the power cannot be executed without them."

The power of an agent to bind the principal by the making or indorsing of negotiable paper can only be charged against

the principal by necessary implication, where the duties to be performed cannot be discharged without the exercise of such a power, or where the power is a manifestly necessary and customary incident of the character bestowed upon the agent, and where the power ¹⁵⁷ is practically indispensable to accomplish the object in view. An agent cannot bind his principal by making or indorsing notes for his own benefit, or the benefit of third persons: *Mechem on Agency*, secs. 389-392.

It is true that Jackson was the superintendent of appellant's mill, and managed the business of running the mill; but "an agent having general authority to manage his principal's business has, by virtue of his employment, no implied authority to bind his principal by making, accepting or indorsing negotiable paper. Such an authority must be expressly conferred, or be necessarily implied from the peculiar circumstances of each case. It may undoubtedly be conferred and by implication, but it will not be presumed from the mere appointment as general agent": *Mechem on Agency*, sec. 398.

Daniel in his work on *Negotiable Instruments*, volume 1, fourth edition, section 292, says: "When the authority to execute or indorse a negotiable instrument is sought to be deduced from an agency to do certain other acts, it must be made to appear affirmatively that the signing or indorsement of such an instrument was within the general objects and purposes of the authority, which was actually conferred. And in interpreting the authority of the agent, it is to be strictly construed." We fail to discover anything in the record in the present case to show that the power to indorse the check here in controversy was within the general objects and purposes of the authority conferred upon Jackson. Instead of transmitting the check to the appellant, he assumed to sign appellant's name upon the back of the check, and to obtain the cash for it. The indorsement was evidently made for his own benefit. There is, of course, some evidence tending to show that the trip made by him to Chicago was a trip taken in the interest of the business of the appellant, but his accounts show that there was paid to him during the time of his trip sufficient money for his expenses. *Copelin & Co.*, who cashed the check upon his indorsement, ¹⁵⁸ had no business, on the eighteenth day of December, 1896, when the check was cashed, with the appellant, or with Jackson, as the agent of appellant. There is nothing to show that *Copelin & Co.* at that time owed

the appellant anything, or purchased any goods from the appellant at that time through Jackson, as appellant's agent. It may be that Jackson had authority at that time to collect debts that may have been due to the appellant as his employer, but "authority to collect debts and give discharges carries no implication of authority to indorse a negotiable note": 1 Daniel on Negotiable Instruments, 4th ed., sec. 293. "The nature and extent of an implied authority are deemed to be limited to acts of a like nature with those from which it is implied": 1 Am. & Eng. Ency. of Law, 2d ed., 1002. It is not shown by any evidence whatever in the record, that Jackson ever indorsed a check for the appellant, except the check here in controversy. It is not proven that he ever did any such act as the indorsement of a check or note, which was approved and ratified by the appellant after it was done.

The statements, made by the text-writers above referred to, appear to be sustained by the decided cases: Boord v. Strauss, 39 Fla. 381, 22 South. 713; Gregory v. Loose, 19 Wash. 599, 54 Pac. 33; Dodge v. National Exchange Bank, 30 Ohio St. 1; Doubleday v. Kress, 50 N. Y. 410, 10 Am. Rep. 502; Smith v. Co-operative Dress Assn., 12 Daly, 304; Atkinson v. St. Croix Mfg. Co., 24 Me. 176; Middlesex County Bank v. Hirsch Bros. etc. Co., 24 N. Y. St. Rep. 297, 4 N. Y. Supp. 385; Graham v. United States Sav. Inst., 46 Mo. 186; Smith v. Gibson, 6 Blackf. 370; Railway Equipment etc. Co. v. Lincoln Nat. Bank, 82 Hun, 9, 31 N. Y. Supp. 44; New York Iron Mine v. First Nat. Bank of Negaunee, 39 Mich. 644; Vanbibber v. Bank of Louisiana, 14 La. Ann. 481, 74 Am. Dec. 442; Jackson v. Bank, 92 Tenn. 154, 36 Am. St. Rep. 81, 20 S. W. 820.

While it is well settled that an authority to draw, accept or indorse bills may be presumed from acts of recognition in former instances, yet those acts must be known to the party setting them up: Rawson v. Curtiss, 19 Ill. 456; Maxey v. Heckethorn, 44 Ill. 437; St. John v. ¹⁸⁹Redmond, 9 Porter, 432; Cash v. Taylor, 8 L. J. K. B., O. S., 262; Chitty on Bills, 13th Am. ed., 41, *32. That is to say, where a party, accepting a check or note or bill indorsed by an agent and shown upon its face to be indorsed by an agent, maintains that the agent had apparent authority to make such indorsement, he must prove that the facts, giving color of authority to the agent, were known to him. If such person has no knowledge of such facts,

he does not act upon them, or part with anything on the faith of any apparent authority, and, therefore, is not in a position to claim anything from such apparent authority: 1 Daniel on Negotiable Instruments, 4th ed., sec. 297, and other authorities last above referred to. Chitty on Bills, thirteenth American edition, page 41, says: "But it must appear that the bill or note is taken upon the faith of prior similar transactions; and, therefore, the holder of a bill purporting to be, but not in fact, accepted by the person to whom it is addressed, cannot recover against the apparent acceptor by proving a fact subsequently discovered, that on a former occasion the defendant had given a general authority to the person, who accepted in his name, to accept bills for him; to make such authority available, the holder must show either that the authority remained unrevoked at the time of the acceptance, or that he took the bill on the faith of such authority."

It is insisted by the appellant that the appellee bank did not show, and did not propose to show, that appellee had any knowledge of the acts relied upon, as showing by implication the authority of Jackson to indorse the check. To this contention the appellee replies that it was not necessary for it to prove its knowledge of prior similar transactions, and that it accepted and paid the check on the faith of such transactions, but that it was sufficient if Copelin & Co., who purchased the check from Jackson, had such knowledge. In other words, the question, as presented by the appellee, is whether Copelin & Co. obtained good title to the check through the indorsement ¹⁰⁰ of Jackson. Appellee claims that, if Copelin & Co. had good title to the check, that firm would transfer by its indorsement no worse title than it had. Without stopping to discuss this contention, or to pass any opinion upon it, it may be admitted for the purposes of this case to be correct, and yet the question remains, whether there were any acts or circumstances brought home to the knowledge of Copelin & Co. which would justify them in purchasing this check upon Jackson's indorsement without making inquiry as to his authority. It is true that Copelin had been to Jackson, Michigan, and had seen Jackson in charge of appellant's mill, and had seen him engaged in the management of appellant's business. There is also evidence to the effect that he saw Jackson opening mail, and giving orders to the men in the employ of the company, and countersigning some of the checks drawn by the company upon its bank to pay for material. But, un-

der the authorities above referred to and quoted from, none of these acts were sufficient to justify Copelin & Co. in inferring that Jackson had authority to indorse the check.

The check was drawn by J. Herz & Son upon the appellee bank. In the present case, it is not denied that Herz & Son had funds enough in the appellee bank to pay the check, so drawn by them to the order of appellant. The doctrine of this court is that, "when the check of a depositor is presented to the banker, if the deposit is sufficient to pay the check, it is an absolute appropriation of the amount of the check to the holder, and that the contract, implied by law between the banker and his depositor for the benefit of whoever may become the holder of the check, is one upon which such holder can maintain an action": *Gage Hotel Co. v. Union Nat. Bank*, 171 Ill. 531, 63 Am. St. Rep. 270, 49 N. E. 420. In the present case it appears that the check was certified by the appellee. By such act of certification appellee assumed the duty to pay the check only to the appellant, the payee therein, or upon appellant's ¹⁶¹ genuine indorsement. Having direct notice of Jackson's agency by his signature upon the back of the check as superintendent, appellee was bound to take notice of the limitations upon his authority. When it certified the check, it entered into an absolute undertaking to pay it when presented at any time within the time fixed by the statute of limitations, and was, therefore, estopped to deny that it possessed sufficient funds of the drawer to pay the check: *Metro-politan Nat. Bank v. Jones*, 137 Ill. 634, 31 Am. St. Rep. 403, 27 N. E. 533; *Middlesex County Bank v. Hirsch Bros. etc. Co.*, 24 N. Y. St. Rep. 297, 4 N. Y. Supp. 385; *Smith v. Co-operative Dress Assn.*, 12 Daly (N. Y.), 304; *Dowden v. Cryder*, 55 N. J. L. 329, 26 Atl. 941.

The mere fact that Jackson was in possession of the check which he thus obtained from J. Herz & Son did not authorize him to transfer it to Copelin & Co., or authorize Copelin & Co. to purchase it from him upon his indorsement of appellant's name thereon; nor was any authority thereby conferred upon the appellee bank to pay the same. In *Dodge v. National Exchange Bank*, 30 Ohio St. 1, it was held that "the rightful possession of a check, made payable to the order of a particular person, confers no authority on the drawee to pay the same to the person having such possession, without the genuine indorsement of the payee," and that, if the drawee relies upon false representations as to identity, for which

neither the drawer nor payee is responsible, he makes payment to a wrong person at his peril.

In *Doubleday v. Kress*, 50 N. Y. 410, 10 Am. Rep. 502, it was held that the possession by an assumed agent of a promissory note, payable to the order of the payee, and not indorsed by him, is not alone sufficient evidence of his authority to authorize a payment thereof to him. In *Smith v. Co-operative Dress Assn.*, 12 Daly, 304, it was held that a party making a special contract with the general manager of a corporation knows that he is making it with a mere agent, and he is bound at his peril to ascertain the agent's real authority. In *Atkinson v. St. Croix Mfg. Co.*, 24 Me. 176, it was held that ¹⁶³ proof that a person was an agent of an incorporated company, and had charge of the business of said company at a certain place, was not alone sufficient to show that such person was authorized to draw a note or bill in behalf of the company, and that the acceptance of a draft by the treasurer of an incorporated company without evidence of any authority in him to perform such acts did not thereby render the company liable thereon.

In *Smith v. Gibson*, 6 Blackf. 370, it was held that the authority of an agent to buy and sell goods for his principal did not confer a power to bind him by drawing or indorsing bills and notes, and that no agency will be implied in such cases, unless there is some evidence of recognition by the principal in the particular case, or in similar cases.

In *Railway Equipment etc. Co. v. Lincoln Nat. Bank*, 82 Hun, 9, 31 N. Y. Supp. 44, which was an action brought to recover for the conversion of certain checks belonging to the plaintiff, it was held that the fact, that the agent there was held out as the manager of the business of the corporation, in no way authorized the conclusion, that he had the right to bind the corporation by his signature to commercial paper.

In *New York Iron Mine v. Bank of Negaunee*, 39 Mich. 644, it was held that a general agent, without being specially empowered so to do, had no authority to make promissory notes in the name of his principal, and that, where a general agent in Michigan was accustomed to indorse the company's paper for collection or discount, and to draw on the treasurer in New York for the current needs of his corporation and his drafts were duly paid, this could not imply authority in the agent to make promissory notes in the name of the corporation.

In *Vanbibber v. Bank of Louisiana*, 14 La. Ann. 481, 74 Am. Dec. 442, it appeared that the drawers of a check were accustomed to have deposits of funds at the bank, and to draw occasionally against the same, and it was there said: "The drawers of this check requested the bank to pay its amount to plaintiffs, or order. The bank had no right to pay it to ¹⁰³ any other person. It has, however, paid it upon a forged indorsement, and the amount of the check must be considered to be still in the bank, subject to the rights of plaintiffs. . . . If there was negligence anywhere, it was upon the part of the bank. Their duty to their depositor required them to be satisfied that the indorsement of the check was that of the payees. . . . It is also established that the collector was never authorized by the plaintiffs to indorse any check drawn to the order of the firm, or any check."

In *Graham v. United States Sav. Inst.*, 46 Mo. 186, which was a case similar in its facts to the case at bar, it was said by the court: "This suit is brought to recover the amount of two checks, which were drawn on the defendant by third parties in favor of the plaintiffs and made payable to their order. The drawers delivered the checks to the plaintiffs' collecting agent, one Dixon, in settlement of certain bills which the latter had in charge for collection, being bills due from the drawer of the checks to the plaintiffs. Dixon indorsed the defendant's firm name upon the checks and presented them at the bank and drew the money upon them, which he seems to have appropriated to his own use, without rendering any account thereof to the plaintiffs. . . . The question presented is purely one of agency. Was Dixon the plaintiffs' agent to indorse negotiable paper given in settlement of debts due to his employers? He was their agent to adjust such claims and receive the amounts due upon them, and to do those subordinate and incidental things usual and customary in the accomplishment of the main purpose had in view, to wit, the collection. The main purpose had been accomplished when he had received the checks payable to his principals. His duties as a collector ceased at that point. His next duty was to account with his employers for the proceeds of his collections, and turn over the checks to them, to be disposed of as they might judge proper. The indorsement of the ¹⁰⁴ checks was no necessary incident of the collection of the accounts."

In *Jackson v. Bank*, 92 Tenn. 154, 36 Am. St. Rep. 81, 20 S. W. 820, which is also a case similar in its facts to the case

at bar, the supreme court of Tennessee says: "No authority will be implied from an express authority. Whatever powers are strictly necessary to the effectual exercise of the express powers will be conceded to the agent by implication. In order, therefore, that the authority to make or draw, accept and indorse commercial paper as the agent of another may be implied from some other express authority, it must be shown to be strictly necessary to the complete execution of the express power. The rule is strictly enforced, that the authority to execute and indorse bills and notes as agent, will not be implied from an express authority to transact some other business, unless it is absolutely necessary to the exercise of express authority: Tiedeman on Commercial Paper, sec. 77. Possession of a check, payable to order, by one claiming to be agent of the payee, is not prima facie proof of authority to demand payment in the name of the true owner: Tiedeman on Commercial Paper, sec. 312. A bank is obliged by custom to honor checks payable to order, and pays them at its peril to any other than the person to whose order they are made payable: Tiedeman on Commercial Paper sec. 431. It must see that the check is paid to the payee therein named upon his genuine indorsement, or it will remain responsible: Pickle v. Muse, 88 Tenn. 380, 12 S. W. 919. An authority to receive checks in lieu of cash in payment of bills, placed in the hands of an agent for collection, does not authorize the agent to indorse and collect the checks: Graham v. United States Sav. Inst., 46 Mo. 186; 1 Wait's Actions and Defenses, 284; 1 Daniel on Negotiable Instruments, sec. 294. The indorsement of the check was not necessary incident to the collection of the accounts: Graham v. United States Sav. Inst., 46 Mo. 186. It follows that a drummer or commercial traveler, employed to sell and take orders for goods, to collect accounts and receive money and ¹⁶⁵ checks payable to the order of his principal, is not, by implication, authorized to indorse such principal's name to such checks. No equitable considerations can be invoked to soften seeming hardships in the enforcement of the laws and rules fixing liability on persons handling commercial paper. These laws are the growth of ages, and the result of experience, having their origin in necessity. The inflexibility of these rules may occasionally make them seem severe, but in them is found general security": See, also, Chicago Electric Light Renting Co. v. Hutchinson, 25 Ill. App. 476; Commer-

cial Nat. Bank v. Lincoln Fuel Co., 67 Ill. App. 166; Beattie v. National Bank of Illinois, 174 Ill. 571, 66 Am. St. Rep. 318, 51 N. E. 602.

A person dealing with an agent takes the risk as to the extent of his authority, and is bound to inquire into his authority: Reynolds v. Ferree, 86 Ill. 570, and authorities last above referred to.

The rulings of the court below upon the admission and exclusion of evidence, and its action in giving and refusing instructions, were in opposition to the views hereinbefore expressed. We are, therefore, of the opinion that the trial court erred in this respect.

2. It was held by the court below, in the instructions given by it to the jury, that the burden of disproving the authority of Jackson to indorse the name of the appellant upon the check in question was upon the appellant. In our opinion this holding was wrong. The appellant asked the court to instruct the jury, that "the burden of showing the authority of a stranger to a check to indorse the same for the payee is upon the drawee, if he would escape liability to pay over again to the payee," and this instruction was refused by the court. It should have been given. Where one attempts to take advantage of the act of an agent, it is for him to show the authority of that agent. The appellee relied for its defense upon the proposition that C. A. Jackson had authority to indorse appellant's name upon the check, and, therefore, ¹⁰⁰ the burden was upon the appellee to prove such authority.

In Hardesty v. Newby, 28 Mo. 567, 75 Am. Dec. 137, it was held that, where a matured negotiable promissory note is delivered by the payee without indorsement to an agent for collection, the possession of the note by the latter will not raise a presumption that he has authority to assign the same, and the burden of proving an assignment by authority of the payee rests upon the party claiming under such alleged assignment. In Hays v. Lynn, 7 Watts, 525, it was said by the court: "A party who avails himself of the act of an agent must, in order to charge the principal, prove the authority under which the agent acted. The burthen of the proof lies on him to establish the agency and the extent of it." In Morgan v. Bank of New York, 1 Duer (N. Y.), 438, it was said by the court: "When a bill or check is payable to order, to justify the application to its payment of the funds of the drawer, it must be proved that the required order was in fact given—in other words, it must

be proved that the indorsement was genuine—and the burden of this proof rests upon the person or bank upon whom the bill or check is drawn.” In *Bank of University v. Tuck*, 101 Ga. 104, 28 S. E. 168, it was held that the maker of a negotiable promissory note pays the amount due thereon to any person other than the holder at his own risk, and a defense to an action on such note, setting up payment to one authorized by the holder to collect for him, casts upon the defendant the burden of showing, not only that he has paid the money, but that he has made payment to a person authorized by the holder to receive it, or else that it actually reached the holder's hands. In *Commercial Nat. Bank v. Lincoln Fuel Co.*, 67 Ill. App. 166, it was said: “But the mere fact that Gordon & Co. had possession of the check affords no presumption of their authority to indorse it, nor would mere authority possessed by Gordon & Co. to accept checks from customers of appellee for ¹⁸⁷ coal sold give to them either express or implied authority to indorse such checks by the name of appellee. And if the drawee of such a check pays the same upon an indorsement that is not genuine, or is not authorized, it does so at its peril, and the burden of showing the authority of the stranger to the check to indorse the same for the payee would be upon the drawee, if it would escape liability to pay it over again to the payee”: *Jackson v. Bank*, 92 Tenn. 154, 36 Am. St. Rep. 81, 20 S. W. 820.

The judgment of the appellate court, and the judgment of the superior court of Cook county, are reversed, and the cause is remanded to the superior court of Cook county for further proceedings in accordance with the views herein expressed.

An Agent with general authority to manage his principal's business has no implied authority to bind his principal by making a negotiable instrument. Such authority must be expressly conferred, or be necessarily implied from the exigencies and the general course of the particular employment, or the act must be ratified by the principal: *Helena Nat. Bank v. Rocky Mountain Tel. Co.*, 20 Mont. 379, 63 Am. St. Rep. 628, 51 Pac. 829. An agent authorized to collect accounts and receive money and checks payable to his principal has no implied authority to indorse checks in the latter's name: *Deering v. Kelso*, 74 Minn. 41, 73 Am. St. Rep. 324, 76 N. W. 792; *Jackson v. National Bank of McMinnville*, 92 Tenn. 154, 36 Am. St. Rep. 81, 36 S. W. 81. And the president and secretary of a corporation are not empowered to bind it by their signatures to commercial paper, unless such authority is expressly conferred: *City Electric St. Ry. Co. v. First Nat. Ex. Bank*, 62 Ark. 33, 54 Am. St. Rep. 282, 24 S. W. 89.

The Liability of Banks for not honoring checks is considered in the monographic note to *J. M. James Co. v. Bank*, 80 Am. St. Rep. 865-875. A reference to this note and the note to *Sowden v. Craig*, 96 Am. Dec. 132-136, will show that the authorities are conflicting on whether a bank is liable to the holder of a check upon its refusal to pay it, the drawer having sufficient funds on deposit with which to meet it.

CRONIN v. SUPREME COUNCIL OF THE ROYAL LEAGUE.

[199 Ill. 228, 65 N. E. 823.]

BENEFICIAL ASSOCIATIONS—Notice of Assessments.—If the prescribed form of notice is provided in the by-laws of an association or the contract of membership, such form must be followed. If the notice is required to bear the official stamp of the collector or the seal of the council, a notice omitting both is void. (p. 129.)

BENEFICIAL ASSOCIATIONS.—The Official Notice of an Assessment can Date Only from the time of its actual receipt by the member to whom it is addressed, or where it is mailed, after a sufficient time has elapsed to enable it to reach him in due course of mail. (p. 129.)

BENEFICIAL ASSOCIATIONS.—The Time Within Which to Pay an Assessment is not to be computed from the date of the notice, but from the time of its receipt or the time it should have reached the member in due course of mail. (p. 129.)

WITNESS—Disqualification of for Interest.—A member of a beneficial association is interested in the result of a suit to recover from it an assessment of a benefit certificate, and is therefore disqualified from testifying against a plaintiff suing as administrator under a statute prohibiting every person from testifying in a suit against an administrator who is interested in the result of the suit. (p. 132.)

James F. Boland and Jones & Luak, for the plaintiff in error.

Millard W. Powers, for the defendant in error.

229 WILKIN, J. This was an action of assumpsit by plaintiff in error, against defendant in error, on a benefit certificate issued by defendant in error to Philip P. H. Cronin for the benefit of his brother, John J. Cronin. The defense was that the insured was not in good standing in the order at the time of his death (which occurred May 4, 1889), by reason of his failure to pay assessment No. 17, regularly levied, and due notice thereof given him on January 1, 1889. Replications to the pleas setting up said defense were filed, denying that no-

tice of the assessment was given in conformity with the requirements of the by-laws of the society. Issue was joined on the replications and the cause tried by a jury. Verdict being rendered for the defendant and judgment entered thereon, plaintiff appealed to the appellate court for the first district, and the case was there assigned to the branch of that court, which affirmed the judgment below, and the plaintiff brings the case here by writ of error.

One of the errors of law urged as a ground of reversal is the refusal of the trial court to give certain instructions asked by the plaintiff.

It was stipulated by the parties upon the trial, among other things, that on January 1, 1889, and up to April 1 of that year, there was in full force and effect a by-law of defendant governing the collection of assessments and payment thereof by its members, in figure and form as follows:

"Sec. 8. (1) The subordinate council having been notified by the supreme scribe that an assessment has been laid, it shall be the duty of the collector at once to notify every member liable to an assessment. (2) This assessment notice shall bear the official stamp of the collector or the seal of the council, and shall be in accordance with the form prescribed by the supreme council, and its date shall be the same as that of the notice received from the supreme scribe. This notice may be ^{sent} mailed to or left at the last known postoffice address or residence of a member, or handed to him in person. . . . Each member shall pay the amount due on the notice of the collector within thirty days of the date of such notice, and every member failing to pay such assessment within thirty days shall stand suspended from the order and all benefits thereof."

It was further stipulated that John J. Cronin, the beneficiary named in the certificate, died on July 5, 1900, and that letters of administration with the will annexed were duly issued to plaintiff on the sixth day of August of that year, and that defendant waived proof of the same; that defendant, by its refusal on August 25, 1900, to pay the amount called for in said benefit certificate, waived notice and proof of death of said Philip P. H. Cronin.

The evidence tended to prove that notice of assessment No. 17, dated January 1, 1889, was mailed to Philip P. H. Cronin from the 5th to the 8th, addressed to his last known postoffice or residence, but it was shown without dispute that such notice had upon it neither "the official stamp of the collector or the

seal of the council." The by-laws required the notice to bear such official stamp or seal. The requirement is a substantial one, and the officer giving the notice had no right to dispense with it. "If a prescribed form of notice is provided for in the by-laws of the association or the contract of membership, such form must be followed in order to be binding on the member": 3 Am. & Eng. Ency. of Law, 2d ed., 1097. There was no conflict in the evidence as to the fact that the notice was not mailed earlier than the fifth day of January, 1889, and the collector whose duty it was to give the notice, and who did give it, testified that it might have been as late as the 8th of that month. The notice stated on its face, "thirty days expire January 31, 1889." Where there is no provision in the constitution and by-laws of such society to the effect that the service of notice shall date from the time of mailing, it can only date ²⁸³¹ from the time of its actual receipt by the member to whom it is addressed, or at least until sufficient time has elapsed to enable it to reach him in due course of mail: *Northwestern Traveling Men's Assn. v. Schauss*, 148 Ill. 304, 35 N. E. 747. Where the by-laws of an accident association provide that payment of assessments shall be made within thirty days from the date of the notice thereof, and not the date of writing the same, a member will not be in default of payment until thirty days from the time he receives the notice, or from the time it would reach him by due course of mail: *United States Mutual Acct. Assn. v. Mueller*, 151 Ill. 254, 37 N. E. 882. "Where assessments are required to be paid within a stated time after notice, such time should be computed from the receipt of notice, excluding the date of receipt—not from the date of the notice or the date of mailing or the date of assessment, unless clearly so provided in the contract": 3 Am. & Eng. Ency. of Law, 1101, note 4, citing numerous authorities, including *Protection Life Ins. Co. v. Palmer*, 81 Ill. 88.

The evidence in this case forcibly illustrates the wisdom and justice of this rule. The member was by the by-laws entitled to thirty days' notice of the assessment. The collector made no attempt to give him to exceed twenty-five days. If he could withhold the mailing of the notices for five days after the date, and the society could still insist that the thirty days began to run from the date of the written or printed notice, it might with equal propriety and justice to the member be withheld for any other number of days.

It is contended that *Hansen v. Supreme Lodge Knights of Honor*, 140 Ill. 301, 29 N. E. 1121, lays down a different rule. We do not so understand that case. There the notice was dated January 26, 1886, and received by the member on the same day, and required payment "within thirty days from this date." It was not signed by anyone. In the decision of the case we said (page 304, 140 Ill., and page 1121, 29 N. E.): "It is not controverted that the notice was inclosed in an envelope directed to Gilbert ²³²³ Hansen at his residence, and received by him, but the notice was objected to on the trial because it [i. e., the printed notice] was not directed to Gilbert Hansen and was not signed by the reporter of Wicker Park Lodge." No other objection to the notice was made, considered or decided. It is further said in note 4, *supra* (Am. & Eng. Ency. of Law): "It may be said, generally, that the computation of time should be so made as to protect a right and prevent a forfeiture, if this can be done without violating a clear intention or positive provision"—citing authorities. And this is in conformity with the universal doctrine that forfeitures are never favored.

The plaintiff asked, but the court refused to give, instruction No. 5 as follows: "In this case, although you may find, from the evidence, that notice of assessment No. 17 was sent or handed to Philip P. H. Cronin, yet if you further find, from the evidence, that such notice did not bear the stamp of the collector or the seal of the council, then such notice was void and no forfeiture could be declared for failure to pay said assessment based upon such a notice."

Plaintiff also asked, and the court refused to give, instruction No. 6, as follows: "Although you may believe, from the evidence, that a notice of said assessment dated January 1, 1889, was mailed to the last known postoffice address or residence of Philip P. H. Cronin, yet unless you further find, from the evidence, that said notice was mailed so that it would in due course of mail reach the place to which it was addressed on the first day of January, 1889, such notice was invalid."

Several other instructions to the same effect as the sixth were asked and refused. From what we have said as to the law applicable to the giving of notice of assessments by beneficiary associations it is clear that the refusal of these instructions was error. The fifth, we think, stated a plain principle of law applicable to the facts of ²³²³ the case. The sixth was as favorable to the defendant as it had a right to ask. None of the instructions given construe the by-laws of the association.

The most that can be claimed is, that some of them inform the jury as to their language.

The appellate court, in affirming the judgment of the court below, did not hold the notice valid, but decided that under the evidence Philip P. H. Cronin had waived the defects herein pointed out. That conclusion is based upon the testimony of the collector of the defendant, Edmund G. Ingersoll. When called as a witness on its behalf he was asked by counsel for the plaintiff, "Are you still a member of the Royal League?" and answered, "Yes, sir." Plaintiff thereupon objected to his testifying to any conversation had with Dr. Cronin, on the ground that under the statute of the state no person directly interested is competent to testify in any civil action or suit where the other party sues or defends as administrator of any deceased person. The objection was overruled and an exception duly taken, and this ruling is also urged as reversible error.

The witness testified that on April 2, 1889, he had a conversation with Dr. Cronin in his office, on North Clark street, having called there for the purpose of collecting assessment No. 17; that he told Dr. Cronin that he owed that assessment, and asked him if he did not want to pay and continue his membership in the Royal League; that he replied that he did not intend to remain in the Royal League and did not expect to pay any more, and acknowledged having received a notice for assessment No. 17; that he could not tell what time of day he called on Dr. Cronin, but thinks it was between the hours of 10 and 3 o'clock; that he remembers a controversy that occurred in Columbia Council No. 7 early in 1889, in which he took one side and Dr. Cronin the other; that there was a great deal of ill-feeling displayed on both sides. The material part of this testimony, in the view ²³⁴ of the appellate court, is, that the member did not intend to pay the assessment and that he did not intend to remain in the Royal League. Conceding that this testimony tended to prove a waiver of material defects in the notice which he received if it had been given by a competent witness, the fact of waiver would be conclusively settled after the judgment of affirmance in the appellate court. But the question of the competency of the witness, Ingersoll, remains. If he was interested in the result of the suit it is clear that he was incompetent to testify against the plaintiff, suing as administratrix. The statute so expressly provides: Starr & Curtis' Annotated Statutes,

c. 51, sec. 2, p. 1824. We have held that stockholders in an ordinary corporation are incompetent, on the ground of interest, to testify in an action by or against the corporation: *Albers Commission Co. v. Sessel*, 193 Ill. 153, 61 N. E. 1075, and cases cited. On the same principle it would seem that a member of a benefit association like this is interested in the result of a suit against the society upon a benefit certificate. No effort whatever is made by counsel for defendant in error to answer the objection urged against the competency of the witness, nor was the question decided in the appellate court. We think the objection to the witness should have been sustained.

But even admitting that there was competent testimony tending to prove a waiver of notice of the assessment by the insured, the foregoing instructions asked by the plaintiff should have been given. The defendant did not place its defense, either by the pleas or its instructions, upon the ground of waiver. The evidence of waiver is not so clear and satisfactory as that we can say the verdict could not have been otherwise notwithstanding the refusal to give these instructions. They announced correct rules of law, and should have been given.

The judgment of the appellate court will be reversed and the cause remanded to the circuit court for another trial.

When a Mutual Benefit Society relies upon the failure of any member to pay his assessment as a forfeiture of his membership and benefits under its charter, it must show affirmatively that the assessment was made in the mode pointed out in the charter; otherwise the member cannot be said to be in default: *American Mut. Aid Soc. v. Helburn*, 85 Ky. 1, 7 Am. St. Rep. 571, 2 S. W. 495.

A Stockholder is not Competent to Testify in favor of the corporation: *Consolidated Ice-Machine Co. v. Keifer*, 124 Ill. 481, 23 Am. St. Rep. 688, 25 N. E. 799.

THOMPSON v. MALONEY.

[199 Ill. 276, 65 N. E. 236.]

STREETS—Statutory Dedication of.—A plat executed and acknowledged for the proprietor by his attorney in fact cannot constitute a statutory dedication of streets and alleys in the state of Illinois. (p. 135.)

STREETS—Title to When Property Owner Sells Lots by a Plat. If an owner of real property sells lots, describing them by reference to a plat, the title to the soil to the center of the street in front of the lots thus conveyed by operation of law attaches and passes with the lots so conveyed. (p. 136.)

IN THE CONSTRUCTION of Maps and Plats all doubts as to the intention of the proprietor of the plat should be resolved against him. (p. 138.)

STREETS—Dedication of Does not Require a Name on the Plat.—Where on a plat filed a strip of ground one-half of the width of the streets dedicated is designated adjacent to a block, but without naming it as a street, the presumption is that the strip so platted is one-half of the street, the other half of which the proprietor intends to be furnished out of adjacent premises when they should be platted. (pp. 138, 141, 142.)

STREETS—Dedication of—Adoption of Plat Made by Owner. Although when a plat was filed, he who filed it did not have title to the lands purported to be subdivided, yet if the owner subsequently makes conveyances referring to the plat and designating the property by it, he thereby adopts it and the subdivisions thereof as his own. (p. 139.)

STREETS—Dedication of—Attachment, When Subject to Plat on File.—If a plat of property is filed on which it is subdivided into lots, blocks, and streets, which plat the owner of the property thereafter adopts by making conveyances of lots by reference to it, any attachment afterward levied, though it purports to be of the whole tract, without reference to any plat, is necessarily subject thereto, and one acquiring title under the attachment takes it subject to the same defects and obligations to which the owner was subject when the writ was levied. (p. 140.)

STREETS—Plats Dedicating, Notice of.—If the owner of real property conveys lots describing them according to a plat on file, a subsequent purchaser from him of other lots designated on the same plat acquires title with notice of the former conveyances and of the plat, and obtains no title or right in the premises which the grantor did not have or was not entitled to enforce. (p. 140.)

STREETS—Withdrawal of Plat.—If the owner of property has filed or adopted a plat, and conveyances have been made by him in accordance therewith, one who subsequently acquires title cannot withdraw a street or public way from such platting and replat it into lots and hold them as individual property. (p. 142.)

RES JUDICATA—Burnt Records Act.—A proceeding under the burnt records act against the city of Chicago and others resulting in favor of the petitioner cannot conclude persons not parties thereto from claiming that a strip of land is in fact a public street. (pp. 143, 144.)

PUBLIC STREETS.—Injunction is a Proper Remedy to prevent the placing of obstructions in a street or other public way. (p. 143.)

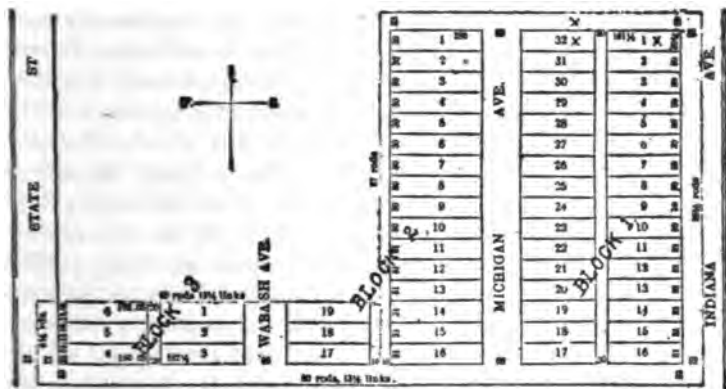
Stephen G. Swisher, for the plaintiffs in error.

Frank, H. Graham and Joseph A. O'Donnell, for the defendants in error.

²⁸⁰ **BOGGS, J.** John H. Thompson, of Cook county, Illinois, died May 16, 1891, leaving as his only heirs at law Payson Thompson and Victoria C. Thompson, the plaintiffs in error, and the defendant in error, Watts C. Thompson (an insane person), and Benjamin F. C. Thompson, now deceased. This is a bill in chancery filed during the lifetime of said Benjamin F. C. Thompson by himself and the other heirs of the said John H. Thompson, deceased (except said Watts C. Thompson, who, being insane, was made defendant), against the defendant in error Patrick J. Maloney. The bill alleged that said John H. Thompson died seised of the title to lot No. 32 in block 1, in Blair's subdivision of part of the southwest quarter of section 10, town 38 north, range 14 east of the third principal meridian, in Cook county, and also of an easement in that certain strip, piece or parcel of ground thirty-three feet in width adjoining said lot 32 on the north, and running westward from Indiana avenue to the alley west of Michigan avenue (describing the same by metes and bounds), for the purpose of a private street or alleyway and of furnishing light, air and access to the said lot; that the title to the said lot and to the easement aforesaid descended to the persons hereinbefore named as the heirs of said deceased. The bill further alleged that the defendant in error Maloney had built, or partially built, a fence, and also a cement sidewalk, across the east end of said thirty-three foot strip, and threatens to build said fence completely around said strip and entirely inclose the same, and prayed for a decree enjoining and restraining the said Maloney from in any way interfering with ²⁸¹ the free and uninterrupted use and enjoyment of the said easement by said heirs of the said John H. Thompson, deceased. The defendant in error, Mary D. Abel, by leave of the court, filed an answer to the bill and also filed a cross-bill. The cross-bill and answer alleged, in substance, that said Mrs. Abel was the owner of lot No. 1 in block 1, in said Blair's subdivision, and also of a like interest in the said easement in said thirty-three foot strip, and asked the same relief prayed in the

original bill. The defendant in error, Maloney, answered the bill and the cross-bill, and replication was filed thereto. The cause was heard in open court, submitted to the chancellor, and a decree was entered dismissing the bill and cross-bill for want of equity, and dissolving the temporary injunction and awarding the defendant in error Maloney a decree for damages in the sum of three hundred dollars. This is a writ of error sued out to reverse the decree.

On October 14, 1859, a map or plat entitled "Blair's subdivision of a part of the west half of the southwest quarter of section 10, township 38 north, range 14 east," was recorded in the office of the recorder of deeds of Cook county, on page 60 of book 160 of maps. The plat is as follows:



The lots belonging to plaintiffs in error and to Mrs. Abel, and the strip or street here involved, are marked with an X.

²³² The plat was executed by Johnson M. Welch, as attorney in fact for the said James G. Blair. The power of attorney so authorizing said Welch to sign, certify, execute and cause to be recorded said plat was proven to have been executed by the said Blair on the tenth day of October, 1859, and to have been recorded in the office of the recorder of Cook county on the fourteenth day of October, 1859, being the same day that the plat was filed for record. The plat not having been executed and acknowledged by Blair, but by Welch, as attorney in fact, did not constitute a statutory dedication of the streets and alleys to the city of Chicago: *Gosselin v. City of Chicago*, 103 Ill. 623. In such cases the title to the streets, alleys, etc., is in the owner of the tract platted, and there remains so long

as he retains the ownership of all the lots shown on the plat. If, however, he sells a lot, describing it in the deed by reference to the plat, the title to the soil of the street in front of the lot, to the center of the street, by operation of law attaches to the fee of the lot, and the proprietor of the plat ceases to be the owner in fee of such portion of the street.

In *Clark v. McCormick*, 174 Ill. 164, 51 N. E. 215, speaking of a plat which failed to accomplish a statutory dedication of the streets and alleys, we said (page 174, 174 Ill., page 219, 51 N. E.): "Each purchaser of a block in the subdivision is presumed to have bought in view of the system of streets and ways designed by the proprietor of the plat to provide means of ingress and egress to and from all parts of the platted ground, not only for the use of the owners and occupants of the lots or blocks, but all who might desire to pass along such streets and ways. The arrangement of streets and ways formed a part of the consideration of the purchase of each block or part thereof, not only as between the original proprietor of the plat and those who purchase from him, but also as between all subsequent vendors and vendees. The original proprietor sold to his vendee the rights and privileges of the streets, and each subsequent ²⁸³³ vendor passed such rights to his vendee. The law implies mutual agreements between all such parties that the streets shall always remain open for use as platted. . . . The fee to the strips in question is attached to the fee in the blocks upon which the streets abut, and rests in the owners of such blocks. It is not a title vesting in the owners of the blocks the ownership of the strips as separate, independent property, which may be detached from and sold distinct from the blocks, but it passes to any subsequent holder of the blocks."

In *Hamilton v. Chicago etc. R. R. Co.*, 124 Ill. 235, 15 N. E. 854, we said (page 248, 124 Ill., page 859, 15 N. E.): "The doctrine is, that a conveyance of a lot abutting on a highway or street, where there has been no statutory dedication, conveys the grantor's interest in the street to the center. . . . We hold, in accordance with the doctrine of the *Littler Case*, 106 Ill. 353, that an acceptance is necessary to make a complete dedication under the statute; that until acceptance the fee does not vest in the municipality, but remains in the original proprietor. Hence a conveyance of the lots before acceptance carries the title to the center of the street."

In *Davenport Bridge Co. v. Johnson*, 188 Ill. 472, 59 N. E. 497, the plat of the town of Stephenson was not authenticated as required by law, and we held the fee to the streets did not pass to the municipality, but that the execution and recording of the plat operated as a conveyance to the abutting lot owners of the fee of the streets to the center thereof. This fee attaches to the ownership of lots and passes with each conveyance of the lots, and is burdened with the easement of use in the public; *Thomsen v. McCormick*, 136 Ill. 135, 26 N. E. 373, and *Henderson v. Hatterman*, 146 Ill. 555, 34 N. E. 1041, affirm the doctrine that the grantees in the deeds for lots in a plat that does not fulfill statutory requirements take title to the center of the street on which such lots abut.

It will be observed the strip of ground in controversy is not given the name of a street on the plat. The plat ²⁰⁰⁴ shows a space north of and adjoining lots Nos. 32 and 1 in block 1, and lot 1 in block 2, in which are found the figures "33" at the easterly and westerly ends thereof. It is urged there is nothing upon the plat to indicate that it was the intention of the proprietor of the plat to dedicate this strip to use as a street or public way, and it is also urged that the failure to name the space upon the plat as a street is fatal to the plat as a dedication of such space for such uses. In *Clark v. McCormick*, 174 Ill. 170, 51 N. E. 218, we said: "It was not necessary that a declaration, either oral or written, should be established in order to show it was the intention of the proprietor to dedicate the strips to such uses. Such intention may be established in any conceivable way by which it may be made manifest: A survey and plat alone are sufficient to establish a dedication, if it is evident from the face of the plat it was the intention of the proprietor to set apart certain grounds for public use: *Smith v. Town of Flora*, 64 Ill. 93; *Godfrey v. City of Alton*, 12 Ill. 29, 52 Am. Dec. 476; *Maywood Co. v. Village of Maywood*, 118 Ill. 61, 6 N. E. 866." In *Elliott on Roads and Streets*, second edition, section 18, it is said: "Where a plat of a town or city is made and recorded, and lots are designated thereon, with spaces left which fairly indicate that they are set apart to the public, the spaces thus indicated are presumptively streets."

It will be observed by reference to the plat that this strip extends also along the east side of the subdivision and there constitutes one-half of Indiana avenue, and along the south side of the subdivision, and also on the west side of the subdivision

as far as the subdivision extends northward, at its westerly end, and that said strip there constitutes one-half of State street. The strip is one-half the width of each of the streets shown upon the plat, and we think that upon the face of the plat alone an intention should be declared to dedicate the strip in question to the use of a street or public way. In the construction of all maps and plats all doubts as to the ²⁸⁶ intention of the proprietor of the plat should be resolved against the proprietor: Elliott on Roads and Streets, 2d ed., sec. 119. The natural presumption arising from the face of the plat is, that the strip in question, being a part of the subdivision as platted and yet not being a part of any platted lot, and extending, as it does, on all sides of the platted lots and comprising one-half of the streets and avenues on other sides of the plat, was platted as one-half of a street, the other half whereof it is clear the proprietor of the plat expected and intended should be furnished out of adjoining premises when platted. There is nothing otherwise on the plat to overcome the presumption. That the presumption arises from the face of the plat that the strip in question was intended to be dedicated to the public use, is supported by the text of section 119 of Elliott on Roads and Streets, second edition, to which is subjoined, in a note, a collection of adjudicated cases upon the subject.

Nothing that was said in *Village of Winnetka v. Prouty*, 107 Ill. 218, militates against the view here taken. In that case, in the spaces on the plat between the blocks which it was sought to contend should be regarded as representing streets, appeared three lines, two in black ink and one in red, the red line being in the center. The quantity in acres of each block appeared in figures on the plat, written in red ink, and our conclusion was that the quantities in each block included all within the red lines drawn in the center of the streets, thus leaving no intervening space on the plat for streets.

It is, however, contended by the defendant in error Maloney, that at the time of the making and recording of the plat the title to the land so purported to be subdivided was not in said James G. Blair, who made the plat, but that one John D. M. Carr, now deceased, was the owner thereof. This contention is correct. On October 31, 1859, being about two weeks after the recording of the plat, the said John D. M. Carr, conveyed lots Nos. 4 ²⁸⁶ to 32, inclusive, as shown on the plat, to James G. Blair, the maker of the plat, describing the lots according to

the description thereof on the plat. The said Carr conveyed to other parties other of the lots in the subdivision, describing them in accordance with the plat. These conveyances, however, did not include all of the lots in Blair's subdivision, nor did any of them expressly mention any of the streets or alleys shown upon the plat. Lot No. 1 of block 1, in Blair's subdivision (the lot now owned by Mrs. Abel), was not among those conveyed by said Carr up to the seventeenth day of September, 1862. On the date last mentioned one George L. Kedzie sued out an attachment writ against the property of said Carr, and caused the same to be levied upon the entire ten acre tract of land covered by the subdivision made by Blair. The levy was upon the lands as a tract, the platting thereof being ignored, and the tract so levied upon was sold, subsequently, to said Kedzie by virtue of a judgment entered in the said attachment proceeding, and in default of redemption a deed therefor was executed and delivered to said Kedzie by the sheriff on the twenty-ninth day of June, 1864. On January 16, 1865, said George L. Kedzie conveyed by quitclaim deed all interest in the entire ten acre tract to John H. Kedzie. In 1890 said John H. Kedzie conveyed to Thomas O. Osborn two lots in Blair's subdivision, describing the same according to the plat. One of these lots was lot 1 in block 1 in said subdivision, and that lot the said Osborn, in 1891, conveyed to Margaret Abel, the mother of the defendant in error Mary D. Abel. Upon the death of her mother, said Mary D. Abel, by inheritance and by quitclaims from the other heirs, obtained title to the said lot 1 in block 1.

It is thus seen that both Carr and Kedzie recognized the plat made by Blair and adopted the same as a plat and subdivision of the land. They each sold and conveyed lots as the same were platted in the subdivision made by Blair. When deeds convey lots according to ²⁰⁷ their description upon a plat, the plat and all the particulars thereon shown are to be regarded as composing a part of the deed as though fully recited and set forth therein: *Henderson v. Hatterman*, 146 Ill. 555, 34 N. E. 1041; *Louisville etc. R. R. Co. v. Koelle*, 104 Ill. 455. Though Blair did not own the land when the plat was made and filed for record, Carr, who was the owner, by conveying lots in the land as subdivided and platted by Blair, adopted and recognized the plat made by Blair, and must be held to have adopted the plat and subdivision made by Blair as his own plat, and he thereby became bound by all the dedications and reservations

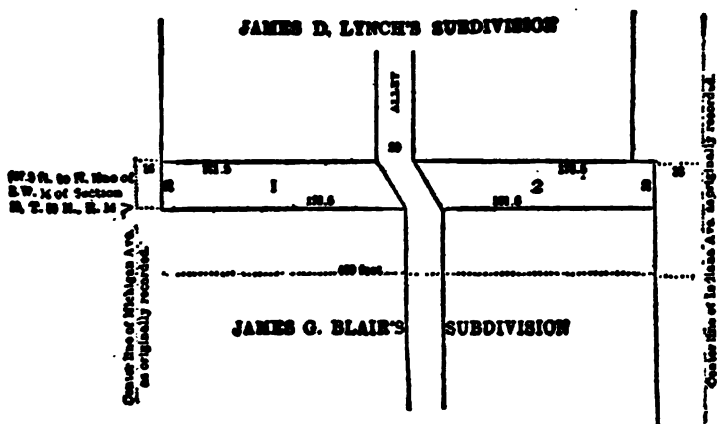
made by Blair in subdividing the land: *Gridley v. Hopkins*, 84 Ill. 528; *Smith v. Young*, 160 Ill. 163, 43 N. E. 486.

Such was the status of Carr's rights and interests in the lots when the writ of attachment against him in favor of George L. Kedzie was levied upon the tract of land which was covered by Blair's subdivision. The deeds made by Carr, which operated as a recognition by him of the subdivision of the land according to the plat made by Blair, were executed and recorded, and appeared of record on the public records of the county before the said attachment writ was issued. The plaintiff in attachment and the purchaser at the sale were therefore charged with notice of the execution of the plat by Blair and its adoption by Carr, the owner of the land and the defendant in the attachment suit, and therefore the sale under the judgment in attachment and the deed made by virtue thereof, though the levy and the deed described the entire tract of ground covered by Blair's subdivision, operated to convey only such interest and title in the ground, as subdivided, as remained in Carr when the levy was made. Carr had conveyed a number of lots, describing them as lots in Blair's subdivision, and such conveyances invested the grantees with the title held by Carr in the lots so conveyed, and also in all parts of the land shown by the plat to have been dedicated to ^{the} the public or for the use of the public, hence the levy of the attachment writ operated only on such of the lots in Blair's subdivision of which Carr had made no conveyance. George L. Kedzie, the purchaser at the sheriff's sale, therefore received no title to or interest in any of the streets, alleys or ways created by the plat made by Blair, inconsistent with the rights and interests of the owners of lots in said plat or subdivision. George L. Kedzie executed a quitclaim deed purporting to convey to John H. Kedzie the ten acre tract of land by the same description as was contained in the deed made by the sheriff to him. This was in 1865. In 1890 said John H. Kedzie executed a deed conveying to said Osborn "lot 1 in block 1, and lot 9 in block 2, in Blair's subdivision," etc. The first described of these lots is the property now owned by the defendant in error, Mary D. Abel. This deed was a personal recognition and adoption by John H. Kedzie of the subdivision made by Blair, and subsequently adopted by Carr to the same extent, as we have before said, as if the plat made by Blair had been inserted at large in the deed.

On December 15, 1892, said John H. Kedzie executed a quitclaim deed purporting to convey to one Henry V. Pierpont

all the right, title and interest of the grantor in and to the ten acre tract of land, describing the same by metes and bounds. This deed had no efficacy to defeat the conveyance which the grantor had previously made of the two lots to Osborn, nor to invest the grantee, Pierpont, with any greater interest, at most, than it would appear from the records of the county affecting the titles of lands therein, that the grantor had. As we have seen before, these records disclosed the grantor had no interest in the said ten acre tract of land purported to be conveyed by the deed as an unplatted tract of land, but that his right, interest or title therein was of the lots or blocks as platted in the subdivision made by Blair. Kedzie the grantor, by the deed to Osborn, which was ²²³⁰ placed upon the deed records of the county nearly three years before Pierpont received his deed, conveyed lots in the subdivision as platted by Blair, and thereby adopted said plat and all the dedications thereof. Pierpont was charged with notice of this deed and with notice of the other deeds in the same line of title. Pierpont therefore obtained no rights or interests in any part of the said ten acres which had been dedicated to the public use as a way or street by the plat made by Blair.

On the fifth day of April, 1894, the said Pierpont filed a plat purporting to subdivide the thirty-three foot strip here involved. The plat was as follows:



The lots marked 1 and 2 on the plat, and the space between them, include this thirty-three foot strip, which, as we have seen, was dedicated through the medium of the plat made by

Blair and adopted by Carr, and also by the grantors of said Pierpont, to the public for use as a street, and the title to which, as we have also seen, passed from said Carr, by his adoption of the plat made by Blair, to the owners of the lots abutting thereon.

It being clear from the face of the plat that the strip in question so designated on the plat on all other sides of the platted lots was intended to and does constitute ²⁸⁹⁰ one-half of the streets on the west, south and east sides of the plat, this strip must also be regarded as intended to constitute one-half of a street on the north side of the plat, the other half whereof it was presumed by the proprietor of the plat would be furnished from the adjoining property when subsequently platted. The title of the owners of lots abutting on this strip therefore extends to the entire width of the strip or street. It will be observed, also, that said Pierpont in his plat recognized the Blair subdivision, and marked its location and north boundary line as being the south line of the strip, thus entirely excluding the strip from the Blair plat. He was bound, however, as we have seen, by the Blair subdivision, and could claim no rights or interests in any part of the ten acre tract which constituted a street, alley or public way under the Blair subdivision. It was not within his power to withdraw a street or public way from the plat made by Blair and replat the same into lots, and claim the lots to be his individual property. We find nothing in this record to authorize Pierpont to claim any right or interest in said thirty-three foot strip to which said Carr could not have successfully laid claim. Carr adopted and recognized the subdivision made by Blair, and it became and was valid, effectual and binding on him before the levy was made under the attachment writ, and the plat, together with the street and ways thereon shown, was therefore a valid and effective dedication as against the plaintiff in attachment, the purchaser at the sale and all persons holding under such purchaser.

It is contended that the title of Pierpont to this strip was involved and decided to be full and complete in him in a proceeding under the burnt records act instituted by Minnie E. Carr, the only heir at law of the said John D. M. Carr, deceased, against the heirs at law of the said John G. Blair, deceased. The petition of the said Minnie E. Carr in that proceeding asserted title in herself as the only heir at law of said John D. M. Carr, deceased, to the ²⁸⁹¹ said thirty-three foot strip. Pierpont, the heirs of said Blair and the city of Chicago

were made parties defendant, and upon a hearing a decree was entered declaring Pierpont to be the owner in fee of the strip. Neither of the plaintiffs in error herein, the said Mary D. Abel or anyone having an interest as the owner of a lot in Blair's subdivision, was made a party to the proceeding. The only parties to the proceeding were those whose interest it was to claim that the strip was an unplatted part of the ten acre tract, except the city of Chicago. The city claimed title to the strip by virtue of the plat made by Blair; but this claim of title was defeated, for the reason that the plat made by Blair did not conform to the requirements of the statute, and therefore was not effectual to vest title to the streets shown upon the plat in the city of Chicago. The record in that case was brought to this court on appeal, and the decree was affirmed: *Blair v. Carr*, 162 Ill. 362, 44 N. E. 720. All that was decided in that case was, that as between Blair and Carr the title was in Carr, and that as between Carr's heirs and Pierpont the title was in Pierpont, and that Carr's conveyance of the lots in the plat according to the plat as made by Blair had no effect to invest Blair with any interest in the ten acres other than such as passed by the deed to the lots. We there said (page 367, 162 Ill., page 721, 44 N. E.): "By making such conveyances Carr recognized the plat, and he and his heirs would be estopped, as against lot owners, to dispute the plat: *Gridley v. Hopkins*, 84 Ill. 528. But by making such conveyances he did not admit title to the land in Blair. They were inconsistent with any such admission. He was claiming title in himself and conveying to Blair."

The defendant in error Maloney insists that the persons to be made parties to establish title in a proceeding under the burnt records act are such, only, as claim an estate in fee in the property involved in the proceeding, or such other persons as are grantees in a deed or deeds of conveyance for such property whose deeds have been ²⁸⁹² recorded since the destruction of the records of Cook county by fire in 1871. Section 11 of the burnt records act (*Hurd's Stat.* 1899, p. 1372) is referred to as supporting this contention. Without being understood to concede the correctness of the insistence, we may dispose of it, for all the purposes of this case, by saying the plaintiffs in error and Mary D. Abel, the owners, respectively, of lots 1 and 32, in block 1, in Blair's subdivision, etc., which lots abut upon the strip or street involved in the proceeding under the burnt records act, were, within the meaning of said section 11 of the

burnt records act, to be regarded as owning an interest in fee in the strip which was the subject matter of the proceeding in question. The city of Chicago was made a party to the proceeding, and properly so, for the reason that upon the plat made by Blair the strip in question appeared to constitute a portion of a street of the city, the title to which passed by the plat to the city unless some defect in the execution of the plat should be found which would defeat the title of the city. The same plat, together with the deed records of the county, disclosed that the owners of lots in Blair's subdivision had legal rights and interests in fee in the strip in the event it was found the plat failed to confer title in fee to the city. The petition proceeded upon the theory the plat was insufficient to vest the fee to the strip in the city as a street, and that being true, the petitioner stood charged with notice and knowledge of the legal rule that if the plat should, because of some nonobservance of statutory requirements, be insufficient to vest title in this strip, as a street, in the city, it had legal operation to attach the fee title to the strip to the title to the lots abutting thereon. If the plat was sufficient to call the attention of the parties to the fact that the city of Chicago was the owner in fee of the strip if all statutory requirements had been observed in making the plat, it was sufficient to call their attention to the fact that the owners of lots abutting on the ²⁹³ strip were interested in the fee of the strip in the event the city of Chicago, by reason of some defect in the plat, did not acquire the fee in the strip. As the petition averred the city of Chicago had no title to the strip as a street, it followed that the owners of the lots abutting on the strip were necessary parties to a proceeding which was designed to have the street declared to be the property of the petitioner as an individual.

The complainants in the original bill in this cause and the complainant in the cross-bill herein were not parties to the proceeding under the burnt records act, had no opportunity to defend or enforce their rights in the proceeding, and are not concluded by any finding or decree rendered therein.

The subdivision of the strip into lots by Pierpont had no effect to deprive the owners of the lots abutting thereon of any rights or interests they possessed in the strip as such abutting owners. Pierpont, after making the subdivision of the strip into two lots, conveyed the lots to the defendant in error, Maloney, by a quitclaim deed. The defects in Pierpont's claim of title were such as grew out of and were disclosed by the pub-

lic records of the county. Notice of them was chargeable to Maloney, and he received no better title than that held by Pierpont, his grantor.

The strip in question constitutes a public way or street, or part of a street, which the complainants in the original bill, as owners of the lot abutting on said street or way, had the right to insist should be kept open and unobstructed, and the chancellor erred in holding to the contrary. The writ of injunction afforded an appropriate remedy to prevent the placing of obstructions in the street or way: *Smith v. Young*, 160 Ill. 163, 43 N. E. 486.

The decree will be reversed and the cause will be remanded, with directions to enter a decree granting the relief prayed in the bill.

One of the Doctrines of the principal case was referred to and applied in *Brewster v. Cahill*, 199 Ill. 309, 65 N. E. 233, where it was held that a conveyance of property abutting upon a street shown upon a plat, not sufficient to constitute a statutory dedication, carries the fee of the soil to the center of the street, although the property was conveyed by lot or block number only, unless the title to the fee was expressly reserved, and hence that the grantor or his successors in interest could not enjoin mining for coal beneath such soil.

Several questions similar to those determined in the principal case were presented to the same court and decided in the same manner in *Russell v. City of Lincoln*, 200 Ill. 511, 65 N. E. 1088, viz., that the signing and acknowledging of a plat by an agent, instead of by the owner personally, is not a good statutory dedication, but is good at the common law, where the owner subsequently sells lots according to the plat and delivers possession; that a common-law dedication cannot be withdrawn after the owner has sold lots and blocks by the description contained in the plat, and the municipal authorities may open the streets at such time as in their judgment public interest may require. In this case it was further held that the difference between a statutory and a common-law dedication is that the former vests title for public purposes in the municipality, while the latter leaves the legal title in the original owner, charged with the same rights and interests in the public that it would be charged with if the fee had been vested in the municipality, and the statute of limitations does not bar the right of the public in the streets, and that the municipal corporation is not estopped from opening a street by the fact that a purchaser of two blocks put a fence around the entire tract, inclosing the street which had been subject to a common-law dedication, and held possession of it for

thirty years, where he had not been misled respecting the existence of the street and had not erected improvements other than such fence.

A Deed of a City Lot, bounded on one side by a street, carries to the center of the street, in the absence of any language showing an intention to exclude the street: *Kneeland v. Van Valkenburgh*, 46 Wis. 484, 32 Am. Rep. 719, 1 N. W. 63; *Salter v. Jonas*, 39 N. J. L. 469, 23 Am. Rep. 229; *Firmstone v. Spaeter*, 150 Pa. St. 616, 30 Am. St. Rep. 851, 25 Atl. 41. But see *Graham v. Stern*, 168 N. Y. 517, 85 Am. St. Rep. 694, 61 N. E. 891.

Dedication of Property to a public use is considered in the monographic note to *State v. Trask*, 27 Am. Dec. 559-570. It is held that a dedication is not good without a definite description of the property: *Carlville v. Castle*, 177 Ill. 105, 69 Am. St. Rep. 212, 52 N. E. 383. Privies in estate are bound to the same extent as the grantor: *Warren v. Jacksonville*, 15 Ill. 236, 58 Am. Dec. 610. And a person not the original owner of land, but claiming under a plat and deed by which a street has been dedicated to the public, is estopped to deny the dedication: *Balston v. Weston*, 46 W. Va. 544, 6 Am. St. Rep. 834, 23 S. E. 326.

CLAY v. HAMMOND.

[199 Ill. 370, 65 N. E. 352]

A BILL to Quiet or Remove a Cloud from the Title to Real Property can be maintained only when the complainant is in possession, or the lands are unimproved and unoccupied. (p. 147.)

IN A SUIT to Set Aside a Deed as a Cloud Upon Complainant's Title, he need not be in possession of the premises if his cause for relief is founded upon fraud. (pp. 147, 148.)

EQUITY JURISDICTION in Case of Fraud.—Although There is a Remedy at Law where a conveyance has been obtained by fraud, equity will take jurisdiction to set it aside or to remove it as a cloud upon complainant's title, whether he is in possession of the premises or not. (pp. 148, 149.)

INSANE PERSONS—Vacating Deeds of.—Whether a deed executed by an insane person is void or voidable, it may be set aside by him after his restoration to sanity, or by his vendee to whom he has conveyed after such restoration. (p. 149.)

INSANE PERSONS—Rights of Successors in Interest of.—A grantee or other successor in interest of a person who has conveyed property while insane has the same right as his grantor would have if he retained title to sue to set aside the deed, because made during the continuance of the insanity. (p. 149.)

INSANE PERSONS.—Every Person Dealing with an Insane Person, with Knowledge of the Insanity, is deemed guilty of meditated fraud. (p. 150.)

INSANE PERSONS—Evidence of Restoration to Sanity.—A discharge of a patient from a lunatic asylum is evidence of his recovery. (p. 150.)

INSANE PERSONS—Restoration to Sanity—When Conceded.—One who commences a suit against a person who has been insane, treating him during such suit as if in the possession of his reasoning faculties, concedes his restoration to sanity. (p. 151.)

EQUITY—When Cannot Put a Party in Possession or Issue a Writ of Assistance.—One claiming to have title to real property, and suing to set aside a conveyance thereof as fraudulent, will not, although the decree is in his favor, be put in possession by the court, but, as to possession, will be left to his remedy at law. (p. 153.)

Bill by Hammond against Clay and others to set aside a conveyance alleged to have been made in the name of the complainant's grantor under a power of attorney executed by him while insane. The answer denied the insanity of the complainant's grantor at the date of the execution of the power of attorney or of the conveyance, and alleged that the premises were held as security for moneys due. Decree in favor of the complainant, and also if possession should be refused, that a writ of assistance issue in his favor.

Swift, Campbell & Jones, for the appellants.

Hiram T. Gilbert, for the appellee.

373 **MAGRUDER, C. J.** 1. It is claimed, on the part of the appellants, that the bill filed in this case is a bill to remove a cloud upon title, and that, inasmuch as appellee, the complainant **-374** below, was not in possession of the premises when the bill was filed, and the same were not vacant or unoccupied at that time, a court of chancery had no jurisdiction to entertain the bill, and grant relief in accordance with the prayer of the same.

The facts show that the appellant, Clay, and his tenants, were in possession of the premises when the bill was filed. This court has held in many cases that a party can only file a bill to quiet title, or remove a cloud from the title to real property, where he is in possession of the land, or where he claims to be the owner and the lands in controversy are unimproved and unoccupied: *Gage v. Abbott*, 99 Ill. 366; *Johnson v. Huling*, 127 Ill. 14, 18 N. E. 786; *Glos v. Randolph*, 133 Ill. 197, 24 N. E. 426; *Glos v. O'Toole*, 173 Ill. 366, 50 N. E. 1063; *Glos v. Goodrich*, 175 Ill. 20, 51 N. E. 643; *Glos v. Kemp*, 192 Ill. 72, 61 N. E. 473; *Glos v. Beckman*, 183 Ill. 158, 55 N. E. 636.

The rule, however, that, in such case, the complainant must be in possession of the premises, or the premises must be vacant or unoccupied, has no application where the deed, or other in-

strument, alleged to be a cloud upon the title, is sought to be set aside upon the ground of fraud. Courts of law and courts of equity have concurrent jurisdiction in cases of fraud. In *Kennedy v. Northrup*, 15 Ill. 148, where the bill was filed for the purpose of setting aside certain deeds held by the defendants, which, as it was alleged, were fraudulently obtained, and which remained as a cloud upon the title of the complainant, the objection was made that the defendants were in possession, and that thereby the plaintiffs were enabled to bring ejectment, and thus contest the fraudulent deeds in a court of law, and that for that reason a court of equity would not assume jurisdiction to try the validity of those deeds and set them aside; but it was there held that, where the complaint is that the title, under which the defendants claim, was obtained by fraud, a court of equity will take jurisdiction. Where the question is simply as to which of the two titles is the better legal title, the ³⁷⁵ party should bring his action in a court of law, but courts of equity will assume jurisdiction to set aside conveyances fraudulently obtained. In the case of *Kennedy v. Northrup*, 15 Ill. 153, it was said: "While a court of equity will not take jurisdiction of every case of fraud which may be presented, yet there are few questions over which its jurisdiction is more universal, and especially so when it relates to the transfer of real estate. . . . Although it may be true that the fraud, if proved, might defeat that title in a court of law, yet the courts of equity have ever claimed to possess superior facilities for investigating such questions, to the courts of law, and certainly the relief which they can give is, in many cases, more satisfactory. When the fraud is once established, they can cut up the fraudulent conveyance or contract by the very roots, and leave the party in as secure a position as if it had never existed."

In *Booth v. Wiley*, 102 Ill. 84, the same objection was made as is here insisted upon, and the case of *Kennedy v. Northrup*, 15 Ill. 148, was approved and quoted from; and, in reference to the contention that there are only two cases under our law, in which a party may file a bill to quiet title, or to remove a cloud from the title to real property: 1. Where he is in possession of the lands; and 2. Where he claims to be the owner and the lands in controversy are unimproved and unoccupied, it was said (page 114, 102 Ill.): "But this is the law where the object is purely to remove a cloud from a title, and does not affect cases where the primary relief is sought upon other and well-established equitable grounds, and the removal of the cloud

is prayed only as an incident to that relief." It was there held that the rule in question has no application, where a deed is sought to be set aside upon the ground of fraud.

In the case at bar, the proof is clear, and uncontradicted by the appellants, that William H. Forrest was insane from August, 1897, to the summer of 1898. A physician, ³⁷⁶ who attended him, testifies to his insanity during the period in question. The appellant, John Clay, Jr., was the brother in law of William H. Forrest, and the physician testifies that he consulted with the appellant, Clay, in reference to Forrest's insanity, and that appellant concurred with him that Forrest was insane. The physician, thus testifying, took Forrest to Boston in the summer of 1897, and left him in an asylum or hospital for the insane in Massachusetts. Subsequently to his being taken there, a trial was had finding him to be insane. The physician, so testifying, and the appellant, Clay, visited him in Massachusetts at this hospital in March, 1898. He testifies also that, just before starting to Massachusetts with Forrest, Forrest signed a paper in his presence at the request of Mr. Clay, which paper was stated by Clay to be a power of attorney. This evidence in regard to the insanity of Forrest, when he executed the power of attorney, stands uncontradicted by any testimony whatever in the record.

Whether a deed thus executed by an insane person is void, or voidable only, it may be set aside by the insane person after his restoration to sanity, or it may be set aside by a vendee, to whom such insane person conveys the premises, after his restoration to sanity: *Hanna v. Read*, 103 Ill. 596, 40 Am. Rep. 608; *Breckenridge v. Ormsby*, 1 J. J. Marsh. 236, 19 Am. Dec. 71.

In *Breckenridge v. Ormsby*, 1 J. J. Marsh. 236, 19 Am. Dec. 71, the authorities upon this subject were reviewed, and, after such review, the court there say: "And these authorities also show that a purchaser or devisee, holding his right from the infant or non compos, derived after the attainment of legal discretion, or restoration to sanity, may avoid a deed made for the same estate during disability." In the latter case, it was said that the deed, so made by an insane person after his restoration to sanity, conveys to the grantee all the right which the vendor has, and, as the vendor had the right to avoid the deed made during his ³⁷⁷ insanity, the vendee, by virtue of the deed to him, acquires the same right.

Every person is deemed guilty of meditated fraud when he deals with an insane person with knowledge of such insanity: *Kilbee v. Myrick*, 12 Fla. 431. In the case at bar, the appellant, Clay, being the brother in law of Forrest, induced him to execute a power of attorney, knowing at the time that Forrest was insane. Under the power of attorney thus obtained, and while Forrest was in an insane asylum in Massachusetts, Clay, in the name of Forrest, executed a deed of the premises in question to Connor, a clerk in his employ, and then, a few days after, Connor and his wife reconveyed the premises to Clay. No evidence is produced by the appellant to contradict any of the facts thus established, and they constitute such fraud as, in our opinion, justifies a court of equity to take jurisdiction for the purpose of setting aside the instruments thus obtained.

2. It is contended, however, on the part of the appellants that, while the proof may show that Forrest was insane when he executed the power of attorney in question, his insanity will be presumed to have continued until his restoration is established by proof. The point, made by appellants, is that the court below did not find that Forrest was restored to sanity when he executed the deed to appellee on June 18, 1901, and, therefore, the presumption is that his insanity continued up to that time, and so it is insisted by the appellants that, if the deed to the appellant, Clay, was invalid by reason of the insanity of Forrest, the deed to the appellee was invalid for the same reason.

The answer to this contention on the part of the appellants is, that the proof does show a restoration of Forrest to sanity when he executed the deed to appellee. Forrest was discharged from the institution, to which he was committed in Massachusetts, in the summer of 1898. In *Langdon v. People*, 133 Ill. 382, 24 N. E. 874, we said: "The discharge ³⁷⁵ of a patient from a lunatic asylum may be regarded as evidence of his recovery": See, also, *State v. Davis*, 27 S. C. 609, 4 S. E. 567. In addition to the fact of the discharge, the proof shows that, after Forrest returned from Massachusetts to Chicago in the summer of 1898, he went to Iowa to the home of his parents, where he remained until some time in the summer of 1899, when he removed to Dixon, Illinois, and then returned to Chicago in March, 1901; that, at the latter date, the appellant, Clay, commenced a suit against him for an accounting and settlement of the partnership affairs of Clay and Forrest, who had theretofore been partners. In this suit, he was served with

summons issued by the appellant, Clay, employed a lawyer, and attended the hearings before the master. By commencing this suit, appellant, Clay, concedes the restoration of Forrest to sanity. It is not shown that any conservator was appointed for Forrest in the suit, but he was treated therein as a person fully possessed of his reasoning faculties. Moreover, in his answer in the present case, the appellant, Clay, insists that, after Forrest returned from Massachusetts, he affirmed or ratified the power of attorney which he executed during his insanity. No proof was introduced to establish any such ratification, but the fact that it was set up in the answer is a concession on the part of the appellant, Clay, that Forrest was restored to sanity. Otherwise, he was unable to ratify an act done during his insanity. Sufficient evidence was introduced by the appellee to establish the restoration of Forrest to sanity, so long as such evidence remained uncontradicted, and the defendants below introduced no evidence whatever to overcome or rebut the prima facie case made by the appellee as to Forrest's restoration to sanity.

3. It is furthermore contended by the appellants that Clay claimed to hold the title under the deed executed by Connor to himself, not as an absolute conveyance, but as a security for an alleged indebtedness from ³⁷⁹Forrest to him, and that, therefore, Clay was a mortgagee in possession. Counsel for appellants then claim that a mortgagor cannot file a bill against a mortgagee without offering to redeem from the mortgage, and that, as appellee did not offer to redeem from the mortgage, the court should have dismissed the bill. The bill filed in this case is in no sense a bill to redeem from a mortgage. The position taken by the appellee is, that while the appellant claimed to hold the title conveyed to him for a debt, as a matter of fact no debt existed. The testimony, introduced by the defendants below themselves, tends to show that the conveyance to appellant, Clay, was not made to secure a bona fide indebtedness. The evidence, tending to show that no such indebtedness existed, was not contradicted by any proof on the part of the appellant. In other words, appellants introduced no testimony whatever showing that any indebtedness existed from Forrest to Clay, and did not rebut the case made by the evidence in the record as to the nonexistence of any such indebtedness.

4. Much is said in the argument of counsel for the appellants to the effect that the appellee paid no valid consideration for the conveyance, executed to him by Forrest in June, 1901, and that,

if the consideration, claimed to have been paid by the appellee, was actually paid, it was less than half the real value of the property. Forrest testifies in the case, and shows that he knew the value of the property. He was not imposed upon by any fraudulent representations made by the appellee. The title to the property was clouded by the existing conveyance to Clay, and by the pendency of the suit for an accounting, which Clay had brought against Forrest. These matters rendered it impossible for Forrest to sell the property for the full value. The proof shows that all these matters were well understood both by Forrest and by the appellee. Appellee paid Forrest eight thousand dollars for the premises in question. He paid four thousand dollars in cash, and ^{also} executed his note for the remaining four thousand dollars. The proof tends to show that the sale to appellee was bona fide, and was for such consideration as Forrest was willing to receive. When Forrest made the sale to appellee, he acted under the advice of legal counsel, capable of protecting his interests. He says in his testimony: "At the last interview I sold the property to Mr. Hammond for eight thousand dollars. . . . The money was paid to me in good faith." There is no controversy here between appellee and Forrest as to the validity and good faith of the transfer to appellee. What the amount of the consideration was, received by Forrest from appellee, is not a matter which concerns the appellant, Clay.

5. There is, however, one feature of the decree, entered by the court below, which we cannot but regard as erroneous. We are of the opinion that the court below decided correctly in holding that the power of attorney, and the deeds, executed under it to Connor, and by Connor to Clay, were null and void, and in decreeing that the instruments in question should be delivered up to be canceled. But that part of the decree which provides that appellee should be let into possession of the premises, and that a writ of assistance should be awarded to him for the purpose of thus putting him into possession of the premises, was not warranted by the facts of the case. Where land is sold under a decree foreclosing a mortgage, a writ of assistance will be issued to put the purchaser at the mortgage sale in possession of the premises: *Aldrich v. Sharp*, 3 Scam. 261; *Bennett v. Matson*, 41 Ill. 332; *Kessinger v. Whittaker*, 82 Ill. 22; *O'Brian v. Fry*, 82 Ill. 87. In such case, however, the purchaser at the foreclosure sale, whether he be the complainant in the foreclosure suit, or a third person, obtains his

title from the decree of the court of chancery. A court of chancery will put a party in possession of premises when it has by its own decree given the title to those premises to such party. Here, however, appellee does not come into ³⁸¹ a court of chancery for the purpose of obtaining a title. He claims by his bill to have the title already through a warranty deed executed to him by Forrest on June 18, 1901, and he merely asks that a fraudulent deed to the premises, held by another party, be removed and canceled as a cloud upon a title already existing. In such case, a court of chancery will leave the party, in whose favor it removes the cloud, to pursue his remedy at law in order to get possession of the premises.

In *Schenck v. Conover*, 13 N. J. Eq. 223, 78 Am. Dec. 95, the cases upon this subject are reviewed by the chancellor, and it is there said: "These cases clearly show the long established and familiar practice of the court of chancery, wherever the conveyance of real estate is decreed, to compel the defendant to surrender the possession to the plaintiff." In *Schenck v. Conover*, 13 N. J. Eq. 223, 78 Am. Dec. 95, it was said that on a bill by a mortgagor to redeem the mortgaged premises the court will order the defendant to deliver up possession to the complainant without putting him to his ejectment, but that, in a strict foreclosure, the practice is otherwise, and that in the latter case the court does not direct the mortgagor to deliver up the possession of the mortgaged premises to the complainant, but leaves the latter to his ejectment; and the reason there given for this conclusion is that, on a bill to redeem, the mortgagor acquires title under the decree of the court, and the court will perfect his title, and give him the benefit of the decree, by putting him in possession; whereas, under a bill for strict foreclosure, the complainant has the legal title already, and only asks that the equity of redemption be foreclosed, not acquiring any title under the decree of the court, and no conveyance being ordered. The reasoning of the New Jersey case applies to the facts of the case at bar. We have held that, where a bill is filed to quiet the title of a complainant, the court should stop with the decree so quieting the title, "without decreeing a conveyance to the complainant": *Rucker v. Dooley*, 49 Ill. 378, 99 Am. Dec. 614; *Pratt v. Kendig*, 128 Ill. 293, 21 N. E. 495. Inasmuch, therefore, as, in the case at bar, the defendants are not and could not be required by the decree to make a conveyance to complainant, the decree should not have gone so far as to award to the complainant a writ of assistance to

compel the defendants to surrender the possession. As was said by the court of chancery in *Schenck v. Conover*, 13 N. J. Eq. 223, 78 Am. Dec. 95, the practice of a court of chancery is to compel the defendant to surrender the possession to the complainant in cases where the conveyance of real estate is decreed. As the decisions of this court hold that, on a bill to remove a cloud from the title to real estate, it is improper to require the defendants to execute to the complainant a deed of the real estate, it would seem to follow that it is improper to require the defendant to surrender the possession to the complainant in a suit begun by the filing of such a bill. The observations here made are not intended to apply to cases arising under the burnt records act of this state, by the terms of which a peculiar and enlarged jurisdiction is conferred upon courts of equity in the matter of establishing titles thereunder: *Harding v. Fuller*, 141 Ill. 308, 30 N. E. 1053.

Accordingly, the decree rendered by the superior court of Cook county is affirmed in all respects except so far as it requires that the possession of the premises be forthwith delivered up to appellee by the appellants, and all other persons claiming under them since the commencement of the suit, and that, upon such possession being refused, the appellee be awarded a writ of assistance, the decree being reversed as to the portion thereof embraced within the exception thus indicated, the costs of this court to be paid one-half by each party.

JURISDICTION OF EQUITY TO PUT PARTY IN POSSESSION IN AID OF ITS DECREE.

- I. Jurisdiction Generally.**
- II. Against Whom Jurisdiction Exercised.**
- III. Method of Enforcing Jurisdiction.**
 - a. Writ of Assistance.
 - b. When Writ Will Issue.
 - c. In Whose Favor Writ May Issue.
 - d. Against Whom Writ Will or Will not Issue.

I. Jurisdiction Generally.

A court of equity unquestionably has jurisdiction to decree the possession of land, and to enforce its decree by putting the party entitled thereto into possession, whenever a controversy about the title of such land has been properly brought into, and determined by, that court. In other words, a court of chancery has jurisdiction to, and will, put a party in possession of premises, when it has by its own decree given the title to those premises to such party: *Irvine v. McRee*, 5 Humph. 554, 42 Am. Dec. 468. It is well established that a court of equity has power in a proper case to put the

purchaser of lands under its decree in possession by an order passed upon the motion or petition of the purchaser. Such jurisdiction is deemed indispensable to the full and complete administration of justice, and is coextensive with the jurisdiction of the subject matter. This jurisdiction is seldom, if ever, denied, and the only question generally arising is whether under the circumstances of the particular case, the conditions are such as to justify its exercise: *Creighton v. Paine*, 2 Ala. 158; *Trammel v. Simmons*, 8 Ala. 271; *Hooper v. Yonge*, 69 Ala. 484; *Johnston v. Smith*, 70 Ala. 108; *Oglesby v. Pearce*, 68 Ill. 220; *White v. Hampton*, 13 Iowa, 259; *Garretson v. Cole*, 1 Har. & J. 370; *Oliver v. Caton*, 2 Md. Ch. 297; *Jones v. Hooper*, 50 Miss. 510; *Schenck v. Conover*, 13 N. J. Eq. 221, 78 Am. Dec. 95; *Valentine v. Teller*, 1 Hopk. Ch. 422; *Commonwealth v. Dieffenback*, 3 Grant Cas. 368; *O'Neale v. Caldwell*, 3 Cranch U. C. 312, Fed. Cas. No. 10,515. A court of equity "will enforce its decree by process for the actual delivery of the possession whenever, in pursuance of the decree, such possession ought to be delivered: *Valentine v. Teller*, 1 Hopk. Ch. 422. "When the court has obtained lawful jurisdiction of the case, and has investigated and decided upon its merits, it is not sufficient for the ends of justice merely to declare the right without affording the remedy": *Kershaw v. Thompson*, 4 Johns. Ch. 609. The power of a court of equity to enforce its decree for possession by its process "rests upon the obvious principle that the power of the court to afford a remedy must be coextensive with its jurisdiction over the subject matter": *Montgomery v. Tutt*, 11 Cal. 190. "The cases clearly show the long-established and familiar practice of the court of chancery, whenever the conveyance of real estate is decreed to compel the defendant to surrender the possession to the plaintiff; in other words, a court of equity will enforce its own decree as between the parties, without compelling a resort to an action at law. . . . It becomes, then, a mere question of practice whether a court of equity will, in the exercise of its undoubted power, give full effect to its decree for the sale and conveyance of the premises by putting the purchaser into possession": *Schenck v. Conover*, 13 N. J. Eq. 224, 78 Am. Dec. 95. Under the rule that where equity obtains jurisdiction of the case for any purpose of relief, it retains it to give full relief, a court of chancery having determined that the equitable title to premises is in the complainant or other party to the suit, will decree a surrender of the possession thereof to him, instead of leaving him to his further remedy of ejectment: *Aldrich v. Sharp*, 3 Seam. 261; *Whipple v. Farrar*, 3 Mich. 436, 64 Am. Dec. 104; *Wales v. Newbould*, 9 Mich. 45; *Trotter v. Heckscher*, 42 N. J. Eq. 254, 7 Atl. 650. "Decreeing the surrender of possession of lands in a proper case is an ordinary and familiar exercise of the power of the court, and the execution of such a decree is as easy and simple as is the execution of a judgment for possession in an action

of ejectment in a court of law. It has often been held, and is regarded as a settled rule, that where a court of chancery has gained jurisdiction of a cause for any purpose of relief, it will retain it for the purpose of giving full relief. This is a rule of such practical utility in promoting the ends of justice, preventing unnecessary suits, saving expense, and avoiding delay, as commends itself strongly to our approbation, and to the case under consideration, where it may well be applied": *Whipple v. Farrar*, 3 Mich. 436, 64 Am. Dec. 104. The exercise of this jurisdiction rests in the sound discretion of the court, and it will never be exercised in cases of doubt, nor under its exercise will a question of legal title be tried or decided: *Schenck v. Conover*, 18 N. J. Eq. 220, 78 Am. Dec. 95.

We are not favorably impressed by the limitation which, in the principal case, is declared to exist upon the power of chancery to put successful litigants in possession. According to the opinion of the court, that power is dependent upon whether or not chancery has given title to the property in question, whereas, in our judgment, the power is exercised to prevent multiplicity of suits, and hence will not be denied when the proper parties are before the court, and it is authorized to give them, or some of them, equitable relief, and the successful litigant also appears to be entitled to the possession of the property as against his adversary, who is in possession. We see no occasion to recede from our views heretofore expressed in section 37d of *Freeman on Executions*, in speaking of writs of assistance, as follows: "As to the decrees or orders which may justify the issuing of this writ, it may be stated broadly that whenever there has been an adjudication in equity from which it appears that a party is entitled to be in possession of property, the court will not require him to bring some further or independent suit or action, but will grant him this writ, entitling him to be placed in possession of the property. This is but an application of the general principle that 'when a court of chancery obtains jurisdiction of the subject matter of a suit, it will retain it to the end that justice may be done between the parties.' Hence, this writ will issue when, by a decree, a conveyance of property has been directed: *Garratson v. Cole*, 1 Har. & J. 370; or the defendant's title has been divested: *Irvine v. McRee*, 5 Humph. 554, 42 Am. Dec. 468; or where, by a cross-bill, the defendant has shown that he is entitled to the possession of the property which is held by the plaintiff: *Lloyd v. Karnes*, 45 Ill. 62; or when, as the result of partition or otherwise, property has been directed to be sold, and a purchase has been made, and a conveyance executed pursuant to the decree: *Keil v. West*, 21 Fla. 508. In a suit for a divorce, if one of the parties is required to deliver property to the other, the rights of the latter may be enforced by a writ of assistance. Where the propriety of issuing such a writ was questioned, the court said: 'The court, in fixing the status of the litigants, has the unquestioned power to

dispose of the property of the community, dividing it between the spouses in such proportions as seem just. It has also the jurisdiction to determine whether or not a given piece of property is or is not community property. Having these ample powers to adjudge and to award, it would be anomalous indeed if, under our simplified procedure, it were obliged to send either of the parties into another forum to prosecute another action to obtain possession of that which it had the power to give'": *Kirsch v. Kirsch*, 118 Cal. 56, 45 Pac. 164. Nor are we able to distinguish in principle the principal case from *Harding v. Fuller*, 141 Ill. 308, 30 N. E. 1013; *Gormley v. Clark*, 134 U. S. 138, 10 Sup. Ct. Rep. 554, and *Root v. Woolworth*, 150 U. S. 401, 412, 14 Sup. Ct. Rep. 186, in all of which the issuing of writs of assistance was sustained.

II. Against Whom Jurisdiction Exercised.

The jurisdiction of equity to put the party into possession who is entitled to it under its decree is restricted to those cases in which the person holding the possession against the purchaser or other party entitled to the possession is either a party to the proceedings, whose rights are consequently determined by the decree, or one who comes into possession pendente lite claiming title to the land, under the parties to the bill or some of them: *Creighton v. Paine*, 2 Ala. 158; *Oliver v. Caton*, 2 Md. Ch. 297; *Jones v. Hooper*, 50 Miss. 510. In the exercise of this jurisdiction the court can compel the delivery of the possession of the land sold under its decree by any of the parties to the suit by persons coming into possession pendente lite, or by mere naked trespassers: *Hooper v. Yonge*, 69 Ala. 484. If lands are ordered to be sold under a decree enforcing a vendor's lien, the decree may direct the register, upon payment of his bid by the purchaser under such decree, to execute to him a conveyance, and to place him in possession of the land: *Johnston v. Smith*, 70 Ala. 108. Though chancery has power to put a party into possession who purchases at a sale made under its decree, where the possession is withheld by the defendant, or anyone who comes in pendente lite, it is not allowable to eject a mere stranger, having no connection with the defendant, either immediately or mediately: *Tramwell v. Simmons*, 8 Ala. 271. Where the party in possession acquired his title prior to the institution of the proceedings in which the decree was rendered, it would be irregular and improper to investigate and pass judgment upon it by the exercise of process to put him out of possession: *Oliver v. Caton*, 2 Md. Ch. 297; and, although a court of equity, in order to give the complainant the full benefit of its decree, will put the purchaser into possession of premises sold and conveyed in pursuance of its decree, yet in so doing it will not interfere with, nor attempt, in cases of doubt, to settle, the rights of any party claiming possession by title paramount to that of a mortgagee or other party in whose favor the decree is

made: *Thomas v. De Baum*, 14 N. Eq. 37. Occupying tenants claiming title under the party against whom the decree passes must be made parties to the suit, if their rights are intended to be concluded thereby so as to dispossess them: *Oliver v. Caton*, 3 Md. Ch. 297; and if the party in possession claims to hold the property under a lease executed before the execution of the mortgage under which the sale has been made, the court will not put him out of possession at the instance of the purchaser under the mortgage: *Thomas v. De Baum*, 14 N. J. Eq. 37.

The jurisdiction should not be indulged where the purchaser seeking the aid of the court to enforce the delivery of lands purchased by him under its decree has suffered several years to elapse after his purchase before filing his application, thus creating a reasonable presumption that the party in possession holds as tenant of the purchaser, or under other like claim of right, which is not negated by averment or proof: *Hooper v. Yonge*, 69 Ala. 484. If a court of equity is called upon to determine, and does determine, that a conveyance is fraudulent as against creditors, and the defendant refuses to surrender possession, the court has jurisdiction to, and generally will, dispossess him: *Pratt v. Burr*, 5 Biss. 36, Fed. Cas. No. 11,372. Although, in a case where the property was subsequently sold under execution against the fraudulent debtor, it was held that the court, in granting relief, would only set aside the deed impeached, and would not decree nor enforce delivery of possession to the purchaser: *Hall v. Greenby*, 1 Del. Ch. 274. Whenever it becomes necessary to the due performance of his duties by a receiver of real estate that he should have actual possession, a court of equity will issue process to put him into possession, but such process will issue only upon the application of a party to the cause: *Stevenson v. Giltenan*, 5 Ohio N. P. 419.

A court of equity is most frequently called upon to exercise its jurisdiction to put a party in possession in favor of the purchaser upon foreclosure of a mortgage, and it is well established that where a court of chancery obtains jurisdiction of the subject matter of a suit it will retain jurisdiction, to the end that complete justice may be done between the parties. It has the power, upon a bill to foreclose a mortgage, to decree a sale of the mortgaged premises, and thereby to pass the title to the purchaser, and it will put him in possession, instead of driving him to his action in ejectment: *Hibernia Savings etc. Soc. v. Lewis*, 117 Cal. 577, 47 Pac. 602, 49 Pac. 714; *Aldrich v. Sharp*, 3 Scam. 261; *Jones v. Hooper*, 50 Miss. 510; *Magruder v. Kittle* (Neb.), 89 N. W. 272. After sale under foreclosure proceedings, a court of equity has power coextensive with its jurisdiction over the subject matter to award orders directing a party in possession to surrender to the purchaser: *Gorton v. Paine*, 18 Fla. 117; *Kershaw v. Thompson*, 4 Johns. Ch. 610; *Ludlow v. Lan-*

sing, 1 Hopk. Ch. 231; Thomas v. De Banm, 14 N. J. Eq. 57; Terrell v. Allison, 21 Wall. 239. After sale on foreclosure, the court will compel the mortgagor, or any person who has come into possession under him pending the suit, or whose title is not superior to his, to deliver up the possession of the premises, and will not drive the purchaser to an action of ejectment, and this assistance will be extended to a stranger to the record purchasing at such sale, as well as to the mortgagee: Schenck v. Conover, 13 N. J. Eq. 220, 78 Am. Dec. 95. A grantee of the rights of the purchaser at a mortgage foreclosure sale has the same right as the purchaser to be put into possession of the property by the court decreeing the sale: Emerick v. Miller (Ind.), 64 N. E. 23. If, however, the person in possession is a mere stranger to the suit, who entered before the foreclosure suit was begun, he cannot be dispossessed by an order on the decree: Gorton v. Paine, 18 Fla. 117.

III. Method of Enforcing Jurisdiction.

a. *Writ of Assistance.*—As we have already shown, if a sale of land is made by virtue of a decree in chancery, and the defendant, or any person who has come into possession under him pending the suit, refuses to deliver up the possession, on demand, to the purchaser under the decree, the court, on his motion and application for that purpose, will order the possession to be delivered to the purchaser, and not drive him to his action of ejectment, and this though the delivery of possession was not made a part of the decree. The earlier practice was that, in case of the disobedience of such order, the court would issue an injunction on proper affidavits to enjoin the defendant or other party concluded by the decree to surrender possession and on proof of the service of the injunction and the refusal of the party to comply, a writ of assistance would issue as a matter of course to put the purchaser in possession: Creighton v. Paine, 2 Ala. 158; Garretson v. Cole, 1 Har. & J. 370; Kershaw v. Thompson, 4 Johns. Ch. 609. This method of putting the purchaser or other party into possession proving somewhat cumbersome, it is now well settled that a writ of assistance is, in ordinary cases, the first and only process necessary for giving the possession of land under a decree of the court of chancery: Schenck v. Conover, 13 N. J. Eq. 220, 78 Am. Dec. 95; Valentine v. Teller, 1 Hopk. Ch. 422. In speaking of this subject, and of the method adopted in Kershaw v. Thompson, 4 Johns. Ch. 610, the court, in Teller v. Hopkins, 1 Hopk. Ch. 423, said: "This circuitry seems unnecessary—at least it is not necessary in the ordinary case of a proceeding for possession, against a party who was a defendant to the suit. When once the principle is established that this court is to give possession, that possession should be given by the most direct, simple, and efficacious means, and the process of this court should be, in effect, the same with the *habere facias possessionem* at law." Again, in Schenck v. Conover,

13 N. J. Eq. 220, 78 Am. Dec. 101, it was said that "the injunction is in fact but a repetition of the order of the court to deliver possession and it would seem that it might be advantageously dispensed with. The cases cited meet all of the objections that were urged upon the arguments to granting the relief asked for in this case. They show that the writ of assistance will issue as well when a special order is made for the delivery of possession after a sale as when the direction is included in the decree, that it will be granted at the instance of the purchaser after a sale as well as on the application of the complainant, and that it may be made, not only as against the defendant, but against any party under him, or by title not superior to his. It is scarcely necessary to add that the exercise of the power rests in the sound discretion of the court. It will never be exercised in a case of doubt, nor under color of its exercise will a question of legal title be tried or decided. With these limitations of its exercise, I believe that the practice which has been adopted will be found both safe and salutary." To the same effect is *Stanley v. Sullivan*, 71 Wis. 585, 5 Am. St. Rep. 245, 37 N. W. 801. The office of the writ of assistance is to give effect to chancery decrees where the rights of the parties are fixed by the decree, and to put a party into possession under an order of the court: *Sills v. Goodyear*, 88 Mo. App. 317. "It is the ordinary process issued by a court of chancery to put a party receiver, sequestrator, or other person into possession when he is entitled thereto, either upon a decree or an interlocutory order": *Sills v. Goodyear*, 88 Mo. App. 317; *Hagerman v. Heltsel*, 21 Wash. 444, 58 Pac. 580. Courts of chancery have authority to issue writs of assistance for the purpose of enforcing their decrees or orders, and in the exercise of this power they can compel the delivery of personal property, or the possession of land, by any of the parties to the suit by persons coming into possession pendente lite, or by mere naked trespassers: *Hooper v. Yonge*, 69 Ala. 484. "The object of the writ of assistance is to put a party who has purchased real estate at judicial sale into possession of the premises. The most familiar instance of its use is where land has been sold under a decree foreclosing a mortgage, but it applies to any other sale enforcing a lien whereby the right and title of the property would pass to a purchaser, and where the party in possession was a party to the suit, or came into possession under him pendente lite. Where a court of equity has authority to dispose of the fee as to all parties to the decree, it ought also to control the possession, in order to administer complete and efficient relief. The power of the court would be inadequate to full redress, if the suitor, after procuring the decree of sale and investing the purchaser with title, must resort to a court of law to obtain possession": *Jones v. Hooper*, 50 Miss. 510.

b. **When Writ Will Issue.**—It is commonly declared that the issuance of a writ of assistance to put a party in possession under a decree or order of a court of equity rests in the sound discretion of the court, and that it will be used only when the right is clear, after the rights of the respective parties have been fully adjudicated in the principal suit, when there is no equity or appearance of equity in the defendant, and where there is not a bona fide contest relative to the right of possession: *Hooper v. Yonge*, 69 Ala. 484; *Schenck v. Conover*, 13 N. J. Eq. 220, 78 Am. Dec. 95; *Vanmeter v. Borden*, 25 N. J. Eq. 414; *Knight v. Houghtalling*, 94 N. C. 408; *Hagerman v. Heltzel*, 21 Wash. 444, 58 Pac. 50; *Stanley v. Sullivan*, 71 Wis. 585, 5 Am. St. Rep. 245, 37 N. W. 801. "Courts of equity have from the earliest times exercised the right to issue the writ of assistance in actions in equity, brought for the purpose of determining the rights of the litigants to the title or possession of real estate, after judgment declaring such rights, as well as in cases for the foreclosure of, or redemption of, mortgages. In such cases the courts of equity having jurisdiction of the persons and property in controversy have, after determining the rights of the parties litigant to the title or possession of real estate, rightfully assumed the power to enforce their judgments by the writ of assistance to transfer the possession, instead of turning the party over to a court of law to recover such possession," when his right is clear: *Stanley v. Sullivan*, 71 Wis. 585, 5 Am. St. Rep. 245, 37 N. W. 801. The writ may be thus employed whenever a court of equity, having jurisdiction of the parties and property in controversy has determined the rights of the litigants to the title or possession of real estate, but it will not issue to try or decide a question of legal title, nor in cases of doubt as to the petitioner's right: *Schenck v. Conover*, 13 N. J. Eq. 220, 78 Am. Dec. 95. If a decree, in ordering the sale of lands, fails to order the surrender of the possession, and the person in possession refuses to give it up, the court will, on proper notice and motion, order the surrender of possession, and after such possession is properly demanded and refused the court will grant a writ of assistance to put the purchaser into possession: *Oglesby v. Pearce*, 68 Ill. 220. If a decree in equity requires the delivery of the possession of lands, and such lands are within the jurisdiction of the court, and defendants refuse to perform the decree, the court will enforce it by a writ of assistance: *Commonwealth v. Dieffenback*, 3 Grant Cas. 368. So a writ of assistance in equity to put plaintiff in possession of lands will issue where delivery of such possession has been directed by the decree, or where the right to such possession flows out of that which is established by the decree: *Kelsey v. Church*, 4 C. P. (Pa.) 105. If the court decrees a conveyance from the defendant, and he refuses to deliver up the possession and to execute a proper deed

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tendered to him, a writ of assistance may issue against him to compel compliance with the decree: *Garretson v. Cole*, 1 Har. & J. 370.

c. *In Whose Favor Writ may Issue.*—The most familiar instance of the issuance of a writ of assistance is where land has been sold under a decree in equity foreclosing a mortgage, but it applies to any other sale of land enforcing a lien: *Jones v. Hooper*, 50 Miss. 510. It is settled beyond all doubt that this writ will issue at the instance and upon the application of a purchaser of mortgaged premises under a decree of foreclosure to put him in possession as against parties who are bound by the decree, and who refuse to surrender possession pursuant to its directions: *Hooper v. Yonge*, 69 Ala. 474; *Hibernia Sav. etc. Soc. v. Lewis*, 117 Cal. 577, 47 Pac. 602, 49 Pac. 714; *Jackson v. Warren*, 52 Ill. 331; *Brush v. Fowler*, 36 Ill. 53, 85 Am. Dec. 382; *Watkins v. Jerman*, 36 Kan. 464, 13 Pac. 798; *Magruder v. Kittle* (Neb.), 89 N. W. 272; *Beatty v. De Forrest*, 27 N. J. Eq. 482; *Bell v. Birdsall*, 19 How. Pr. 491; *Knight v. Houghtaling*, 94 N. C. 408; *Voightlander v. Brotze*, 59 Tex. 286; *Hagerman v. Hetzel*, 21 Wash. 444, 58 Pac. 580; *Terrell v. Allison*, 21 Wall. 289. The writ will be granted at the instance of a purchaser after the sale, as well as on the application of the complainant, and to a stranger to the record who purchases at foreclosure sale, as well as to the mortgagee: *Shenck v. Conover*, 13 N. J. Eq. 220, 78 Am. Dec. 95. And according to the great weight of modern authority, it will be awarded in favor of the grantee of such purchaser: *McLane v. Piaggio*, 24 Fla. 71, 3 South. 323; *Emerick v. Miller* (Ind.), 64 N. E. 28; *Ketchum v. Robinson*, 49 Mich. 618, 12 N. W. 577. A court of chancery may, upon the application of a purchaser at a sale under a decree of that court, have a writ of assistance issued to put the grantee of such purchaser in possession of the land bought, if such grantee, though not a party to the record, is entitled to possession as against him who has the possession: *Gibson v. Marshall*, 64 Miss. 72, 8 South. 206. The purchaser, by his bid, becomes a party to the suit, so far as to enable him to move for confirmation of the sale, or for the writ of assistance: *Jones v. Hooper*, 50 Miss. 510; *Gibson v. Marshall*, 64 Miss. 76, 8 South. 207. In such case, the assignee of the purchaser's bid stands in the purchaser's place, as to the remedy for the possession: *Motz v. Henry*, 8 Kan. App. 416, 54 Pac. 796; *Elkings v. Murray*, 29 N. J. Ep. 388; *Farmers' etc. Co. v. Chicago etc. R. R. Co.*, 44 Fed. 653. An early case in Mississippi holds, contrary to the doctrine prevailing there at the present day, that a writ of assistance cannot regularly be issued at the instance of one not a party to the cause; that a purchaser at a sale under a decree is not such a party, and that he can proceed only by getting the vendor to make the application: *Wilson v. Polk*, 13 Smedes & M. 131, 51 Am. Dec. 151. The writ will also issue upon the application

of a party to a cause to put a receiver into possession of real estate, when such possession is actually necessary, and is wrongfully withheld: *Stevenson v. Giltinan*, 5 Ohio N. P. 419. If a conveyance is set aside as fraudulent under a creditor's bill, a writ of assistance will issue upon the application of the interested parties, when the fraudulent debtor refuses to surrender possession under the decree: *Pratt v. Burr*, 5 Biss. 36, Fed. Cas. No. 11,372. A purchaser of land under a decree of a court of equity is not entitled to a writ of assistance for possession, where he has suffered six or seven years to elapse since his purchase, before making application for the writ: *Hooper v. Yonge*, 69 Ala. 484; *Ex parte Forman*, 180 Ala. 278, 80 South. 480.

d. *Against Whom Writ Will or Will not Issue.*—A writ of assistance may be issued to put a party into possession, where he is entitled thereto, not only against the defendant in the decree under which a sale of land has been made, but also against any party in possession under him, or by title not superior to his: *Schenck v. Conover*, 18 N. J. Eq. 220, 78 Am. Dec. 95. Such writ is the proper remedy to place the mortgagee, who has purchased under a foreclosure sale in possession under his deed, and it runs against the mortgagor and all persons who have purchased, or come in under him *pendente lite*, with notice of the action: *Hibernia Sav. etc. Soc. v. Lewis*, 117 Cal. 577, 46 Pac. 602, 49 Pac. 714. And while the purchaser in such case is entitled to the assistance of the court in obtaining possession, as against the parties to the suit, or those who have come into possession under them subsequent to the filing of the notice of the commencement of the suit: *Creighton v. Paine*, 2 Ala. 158; *Brush v. Fowler*, 36 Ill. 53, 85 Am. Dec. 382; *Frelinghuysen v. Colden*, 4 Paige, 204; the writ will issue only against parties to the suit or their representatives, or those who came into possession under either of the parties, while the suit was pending, and who are bound by the decree: *Burton v. Lies*, 21 Cal. 87; *Gilcrest v. Magill*, 37 Ill. 300; *Heffron v. Gage*, 44 Ill. App. 147; *Blauvelt v. Smith*, 22 N. J. Eq. 81; *Bell v. Birdsall*, 19 How. Pr. 491; *Exum v. Baker*, 115 N. C. 242, 44 Am. St. Rep. 449, 20 S. E. 448; *Comer v. Felon*, 61 Fed. 731. To authorize the award of the writ in favor of a purchaser under a decree against one in possession of the land, it must be clearly shown that the former was either a party to the suit, or that he purchased *pendente lite*: *Paine v. Root*, 121 Ill. 77, 13 N. E. 541. And the purchaser is not entitled to the writ to turn a person out of possession of the purchased premises, although such person went into possession *pendente lite*, unless he went into possession under or by permission of some one of the parties to the suit: *Van Hook v. Throckmorton*, 8 Paige, 33. The writ will not issue against one not a party to the suit, and who came into possession before the beginning of the suit: *Brush v. Fowler*,

26 Ill. 53, 85 Am. Dec. 332; *Sills v. Goodyear*, 88 Mo. App. 316. The writ will not issue to determine questions of equitable cognizance between parties in possession not parties to the suit, and the plaintiff and purchaser, as to their respective rights in the land: *Henderson v. McTucker*, 45 Cal. 647. The power of the court to issue the writ does not extend to the case of the wife of the mortgagor, not a party to the suit, claiming under color of title acquired from one of the defendants before suit brought, although such title may be void: *Thompson v. Smith*, 1 Dill. 459, Fed. Cas. No. 13,999. A person not a party to the suit, who claims possession to the lands involved therein, otherwise than through a party to the proceeding while pending, cannot be dispossessed of such lands by writ of assistance issued at the instance of the purchaser under the decree in that suit: *Ex parte Jenkins*, 48 S. C. 325, 26 S. E. 686. The writ will not issue at the instance of a purchaser at foreclosure sale as against a party in possession claiming under an independent, and claimed to be paramount title not raised nor litigated in the foreclosure proceedings: *Tevie v. Hicks*, 38 Cal. 234; *Langley v. Voll*, 54 Cal. 435; *Hayward v. Kinney*, 84 Mich. 591, 48 N. W. 170; *Chadwick v. Island Beach Co.*, 42 N. J. Eq. 602, 8 Atl. 650; *Gelpeke v. Milwaukee etc. R. R. Co.*, 11 Wis. 454. Thus, if the party in possession, not a party to the suit, claims to hold the premises under a lease executed before the execution of the mortgage under which the sale was made, the court has no power to grant a writ of assistance at the instance of the purchaser under the mortgage: *Thomas v. De Baum*, 14 N. J. Eq. 37; *State v. Superior Court*, 21 Wash. 469, 58 Pac. 572. It seems, however, if such tenant is made a party to the suit, and refuses to attorn to the purchaser, the writ may lie against him: *Lovett v. German Reformed Church*, 9 Hew. Pr. 220. If the court does not acquire jurisdiction of the person owning the land at the time of the foreclosure of the mortgage, a writ of assistance against such owner, or of his grantees, cannot be granted in favor of the purchaser: *Steinbach v. Leese*, 27 Cal. 295. Nor can the writ be issued against a purchaser from the mortgagor pendente lite, who is not a party to the suit to foreclose, and has no notice thereof: *Harlan v. Backerby*, 24 Cal. 561. But it may be issued to put out of possession one who enters during the pendency of the suit, with the consent, connivance, and in collusion with the mortgagor, under a false claim of title, for the purpose of keeping the purchaser under foreclosure out of possession: *Brown v. Marzyck*, 19 Fla. 840. The writ does not lie to remove persons who go into possession after the purchaser has received his deed, and conveyed the premises to another: *Bell v. Birdsall*, 19 How. Pr. 491. Generally, the rule applied to any sort of proceeding in equity is, that the writ of assistance cannot be issued to go against persons not parties to the suit, unless such persons went into possession pendente lite, and claim under

parties to the suit by title accruing subsequent to its commencement, or unless the possession was subsequently taken by fraud and collusion with parties to the action for the purpose of defeating its objects, or unless it is evident that such persons have no possessory rights whatever. Hence the writ will not lie against a receiver in possession of property under appointment from a national court, in favor of a receiver of the same property appointed by a state court in an action to which the first receiver is not a party: *Galpeke v. Milwaukee R. R. Co.*, 11 Wis. 454.

The Deed of an Insane Person, not under guardianship, is merely voidable, and vests title until disaffirmed by the grantor on becoming sane, or by his heirs: *Downham v. Halloway*, 158 Ind. 626, 64 N. E. 82, 92 Am. St. Rep. 330, and cases cited in the cross-reference note thereto. It has been held that privies in blood and legal representatives are the only persons who can avoid the deed of an insane grantor: *Hunt v. Rabitoay*, 125 Mich. 137, 84 Am. St. Rep. 563, 84 N. W. 59. See the monographic note to *Flach v. Gottschalk Co.*, 71 Am. St. Rep. 425-433.

A *Suit to Quiet* or remove a cloud from the title of real estate cannot ordinarily be maintained, unless the complainant is in possession. Possession, however, is not always essential: See the monographic note to *Helden v. Hellen*, 45 Am. St. Rep. 375-377.

CAMERON v. BOEGER.

[200 Ill. 84, 65 N. E. 690.]

ATTORNEYS AT LAW—Solicitors in Chancery—Plaintiff's Right to Dismiss Suit Without Consent of.—A complainant in chancery has the right to dismiss the suit without the knowledge or consent of his solicitor. (p. 166.)

ATTORNEYS AT LAW Who Have Agreed with the Plaintiff that They Shall Receive as Compensation for their services in prosecuting a certain litigation, one-third of whatever is realized as the result of the litigation or of any settlement thereof, are not assignees of the plaintiff as to any part of his cause of action, and therefore are not entitled to have vacated a dismissal of the suit made or authorized by him, without their consent. (p. 168.)

AN ATTORNEY AT LAW Has no Lien for His Compensation upon any judgment or decree rendered in an action or suit brought by him, nor upon the property recovered as a result of his labors, though for his services the complainant agreed to pay him a share of the property obtained. (p. 169.)

Bill by the Oakland Cemetery Association against Boeger and others for an accounting as to the proceeds of sales of real property, and for a specific performance of a contract of sale. After the cause was at issue and much testimony had been

taken, it was dismissed pursuant to a stipulation signed by the complainant. Thereafter, on the same day, its solicitors, Cameron, Kelly & Firebaugh, moved to vacate the order of dismissal, and they subsequently filed an intervening petition in which they set forth an agreement between them and the complainant whereby they were employed to conduct the litigation, and were to receive as compensation for their services one-third of whatever should be realized as the result of the litigation or any settlement thereof. The petitioners also averred that the complainant was insolvent, and that defendants at all times knew of the agreement between it and the petitioners, and that the dismissal was made for the purpose of defrauding them. A demurrer to the petition was sustained, the trial court finding that the agreement gave the attorneys no interest in the subject matter of the suit.

Ossian Cameron, Chester Firebaugh and James J. Kelly,
pro se.

Thatcher & Griffen, for the appellees.

MR. MAGRUDER, C. J. 1. Appellants were solicitors of the Oakland Cemetery Association, the complainant in the chancery suit referred to in the statement preceding this opinion, and filed the bill therein as such solicitors for the association. After the chancery suit had been put at issue by the filing of an answer to the bill and replication to the answer, the cause was referred to a master in chancery before whom testimony was taken; and the cause was pending before the master when the same was dismissed.

Appellants claim, as we understand their contention, that the complainant in the chancery suit had no right to dismiss the same, upon the alleged grounds that such dismissal was without notice to them, as solicitors, and ^{was} was brought about by collusion with the defendants in the chancery suit for the purpose of depriving them of their fees, as such solicitors.

While the dismissal of a suit in the way in which the dismissal here under consideration was accomplished may not be a commendable practice, still the complainant in the suit had a right to dismiss the same without the consent or knowledge of its solicitors; and we cannot set aside the action of the lower court because of such dismissal, there being no proof that there was any fraud practiced in procuring the consent of the complainant in the chancery suit to the dismissal.

In *Henchey v. City of Chicago*, 41 Ill. 136, we said (page 139): "Although the better practice undoubtedly is, not to dismiss a suit in the absence of plaintiff's counsel, upon motion of defendant's counsel based upon a stipulation to that effect, signed by the plaintiff in person, yet we cannot set aside the action of the court merely for that reason, and in the absence of proof that the stipulation was fraudulently or improperly obtained. . . . It is better that clients should be at liberty to adjust their difficulties if they can." In the case at bar, a meeting of the board of directors of the Oakland Cemetery Association, complainant in the suit, was held on February 20, 1901, and a resolution was then adopted by the board, reciting that it was for the best interest of all parties that the litigation should be abandoned, and ordering a dismissal of the suit. On the same day a written stipulation was entered into between the association and the solicitors for the defendants in the chancery suit, agreeing that the suit might be dismissed without cost to either party. This stipulation was signed by the association by its president, and attested under the corporate seal by the secretary, and was also signed by a new counsel, appointed by the association for the purpose of entering the order of dismissal. The stipulation in question was not obtained from the complainant in the chancery ^{or} suit in any improper way, or by any fraudulent means, but appears to have been executed freely and voluntarily. "A client may, without the knowledge and against the consent of his attorney, compromise or otherwise settle his case with the opposite party before judgment or decree": 3 Am. & Eng. Ency. of Law, 2d ed., 465.

The court below, upon application of the present appellants, first set aside the order dismissing the cause, and permitted appellants to file an intervening petition, setting up their contract with the Oakland Cemetery Association, as the same appears in the statement preceding this opinion. The record recites that the intervening petition was demurred to, and that such demurrer was sustained by the court. The court thereupon found that the contract for solicitors' fees between the Oakland Cemetery Association and the appellants gave no interest to appellants in the subject matter of the suit, and that the complainant therein had the right to dismiss its suit; and thereupon the suit was dismissed by the court.

Appellants seem to rely upon the case of *Weinberg v. Noonan*, 193 Ill. 165, 61 N. E. 1022, as showing that the intervening petition herein was improperly disposed of by the court. The

case referred to is so different in its facts from the case at bar that it cannot be regarded as having any application here. There, the intervening petition was filed by consent, and was stricken from the files without being "judicially heard and determined." Here, however, the court granted to appellants a hearing upon the demurrer to their intervening petition, and judicially determined the insufficiency of the matter alleged in the petition. Moreover, as the court properly dismissed the original suit, in which the intervening petition was filed, the dismissal of the intervening petition necessarily followed, because it was merely a part of such suit.

2. The question then arises whether the court below decided correctly that the contract of the appellants²¹ for fees, set up in their intervening petition, gave to appellants no interest in the subject matter of the suit. If they had an interest in the subject matter of the suit by reason of the contract, then they were proper parties to the suit, and should have been allowed to become parties thereto.

Upon an examination of the contract, set up in the intervening petition, it will be seen that, by the terms of that contract, there was no assignment, equitable or otherwise, to the appellants of any interest in the subject matter of the suit. The agreement provides that appellants shall receive, as "compensation for their services in and about the prosecution of said litigation on behalf of the first parties hereto from the first parties hereto one-third of whatever is realized or obtained, as the result of any such litigation, or if any settlement is made pending any such litigation, then the second parties hereto shall receive one-third of whatever amount is obtained or received as a settlement of said matters in litigation," etc. The contract was a personal agreement on the part of the Oakland Cemetery Association and its president, being "the first parties hereto," to pay to appellants fees, the amount of which was to be determined by what was recovered. Under the authorities there is a clear distinction "between an actual assignment of a part of a debt or claim or fund, and a mere promise or agreement to pay a part of such debt or claim when collected or recovered, or pay out of such fund": *Story v. Hull*, 143 Ill. 506, 32 N. E. 265. Here, the agreement that the compensation of appellants should come out of the amount realized as the result of the litigation was simply a promise by the association and its president that they would pay such compensation out of the proceeds of the litigation, and depended for its performance

upon the mere personal responsibility of the promisor. Where there is an agreement by a party to pay his attorney a reasonable compensation for his legal services out of the ²² proceeds of the litigation, such agreement, depending as it does upon the mere responsibility of the employer, does not operate as an equitable assignment of any portion of the fund sought to be recovered in the suit: *Story v. Hull*, 143 Ill. 506, 32 N. E. 265; *Wyman v. Snyder*, 112 Ill. 99; *Trist v. Child*, 21 Wall. 441; *Christmas v. Russell*, 14 Wall. 84; *Pomeroy's Equity Jurisprudence*, secs. 1280-1283; *Bromwell v. Turner*, 37 Ill. App. 561.

Nor can it be said that appellants had any lien for their fees. "In this state, and in the absence of an express contract, out of which an equitable assignment arises, an attorney at law has no lien for his compensation upon the judgment or decree rendered in a suit prosecuted by him, or upon the real estate, moneys, fund or other property recovered by means of his exertions and labors": *Story v. Hull*, 143 Ill. 506, 32 N. E. 265; *Wyman v. Snyder*, 112 Ill. 99; *Humphrey v. Browning*, 46 Ill. 476, 95 Am. Dec. 446; *Forsythe v. Beveridge*, 51 Ill. 268, 4 Am. Rep. 612; *La Framboise v. Grow*, 56 Ill. 197; *Nichols v. Pool*, 89 Ill. 491; *North Chicago Street R. R. Co. v. Ackley*, 171 Ill. 100, 49 N. E. 222. In the *Ackley* case, *supra*, we said (page 113, 171 Ill., and page 226, 49 N. E.): "The plaintiff has a right to compromise and avoid the anxiety resulting from a cause pending to which he is a party. Any contract, whereby a client is prevented from settling or discontinuing his suit, is void, as such agreement would foster and encourage litigation": *Williams v. Ingersoll*, 89 N. Y. 518. Inasmuch as the agreement set up by the appellants in their intervening petition did not amount to an assignment to them of any portion of the subject matter of the suit, or of what might be obtained as the result of the suit, and conferred upon them no lien for their fees, they did not show that they were entitled to be made parties to the chancery suit.

Accordingly, the judgment of the appellate court is affirmed.

EXTENT TO WHICH A LITIGANT MAY CONTROL A CAUSE IN WHICH HE HAS APPEARED BY ATTORNEY.*

I. Exclusiveness of Attorney's Control.

a. In General.

***REFERENCES TO MONOGRAPHIC NOTES.**

Respective rights and powers of attorney and client to manage action: 87 Am. Dec. 166-170.

Lien of attorneys: 51 Am. St. Rep. 159-187.

Contracts between attorney and client: 88 Am. St. Rep. 159-187.

- b. Dismissal of Suit—Stipulations and Motions.
- c. Settlements and Compromises.
- d. Fraudulent Settlements.
- e. Contracts not to Compromise Suit.

II. Statutes Giving Attorney a Lien.

- a. Effect of—Do not Prevent Settlements.
- b. Whether Attorney may Continue Suit after Settlements.
 - 1. Under the Tennessee Statutes.
 - 2. The Wisconsin Statute.
 - 3. The New York Statutes.
 - 4. The Georgia Statute.
 - 5. Other Statutes.
- c. Attorney Must Establish the Original Cause of Action.
- d. Defendant's Attorney Cannot Continue the Suit.

I. Exclusiveness of Attorney's Control.

a. In General.—The line of demarkation between the respective rights and powers of attorney and client, when a suit has been instituted, is not clearly defined. However, it may be said, in a general way, that a party to an action may appear in his own proper person, or by attorney, but he cannot do both. If he appears by attorney, he should be heard through him. It is necessary to the decorum of the court and the due and orderly conduct of the cause that the attorney should have the control and management of the action. Moreover, the client is thereby protected from the intrigues of his adversary. All the proceedings in court to enforce the remedy, to bring the demand, cause of action, or subject matter of the suit to trial, judgment and execution, are, ordinarily, within the exclusive control of the attorney; and, on the other hand, the attorney cannot compromise, settle, surrender, or impair the cause of action, or the subject matter of litigation without the consent of his client, it being within the exclusive control of the client: *Board of Commrs. v. Younger*, 29 Cal. 147, 87 Am. Dec. 164; *Crescent Canal Co. v. Montgomery*, 124 Cal. 134, 56 Pac. 797; *Oonan v. Loewenthal*, 129 Cal. 197, 61 Pac. 940; *McConnell v. Brown*, 40 Ind. 384; *Moulton v. Bowker*, 115 Mass. 36, 15 Am. Rep. 72; *Webb v. Dill*, 18 Abb. Pr. 264; *Pilger v. Gon*, 21 How. Pr. 155; *Board of Supervisors v. Broadhead*, 44 How. Pr. 426; *Swartz v. Morgan*, 163 Pa. St. 195, 43 Am. St. Rep. 786, 29 Atl. 974, 975; *Bonnifield v. Thorp*, 71 Fed. 924.

Accordingly, when a party has appeared by attorney, the court will not recognize a stipulation signed by the party extending the time to answer: *Bonnifield v. Thorp*, 71 Fed. 924; or a stipulation granting time to file a statement on a motion for a new trial: *Mott v. Foster*, 45 Cal. 72; or a stipulation for a continuance: *Nightingale v. Oregon Cent. Ry. Co.*, 2 Saw. 338, Fed. Cas. No. 10,264; or a notice of an election to end a reference: *Halsey v. Carter*, 6 Rob. (N. Y.) 535. But it is held in *Reeder v. Lockwood*, 62 N. Y. Supp. 713, 30 Misc. Rep. 831, that a party may withdraw a pleading interposed

by his attorney. A tender of payment of judgment may be made to the client: *Ferrea v. Tubbs*, 125 Cal. 687, 58 Pac. 308.

b. **Dismissal of Suit—Stipulations and Motions.**—In California, if a client signs a stipulation dismissing the action, when he is represented by an attorney of record, the court will disregard it: *Wylie v. Sierra Gold Co.*, 120 Cal. 485, 52 Pac. 809. In our opinion, a court will not, under all circumstances, disregard such a stipulation. Although, as expressed by the supreme court of Illinois, "the better practice undoubtedly is, not to dismiss a suit in the absence of plaintiff's counsel, upon motion of defendant's counsel based upon a stipulation to that effect, signed by the plaintiff in person, yet we cannot set aside the action of the court merely for that reason, and in the absence of proof that the stipulation was fraudulently or improperly obtained": *Henchey v. Chicago*, 41 Ill. 136; *Cameron v. Boeger*, the principal case, ante, p. 165; *Voight Brewery Co. v. Donovan*, 108 Mich. 190, 61 N. W. 343.

In *Toy v. Haskell*, 128 Cal. 558, 79 Am. St. Rep. 70, 61 Pac. 89, the plaintiff, without the consent or knowledge of his attorney, signed and delivered to the defendant's attorneys, a stipulation prepared by them authorizing a dismissal of the case, and a judgment of dismissal was accordingly entered. It was held that such judgment should be set aside on motion of the plaintiff's attorney. "It should be borne in mind," said the court, "that the question here under consideration relates to the power of a party to control the course of the action in court; and the case, therefore, is to be distinguished from those which merely involve the right of a party to compromise, settle, and acknowledge satisfaction of the claim on which the action is based, and the effect of such a settlement as a defense to the action." We have not found this distinction expressly made elsewhere, and doubt whether it is well founded. In practical effect, what would be the difference between authorizing the dismissal of a case by stipulation, and settling or adjusting the controversy between the parties out of court?

"Ordinarily, a litigant may make such disposition of an action pending, to which he is a party plaintiff, as his wisdom and judgment may dictate; and, if a plaintiff chooses to settle or discontinue an action without the consent of his attorneys, this he has the lawful right to do, and the action should be dismissed on his motion. This rule, it would seem, is but natural justice, and giving to an individual his undoubted right to manage his private affairs according to his own conception of what is best for his individual interests. A party ought not to be held for increased costs, attorney's fees, and other expenses incidental to continued litigation, against his expressed will and desire. . . . It is not the policy of the law to encourage litigation and coerce parties to continue in the prosecution of a suit in which they have lost faith in the merits of

their cause of action. On the contrary, all such should be encouraged to discontinue that which will probably only result in an unprofitable and useless waste of time and expenditure of money. The right of the plaintiffs to dismiss their action and terminate the controversy, so far as their individual interests are affected, can hardly be questioned, and, we take it for granted, is conceded. They are the owners of the cause of action, to the extent of their interests therein, have absolute control thereof, and the right to dismiss their action when their own judgment approves the same. We know of no principle of law, and are aware of no rule of practice, which will compel a party to continue the prosecution of a suit, involving only private rights, at his own expense, and against his will. He may lawfully terminate the agency created by the employment of his attorneys engaged to conduct the litigation, and take such proper steps as will release him from further responsibility and costs, by a dismissal of his cause of action": *Williams v. Miles*, 63 Neb. 851, 89 N. W. 455.

The dismissal in the above case was made by a part of the plaintiffs, as to their interests, after judgment and pending appeal, upon payment of a proportionate amount of the taxable costs. While we do not consider the right of a plaintiff to dismiss the action unqualified, nor does the court in this case, yet it would be a remarkable doctrine that would permit an attorney, against the will and judgment of his client, to continue the client's cause of action at the attorney's pleasure. And a right so palpable and unquestioned should not be denied on the ground that for him to stipulate or move for the dismissal of the action would interfere with the orderly conduct of the cause. No doubt, this right may be abused, especially where an attorney has advanced the costs of the litigation, or has contracted with his client for a share of what may be recovered in the event of a successful termination of the cause. Nevertheless, the right for the protection of the client, must be recognized; but not, however, as an absolute right. We shall see, later on, that the court will, in a proper case, protect the attorney as its officer.

c. *Settlements and Compromises.*—Thus far, we have had to do with the control of the cause in court. While there is not an entire harmony in the decisions on this subject, as has been seen, the right of a party to settle, adjust, or compromise his cause of action out of court, without the knowledge or consent of his attorney, when acting in good faith and when the attorney has no lien, is undoubted: See *Connor v. Boyd*, 73 Ala. 385; *De Graffenreid v. St. Louis etc. Ry. Co.*, 66 Ark. 260, 50 S. W. 272; *Pence v. Sweeney*, 3 Idaho, 151, 23 Pac. 413; *Rowe v. Fogle*, 88 Ky. 105, 10 S. W. 426; *McCoy v. McCoy*, 36 W. Va. 772, 15 S. E. 973; *Swanson v. Morning Star Min. Co.*, 13 Fed. 215, 4 McCrary, 241. And an attorney's lien does not attach, in the absence of an express statutory provision, until judg-

ment. Before such time, at least, the client is at liberty to settle the suit without consulting his attorney, if he does so in good faith: See the monographic note to *Hanna v. Island Coal Co.*, 51 Am. St. Rep. 261.

When a suit has progressed to judgment, then if the law gives the attorney an interest in the judgment and he perfects his lien thereon, the parties cannot ignore his claim. They may settle, if they choose, but his rights must be respected: *Davis v. Webber*, 66 Ark. 190, 74 Am. St. Rep. 81, 49 S. W. 822; *Davidson v. Board of Commrs.*, 26 Colo. 549, 59 Pac. 46; *Peterson v. Struby*, 25 Ind. App. 19, 56 N. E. 733, 57 N. E. 599; *Larned v. Dubuque*, 86 Iowa, 166, 53 N. W. 105; *Wallace v. Chicago etc. Ry. Co.*, 112 Iowa, 565, 84 N. W. 662; *Louisville etc. R. R. Co. v. Proctor*, 21 Ky. Law Rep. 447, 51 S. W. 591. These cases arose under statutes giving an attorney a lien. In another part of this note, we have considered whether an attorney may, under a statute giving him a lien on the cause of action or the suit, prevent his client from adjusting the controversy; and if a settlement is made without the consent of the attorney, whether he may thereafter prosecute the suit for his own benefit.

If a cause of action before judgment is in its nature assignable, the owner of it may assign and create equitable interests therein. Such agreements may be made with attorneys, and the interests created must be respected by those having notice: *Coughlin v. New York etc. R. R. Co.*, 71 N. Y. 443, 27 Am. Rep. 75. See, too, *Carpenter v. Myers*, 90 Mich. 209, 51 N. W. 206. If the right of action is not considered assignable, the case may be different. In *North Chicago St. R. R. Co. v. Ackley*, 171 Ill. 100, 49 N. E. 222, a right of action for personal injuries is held not assignable. And a contract by which a person assigns one-half of his right of action for personal injuries to his attorney, who is to prosecute a suit for damages for one-half the sum recovered, and by which the client agrees not to compromise or settle the claim, is invalid; and the defendant may, with notice of the contract, settle with the plaintiff in person, and will not be liable to the attorney for his part. Two of the justices dissented: Compare *Vermont v. Chicago etc. Ry. Co.*, 69 Iowa, 296, 22 N. W. 906, 23 N. W. 612. In *Weeks v. Wayne Circuit Judges*, 73 Mich. 256, 41 N. W. 269, it is held that an agreement between attorney and client that the attorney is to be paid for his services rendered in prosecuting a suit, and reimbursed for money advanced, from the proceeds of the judgment, operates as an assignment of the judgment to the attorney to the extent of such claims, and until the claims are paid, the client can give no valid discharge of the judgment: See, too, *Potter v. Ajax Min. Co.*, 19 Utah, 421, 57 Pac. 270.

d. **Fraudulent Settlements.**—While honest settlements between the parties to a litigation, made without any intention of taking advantage of their attorneys are commendable and to be encouraged, col-

lusive and fraudulent settlements made for the purpose of defrauding the attorneys are, of course, reprehensible. If such are attempted, the court may interfere to protect the attorney. Its power to do so is inherent, and is founded on its right to protect its own officers against collusion and fraud practiced by the parties to the cause. The authority of courts in this respect has been exercised both under the common law, and under the statutes designed to secure attorneys in the collection of their compensation for services rendered in a cause. The proper course for the attorney is to proceed with the suit, notwithstanding the fraudulent settlement, for the purpose of enforcing his claims: See the monographic note to *Hanna v. Island Coal Co.*, 5 Ind. App. 163, 51 Am. St. Rep. 268, 276; *Bailey v. Murphy* 136 N. Y. 50, 32 N. E. 627; *In re Regan*, 167 N. Y. 338, 60 N. E. 658; *Fischer-Hansen v. Brooklyn Heights B. R. Co.*, 71 N. Y. Supp. 513, 68 App. Div. 356; *Potter v. Ajax Min. Co.*, 19 Utah, 421, 57 Pac. 270.

The plaintiff's attorney cannot continue with the suit, however, if it appears that the defendant was actuated by no fraudulent motive in making the settlement. In *Courtney v. McGavock*, 23 Wis. 619, the plaintiff's attorney rendered valuable services and advanced money, relying upon an agreement with his client to be paid out of the proceeds of the judgment. The client, by settling the case, and stipulating to dismiss the appeal which had been taken, barred his attorney of securing compensation under the agreement. The conduct of client was unfair and dishonest, and he was utterly insolvent. "The attorneys move," say the court, "to set aside the stipulation, and that the action may proceed as if it had not been made, in order that they may prosecute it to final judgment, and so get their claims according to the terms of the agreement. It would be very gratifying to us if the law would permit them to do so, and if, at the same time, no injustice would be done to the defendant. But injustice would be done to the defendant, and, therefore, the law will not permit it."

In *National Exhibition Co. v. Crane*, 167 N. Y. 505, 60 N. E. 768, the defendant, who was irresponsible, collusively agreed with the plaintiff to discontinue the action without costs. The defendant's attorney objected to the discontinuance. It was held that the court had power to protect the attorney, in his inchoate right to costs, by imposing the payment of costs to the attorney by the plaintiff as a condition to the granting of an order of discontinuance. Chief Justice Parker dissented.

a. **Contracts not to Compromise Suit.**—In contracts between attorney and client, stipulations are sometimes inserted whereby the client agrees not to compromise or settle the controversy without the attorney's consent. Such a stipulation is against public policy, and the contract is void. Any agreement whereby a client is prevented

from settling or discontinuing his suit is void, as tending to foster and encourage litigation: *Davis v. Webber*, 66 Ark. 190, 74 Am. St. Rep. 81, 49 S. W. 822; *North Chicago St. R. R. Co. v. Aakley*, 171 Ill. 100, 49 N. E. 222.

II. Statutes Giving Attorney a Lien.

a. **Effect of—Do not Prevent Settlements.**—Before judgment, an attorney has no common-law lien on the cause of action for his services: *Sandberg v. Victor Gold Min. Co.*, 18 Utah, 66, 55 Pac. 74. Statutes have been enacted, however, giving the attorney a lien on a cause or right of action from the date of the commencement of the suit. These statutes do not permit the plaintiff's attorney to stand in the way of a settlement of an action desired by the parties which does not prejudice his rights. The client still has the unrestricted control of the subject of the action, and the terms upon which a settlement may be made, unless the attorney's claim is prejudiced: *Poole v. Belcha*, 131 N. Y. 200, 30 N. E. 53; *Hart v. Mayor*, 23 N. Y. Supp. 555, 69 Hun, 237; *Reeder v. Lockwood*, 62 N. Y. Supp. 713, 30 Misc. Rep. 531; *Young v. Howell*, 72 N. Y. Supp. 5, 64 App. Div. 246. The settlement does not destroy the lien, however. It continues on the amount or value of the settlement: *Deliver v. American Swan Boat Co.*, 65 N. Y. Supp. 978, 32 Misc. Rep. 264. The lien which the statute fixes on the plaintiff's cause of action "follows the transition, without interruption, and simply attaches to that into which the right of action is merged. If a judicial recovery is obtained, the lien attaches to that; if a compromise agreement is made, the lien attaches to that; and in each case, the attorney's interest is such that it cannot be defeated or satisfied by a voluntary payment to his client without his consent": *Illinois Cent. R. R. Co. v. Wells*, 104 Tenn. 706, 59 S. W. 1041. Indeed, an examination of some of the statutes disclose that by their express terms the lien cannot be affected by any settlement between the parties before or after judgment or final order.

b. Whether Attorney may Continue Suit After Settlement.

1. **Under the Tennessee Statutes.**—Ordinarily, an attorney cannot, where his client has made a bona fide settlement of the cause of action, continue to prosecute the suit for the sole purpose of enforcing his own claims: See *Hutchinson v. Pettes*, 18 Vt. 614; *The Bella*, 91 Fed. 540. Under the Tennessee statute, giving attorneys who begin a suit a lien upon the cause of action from the date of filing the suit, it is held that the plaintiff's attorneys in an action for personal injuries, entitled to a percentage of the recovery, cannot object to the plaintiff's dismissal of the suit, nor can they be made parties and prosecute the suit to its termination after such dismissal: *Tompkins v. Nashville etc. Ry. Co. (Tenn.)*, 72 S. W. 116. Justice McAllister says: "We think that public policy and private right would be best subserved by adhering to the rule so long adopted in

this state, both by statute and legal practice, of permitting a litigant to dismiss her suit without the intervention of her attorney. If, for instance, a complainant in a bill for divorce should conclude to withdraw her complaint, and become reconciled to her husband, should the dismissal of her suit be prevented by her attorney, and he be permitted to become coplaintiff with her in the prosecution of her suit, because by attachment he has impounded property of the husband to secure her alimony? This very case was recently before this court, wherein it was seriously contended by counsel that he had a lien on the complainant's cause of action, and the bill could not be dismissed without the settlement of his fees. It is needless to say that the question was resolved adversely to the contention of counsel. Again, it would seem that a litigant has a right to say when he will no longer incur the liability of a bill of costs for the prosecution of a suit. If he has no right to control this matter, his counsel can carry him through all the courts, and, at the end of a long litigation, have him mulcted in a heavy bill of costs."

2. The Wisconsin Statute provides that a client may contract with his attorney to prosecute a cause of action, and give the attorney a lien upon the cause of action as security for his fees in conducting the litigation; and that when notice of such agreement is given to the opposite party or his attorney, no settlement of the action is valid as against the lien. Under this statute it is held that, in case of settlement between the parties, without the consent of the attorney, he may prosecute the action to final judgment in his own behalf, as though no settlement had been made: *Smelker v. Chicago etc. Ry. Co.*, 106 Wis. 135, 81 N. W. 994. While giving the statute this interpretation, the court doubts the policy of the law which compels parties to litigate in court for the benefit of their attorneys, after they have settled their difficulties.

3. The New York Statutes give an attorney a lien on a cause of action from its commencement, which cannot be affected by any settlement between the parties before or after judgment. On the question whether, in the event of a settlement between the parties without the consent or knowledge of the attorneys, the attorney may prosecute the action to final judgment to enforce his lien, the decisions have been characterized as a "bundle of confusion": See *Burpee v. Townsend*, 61 N. Y. Supp. 467, 29 Misc. Rep. 681. According to some of the cases, the attorney is recognized as having that right: *O'Brien v. Metropolitan St. Ry. Co.*, 27 App. Div. 1, 50 N. Y. Supp. 159; *Pilkington v. Brooklyn Heights R. R. Co.*, 63 N. Y. Supp. 211, 49 App. Div. 22; *Rochford v. Metropolitan St. Ry. Co.*, 63 N. Y. Supp. 1036, 50 App. Div. 261; *Dolliver v. American Saw Boat Co.*, 65 N. Y. Supp. 978, 32 Misc. Rep. 264. In our opinion, the cases in which the court allow the attorney to proceed with the action for his own benefit are limited to those where the settle-

ment is collusively or fraudulently made for the purpose of defeating the attorney's rights. Then, if he cannot get justice otherwise, the court may interfere to protect him, and allow him to take such steps in the cause as are necessary to his protection, but not otherwise: *Poole v. Beleha*, 181 N. Y. 200, 30 N. E. 53; *Peri v. New York Cent. R. R. Co.*, 152 N. Y. 521, 46 N. E. 849; *Mitchell v. Piqua Club Assn.*, 87 N. Y. Supp. 406, 15 Misc. Rep. 366; *Publishers' Print. Co. v. Gillin Print. Co.*, 38 N. Y. Supp. 784, 16 Misc. Rep. 558; *McKay v. Morris*, 72 N. Y. Supp. 23, 35 Misc. Rep. 571; *Young v. Howell*, 72 N. Y. Supp. 5, 64 App. Div. 246.

"The client, having the absolute right of settlement, it must follow that the attorney's lien on the cause of action is subject to such right. The attorney is subject to his client, and his lien to all the prudences, fears, necessities, and so on, of his client, which may induce him to compromise, and settle. The cause of action merges in the settlement. There is then no cause of action left for the attorney's lien to attach to. His lien is determined by the settlement. The amount agreed to be paid in settlement is then all that his lien covers. If nothing is to be paid in settlement, his lien is gone. To say that an attorney for the plaintiff can repudiate such settlement, and harass the defendant by going on with the action in order to see if he cannot, by obtaining a judgment, create a fund, or a larger fund than the amount agreed to be paid in settlement, for his lien to reach, is equivalent to saying that the defendant cannot settle the cause of action with the plaintiff without the attorney's consent; and that is not so": *Schrivver v. Brooklyn Heights R. R. Co.*, 61 N. Y. Supp. 644, 890, 30 Misc. Rep. 145. If the parties settle, "and thereby extinguish the cause of action, the lien is carried along to the sum agreed upon in settlement, the same as it is carried along to the judgment where there is one. This is all that is meant by the provision that the lien cannot be affected by a settlement, for, as we have seen by *Peri v. New York etc. R. R.*, 152 N. Y. 521, 46 N. E. 849, the right of the parties to settle is absolute. The cause of action by the settlement merges into the amount agreed upon in settlement. And if the plaintiff should honestly settle for nothing, all the same the cause of action would be extinguished; and the lien also, for there would be nothing left for it to attach to": *Fenwick v. Mitchell*, 70 N. Y. Supp. 667, 34 Misc. Rep. 617.

4. The Georgia Statute gives attorneys a lien upon a suit whenever the suit commences, and expressly gives them power over the suit to enforce their liens. The decisions under this statute are to the effect that the plaintiff cannot settle and dismiss his suit, over the objections of his attorney, without paying him his charges. If such an attempt is made, the attorney may proceed with the suit to recover the amount of his fee: *Twiggs v. Chambers*, 56 Ga. 279; *Am. St. Rep.*, Vol. 98—12

Coleman v. Ryan, 58 Ga. 132; *Little v. Sexton*, 89 Ga. 411, 15 S. E. 490; *Johnson v. McCurry*, 102 Ga. 471, 31 S. E. 88. The attorney may prosecute the suit in the supreme court in the name of the client for the recovery of his fees, without regard to the objections of the client and his direction to dismiss the writ of error: *Kimbrough v. Pitts*, 63 Ga. 496; *Walker v. Equitable Mortg. Co.*, 114 Ga. 862, 40 S. E. 1010. However, where a settlement is effected between the parties after suit has been filed, but before service of process or actual notice of the filing of the suit, the lien does not arise as against the defendant: *Florida Cent. R. R. Co. v. Bagan*, 104 Ga. 353, 30 S. E. 745. And if, pending the suit, the parties settle their differences, and upon the trial a nonsuit is awarded, the suit thus commenced is thereby ended; and if another action upon the same cause is afterward brought, the defendant may plead such settlement in bar of the renewed suit, as well as in bar of the right of plaintiff's counsel to prosecute the same for the recovery of contingent fees alleged to be due: *Brown v. Georgia etc. Ry. Co.*, 101 Ga. 80, 28 S. E. 634. According to the statute, the lien attaches to the suit only, and not to the cause of action. The court observes that the plaintiff is entitled to make such settlement of his own interest as he may see proper, the law preserving the action and giving the attorneys the power to prosecute it for the recovery of their fees.

5. *Other Statutes.*—In Kansas, where a settlement is made by the parties, the plaintiff's attorney having filed a lien, and given notice thereof, to the defendant, the attorney must proceed by an independent action to establish their lien and collect their fees. It is error if the case proceeds, without any motion for substitution, over the objection of the defendant, as upon an issue between the plaintiff's attorneys and the defendant for the recovery of fees under the lien: *Farry v. Davidson*, 44 Kan. 377, 24 Pac. 419. In other states, defendants settling a judgment with the plaintiff in person, when they have notice of the lien of the plaintiff's attorney, have been held liable to the attorney for what is due him: *Flint v. Hubbard* (Colo. App.), 66 Pac. 446; *Parsons v. Hawley*, 92 Iowa, 175, 60 N. W. 520. But a settlement before the attorney has converted his claim into a lien relieves the defendant from liability: *Barnabee v. Holmes*, 115 Iowa, 581, 88 N. W. 1098; *Day v. Larsen*, 30 Or. 247, 47 Pac. 101. It has been held that an attorney's lien on a judgment cannot be defeated by a discharge of the judgment given by his client to the judgment debtor: *Peterson v. Struby*, 25 Ind. App. 19, 56 N. E. 733, 57 N. E. 590. An execution may issue, notwithstanding, for the balance due the attorney: *Foster v. Danforth*, 59 Fed. 750.

c. *Attorney Must Establish Original Cause of Action.*—If, after the adjustment of a cause between the parties, the plaintiff's attorney is permitted to continue the prosecution of the cause to recover fees, it is indispensable to the maintainance of his action that he

prove the material allegations of the original declaration, and establish a liability upon the part of the defendant to his client, the plaintiff. Such liability cannot be shown by the mere opinion of the original plaintiff that he was entitled to recover an amount stated: *Swift v. Register*, 97 Ga. 446, 25 S. E. 315. It is necessary to establish the existence of the original demand with the same certainty as though the injured party were still prosecuting: *Smelker v. Chicago etc. Ry. Co.*, 106 Wis. 135, 81 N. W. 994.

d. Defendant's Attorney Cannot Continue Suit.—The cases are not many in which the defendant's attorney has questioned a settlement or dismissal of the action between the parties. In *Gavin v. Martin* (Wis.), 93 N. W. 470, an agreement by an attorney to defend an action and receive for his services the cost recoverable from the plaintiff, if successful, was held not to give the attorney such an interest in the action as would prevent a discontinuance without costs on a stipulation signed by the parties. Said Justice Marshall: "The idea that an attorney can acquire a lien of either a legal or an equitable character upon the mere right of his client to defend against the claim or cause of action of the plaintiff, precluding the parties from settling the litigation independently of him, regardless of their motives therefor, is without support in principle or authority, so far as we are aware." But see "Fraudulent Settlements," ante, p. 174.

In Georgia, according to *Fry v. Calder*, 74 Ga. 7, an attorney who successfully defends a suit for foreclosure of an alleged lien, has himself a lien for his fee on the property sought to be subjected. But the parties may settle at any time before judgment, and when this is done the case will not be retained in court to allow the defendant's attorney an opportunity to establish a lien. A fortiori, it follows that if such a case resulted in a judgment for the plaintiff, and the defendant's attorney brought to the supreme court a bill of exceptions alleging error in the overruling of a motion for a new trial, the plaintiff in error has the right to dismiss the writ of error over the objection of his attorney: *Morrison v. Green*, 96 Ga. 754, 23 S. E. 845.

MORRIS & CO. v. MALONE.

[200 ILL. 132, 65 N. E. 704.]

AN AGENT of an Undisclosed Principal is Liable for Negligence in the same manner and to the same extent as if he were the principal in interest. (p. 181.)

MASTER AND SERVANT—Negligence, Liability for.—A master who neglects his duty to use reasonable care to provide a safe place in which his servant may work, and negligently fails to advise him of the danger to which he is exposed by such omission, is answerable for injuries suffered from such negligence. (p. 182.)

F. J. Canty and J. A. Bloomington, for the appellant.

John P. Ahrens and F. W. Becker, for the appellee.

132 BOGGS, J. Judgment against the appellant in the sum of two thousand dollars, entered in the superior court of Cook county in an action under the statute by the appellee administratrix, for the benefit of the widow and next of kin of Peter Malone, deceased, was affirmed by the appellate court for the first district. The recovery was upon the ground that the said Peter Malone, while in the employ of the appellant company, through the negligence of the company, received personal injuries which caused his death. This appeal asks reversal of the judgment of affirmance upon two grounds: 1. That the superior court erred in refusing to admit proper and competent evidence offered in behalf of appellant; 2. That the superior court erred in denying the motion, entered by appellant at the close of all the evidence, to instruct the jury to return a verdict in appellant's favor.

The evidence which was tendered by appellant and excluded was designed, as counsel for appellant insist, to show that on the day of the accident the appellant company, a copartnership, "was acting as an agent of the Fairbank Canning Company, and that it was organized as a copartnership simply for that purpose and for the purpose of selling goods only, and not manufacturing or producing, and for the further reason of showing that the name 'Nelson Morris & Co.' was used simply because it was better known to the trade and for advertising purposes on that account," and that actually the said deceased, Peter Malone, was in the employ of the said appellant company as agent for the Fairbank Canning Company.

The evidence clearly showed that the deceased was employed by Nelson Morris & Co., and that it was not disclosed to him

that said Nelson Morris & Co. was acting as agent for any one, if it was, in fact, so acting. The testimony of the foreman under whom deceased worked, and the man who employed the deceased, was that he, ¹³⁴ as foreman for Nelson Morris & Co., employed the deceased, and that deceased was in the employ of Nelson Morris & Co. Nelson Morris & Co. was operating the factory in which the accident occurred, as owner and proprietor thereof, so far as the public and the workmen employed therein knew. Upon this point there was no controverting proof. The contention Nelson Morris & Co. was in fact acting as agent first arose from the offer of the excluded testimony. We think that the agency, if any existed, not having been disclosed, Nelson Morris & Co. became liable for negligence, either by way of misfeasance or nonfeasance, in the same manner and to the same extent as if it were a principal in interest: *Malone v. Morton*, 84 Mo. 436. The evidence was therefore properly excluded.

The court did not err in refusing to direct a peremptory verdict in favor of the appellant company. The deceased, while in the employ of the appellant company, was ordered to go into a vat and there receive, and place in even, level rows, hams of about fifty pounds' weight, which were to be conveyed to the vat from the floor above by means of a "chute." The vat was fifteen feet long from east to west, five feet four inches wide and four feet deep. The chute was of the dimensions of two feet by four feet, and passed from the floor above to the bottom of the vat, dividing the vat into two equal compartments, save that there was a space of about sixteen inches between one side of the vat and the chute. The chute was double—that is, it delivered hams to each compartment of the vat. The compartments of the vat were six and one-half feet by five feet four inches, and four feet in depth. The deceased was in the easternmost compartment. About ten inches above that part of the vat in which he was working was a shaft and an iron rod called a "belt-shifter." The shaft, when in motion, made five hundred revolutions per minute. The purpose of the belt shifter was to shift the belt and put the machinery in ¹³⁵ motion or throw it out of gear. The shaft passed over the vat at a point about two feet west of the east end, and the belt-shifter was some eighteen inches still further to the west. The shaft and belt-shifter were four feet and ten inches above the bottom of the vat where the deceased was working. If standing upright on the bare floor of the vat, his head and

shoulders would have been above the shaft and belt-shifter. The shaft was not boxed or otherwise covered so as to protect the workmen from coming in contact with it. After the vat was about half full of meat, on which the deceased was standing, the shaft, by some means not disclosed, was put in motion, caught the clothing of the deceased and whirled him about the shaft and instantly killed him. There were seven other vats in the same room, and the deceased had worked in the other vats, but never before in the one in which he was killed. The shaft did not pass above any of the other vats. The danger which attended the work in this vat was not explained to the deceased, and the shaft was not in motion when he entered the vat. It appeared that the machinery might be put in motion by a pressure of fifteen pounds upon the belt-shifter over the vat. The belt-shifter was not boxed or in anywise protected from contact with the workmen. The evidence tended to show the deceased was not advised and did not know that pressure upon the belt-shifter might put the shaft in motion.

The testimony tended to show the appellant company neglected its duty to use reasonable care to provide a safe place in which the deceased might work, and negligently failed to advise him of the dangers to which he was exposed by such omission of duty. The court therefore properly declined to declare, as matter of law, that the appellant company was free from the negligence charged in the declaration.

The judgment of the appellate court must be and is affirmed.

One Acting as Agent of an undisclosed principal may be treated as a principal by the party with whom he deals: Welch v. Goodwin, 123 Mass. 71, 25 Am. Rep. 24; monographic note to Baird v. Shipman, 22 Am. St. Rep. 508. And the actual perpetrator of a wrong cannot exonerate himself from personal liability by showing that he was acting as the agent of another: Note to Baird v. Shipman, 22 Am. St. Rep. 512. As to an agent's liability for unsafe premises, see Kuhnert v. Angell, 10 N. Dak. 59, 88 Am. St. Rep. 675, 84 N. W. 579; Baird v. Shipman, 132 Ill. 16, 22 Am. St. Rep. 504, 23 N. E. 384; Mayer v. Thompson etc. Co., 104 Ala. 611, 53 Am. St. Rep. 88, 16 South. 620.

A Servant has the right to assume that his master will furnish a reasonably safe place to work, and warn him of the dangers incident to the employment. If the master does not do this, he is answerable for the consequences: Downey v. Gemini Min. Co., 24 Utah, 481, 91 Am. St. Rep. 798, 68 Pac. 414; Western Stone Co. v. Muscial, 196 Ill. 382, 63 N. E. 664, 89 Am. St. Rep. 325, and cases cited in the cross-reference note thereto: Ribich v. Lake Superior Smelting Co., 123 Mich. 401, 81 Am. St. Rep. 215, 82 N. W. 279.

DU BOIS v. PEOPLE.

[200 Ill. 157, 65 N. E. 658.]

CRIMINAL LAW.—The Confidence Game is any Swindling Operation in which advantage is taken of the confidence reposed by the victim in the swindler. (pp. 185, 186.)

CRIMINAL LAW.—Confidence Game—False Telegrams of Confederates.—One who induces another to purchase worthless stocks on representations that they can be sold for an advanced price, and by having confederates telegraph under fictitious names from another city that they will purchase at such price, is guilty and subject to punishment under a statute providing that every person who shall obtain, or attempt to obtain, any money or property by means of any false or bogus checks, or by any other means, instrument, or device commonly called the confidence game shall be imprisoned in the penitentiary. (p. 186.)

EVIDENCE of Other Crimes than that for which the defendant is on trial may be admitted when it is offered for the purpose of proving, and it tends to prove, guilty knowledge. (p. 188.)

EVIDENCE.—The Admission of Incompetent Evidence does not entitle the accused to a reversal, if the evidence clearly justifies the verdict, and it must have been the same if the incompetent evidence had not been admitted. (p. 188.)

CRIMINAL TRIALS.—Whether the Prosecution Shall be Ruled to Furnish a Bill of Particulars is a matter within the sound legal discretion of the court. (p. 188.)

CRIMINAL LAW.—Bill of Particulars, When Unnecessary.—Under an indictment charging the defendant with obtaining money from a person specified by means and by use of the confidence game, he is not entitled to a bill of particulars. (p. 189.)

R. A. Wade and John E. Northrup, for the plaintiff in error.

Charles S. Deneen, state's attorney, and Edwin S. Elliott, for the people.

¹⁸⁸ WILKIN, J. Harry Du Bois, alias Harry I. Harris, and Charles M. Fegenbush, alias Charles K. Thorne, were indicted by the grand jury of Cook county, at the November term, 1900, of the criminal court, for the crime of obtaining money by means and by use of the confidence game. Upon the trial at the May term, 1902, they were convicted and sentenced to the penitentiary at Joliet. Harry Du Bois, alias Harris, alone prosecutes this writ of error.

The testimony of the prosecuting witness, Mrs. Laura G. Fixen, shows that she resided in the city of Chicago and knew both defendants. She first met Fegenbush, who called himself Thorne, early in the fall of 1900, at which time she answered an advertisement which he had caused to be published

in the "Sunday Tribune," and he called upon her. The advertisement was to the effect that anyone who would invest money with him could double it or get large returns for it in a short time. When he called upon her, which was early in September, he read a letter to her which he said was from his brother in Denver, Colorado, to the effect that the brother knew certain firms there who were anxious to buy stock in a valuable mine and Fegenbush told her that he knew where a large block of the stock was; that a man by the name of Harris had it, and that the Colorado parties had difficulty in locating him, but that he (Fegenbush) had located him and would take her to the man if she thought she wanted to buy the stock; that she could sell it to the ¹⁵⁹ Colorado parties, and that he then read the names of the parties in Denver from the letter purporting to be from his brother. She told him she would go and see Harris, and they went together the same day. They found Harris about 29 Indiana avenue, in bed, with his head bundled up, claiming to be suffering from rheumatism and seeming to be in great pain. He showed her the stock and said he wanted to sell it so he could go to Hot Springs. She obtained from him an option for sixty thousand shares of stock at five cents per share, in the Ward Consolidated Gold Mine Company of Colorado, to be paid for before September 20, 1900, else the agreement should be void. Fegenbush was present at the time of the signing of the option agreement, and as soon as they left the house Mrs. Fixen went to the telegraph office and telegraphed the parties in Denver whose names had been given her, asking what they would give for the stock. In about two hours she received replies, purporting to be signed by the firms telegraphed to, each making an offer for the stock, ranging from ten to twenty cents per share for the entire block of sixty thousand shares. Upon receiving these telegrams she went the next day to see Harris, thinking it was a good investment, and taking with her three thousand dollars in cash. She found him in bed, as before, and after some negotiations she took an assignment of the stock and paid him the three thousand dollars. She immediately took a train for Denver, and upon arriving there made inquiry for the parties whose names were signed to the dispatches received by her, and soon ascertained that there were no such persons or firms in the city—in other words, that the dispatches were false and fictitious. She returned immediately to Chicago, and began to look for the defendants, but failed to

find either of them. She then reported the case to the police, and the defendants were subsequently located in Washington City and arrested, but by some means successfully resisted the extradition papers. They were later found in the city of New York, ¹⁶⁰ arrested and brought back to Chicago. They gave bond for their appearance, but their recognizance was forfeited, but they were finally brought to trial with the result above mentioned.

It is clear, not only from the testimony of Mrs. Fixen, but from that of the defendants themselves, that the whole scheme was a plot to obtain the money of Mrs. Fixen by fraudulently obtaining her confidence and inducing her to believe that the worthless shares of stock held by Harris were of great value. That the dispatches sent by her from Chicago to Denver, inquiring what the stock could be sold for, were answered by a confederate of the defendants is perfectly clear. Fegenbush virtually admits it by saying, "I don't know that I had a confederate in Denver to answer these telegrams." In short, the evidence is overwhelming that the defendants, acting together, by false and fraudulent means, commonly known as the confidence game, obtained the money of the prosecuting witness.

Counsel for plaintiff in error admit that the conduct of defendants was criminal, but seek to show that the crime committed was that of obtaining money by false pretenses, and not a violation of the statute against obtaining money by means of the confidence game, the argument being that the "means, instrument or device" used was not such as is contemplated by the use of those terms in the statute, and therefore the evidence fails to support the verdict. Section 98 of the Criminal Code (Starr and Curtis' Annotated Statutes of 1896, p. 1280) is as follows: "Every person who shall obtain, or attempt to obtain, from any other person or persons, any money or property, by means or by use of any false or bogus checks, or by any other means instrument or device commonly called the confidence game, shall be imprisoned in the penitentiary not less than one year nor more than ten years." The words, "or by any other means, instrument or device," were intended by the legislature to embrace any other means, ¹⁶¹ instrument or device, than false or bogus checks, which comes within the meaning of what is commonly called the confidence game: *Maxwell v. People*, 158 Ill. 248, 41 N. E. 995. "Confidence game is any swindling operation in which advantage is taken

of the confidence reposed by the victim in the swindler": Webster's International Dictionary. This definition was quoted and adopted in *Maxwell v. People*, 158 Ill. 248, 41 N. E. 995. The Century Dictionary and Cyclopedia, volume 2, page 1183, defines confidence game as "a kind of swindle, practiced usually in large cities upon unwary strangers."

It is further said by counsel for plaintiff in error "that the means, instrument or device relied upon by the state as indicating guilt must be that which is actually given or parted with for the money or property of another, and therefore the proximate cause inducing such person to part with his money or property." This proposition is clearly unsound. The confidence game is most frequently practiced by the use of cards, dice or other means, instrument or device, in which game the victim gets nothing, but is simply swindled out of his money by a trick, as was the case in *Maxwell v. People*, 158 Ill. 248, 41 N. E. 995, and *Van Eyck v. People* 178 Ill. 199, 52 N. E. 852. The means used in this case were to our minds clearly within the inhibition of section 98. While the point was not raised in *Morton v. People*, 47 Ill. 468, the language of Chief Justice Breese, who rendered the opinion in that case, clearly sustains the view here expressed.

Two witnesses were introduced by the prosecution, Berlzheimer and Brewer, and allowed to testify, over the objection of counsel for the defendants, to certain transactions by Du Bois similar to the one practiced upon Mrs. Fixen, and that ruling is assigned for error. In so far as that testimony tended to show a willingness on the part of the defendant Du Bois to commit other offenses similar to the one charged in the indictment it was competent, as repeatedly held by this court; but it is claimed by counsel for the people that it was not ^{was} offered for that purpose, but to prove that said Du Bois had guilty knowledge. The first witness says: "I know the defendant Du Bois. I first saw him about the last of April or the first of May last year. I read the ad. in the 'Tribune.' The ad. stated that by a two thousand dollar investment there would be six thousand dollars or eight thousand dollars made within a few weeks without any risk whatsoever, and a sure case. The first thing he said when he came to the house was, that he had a brother in a large brokerage house in Denver. He wrote to him that by chance he had found out that there was a mine that contained a good deal of valuable gold, and he thought they could work that privately themselves without the

concern in Denver knowing anything about it." He then goes on to detail a scheme proposed by Du Bois as to sending dispatches, getting answers, etc., similar to that presented to Mrs. Fixen by Fegenbush. Brewer testified that he knew both the defendants, and that he saw Du Bois first. He says: "He came to my office in the last of July, 1900. I didn't know him before that. He came in with a friend of his and said they had been sent by a friend of mine. The man who was with him went by the name of Ford. Du Bois said his name was William Davidson. My clerk was there. He heard part of the conversation. Du Bois said he had some stock hypothecated with some dealer in Dearborn street, and that he had been advised that the stock was becoming valuable and he wanted to get it out. He said it would require five hundred dollars, and interest, to redeem the stock certificate, and that he had offers from several parties in Denver at a much advanced figure for the stock, and asked me if I would help him out to the extent of getting this stock out for him and sending it out to Denver. He showed me correspondence and gave me the names of parties in Denver to whom he was going to sell. He gave me the name of Haskell, Tripp & Bey, in Denver, in the Equitable Building." This was the name of one of the firms which was given Mrs. Fixen ¹⁰⁰⁸ by Fegenbush. The witness proceeds: "So I wired to Haskell, Tripp & Bey and received a response from them. I have it here. I got it the same day. I just wired would they honor a sight draft for this stock certificate." By this means Brewer was induced to advance the money to redeem the certificate. The dispatch from the Denver firm proved a forgery, as did those sent to Mrs. Fixen, and Brewer lost the money which he invested. This testimony tended very strongly to show that Du Bois knew all about the means used by his confederate, Fegenbush, in obtaining the money from the prosecuting witness, and was not, as he claimed to be, the honest, innocent holder of the sixty thousand shares of stock which he simply sold without any knowledge of the conduct of Fegenbush. We think the evidence was clearly competent against Du Bois, and he alone is complaining of its admission.

The court, by an instruction to the jury, informed them that the evidence could not be considered as tending to prove that it was likely or probable that defendants committed the offense charged in the indictment, "but these facts may be considered by the jury, together with and in the light of all the

facts and circumstances proved in the case, as evidence which may tend to show that the defendants knew the stock was false or worthless." Although evidence may tend to prove a defendant guilty of an offense not charged in the indictment, it is not for that reason incompetent if it fairly tends to prove the offense charged in the indictment: *Farris v. People*, 129 Ill. 521, 16 Am. St. Rep. 283, 21 N. E. 821; *Williams v. People*, 166 Ill. 132, 42 N. E. 749; *Bottomly v. United States*, 1 Story, 135, Fed. Cas. No. 1688; *Cook v. Moore*, 11 Cush. 213. Many other cases might be cited to the same effect. But even if the testimony of these two witnesses could be said to be incompetent, still, in view of the other evidence, the competency of which is not questioned, its admission could not be regarded as reversible error. "In cases where the evidence clearly justifies the finding, and it ¹⁶⁴ must have been the same had not certain incompetent evidence been admitted, the error in its admission will be no ground for a reversal": *Jackson v. People*, 126 Ill. 139, 18 N. E. 286; *Williams v. People*, 166 Ill. 132, 42 N. E. 749.

A motion was made by the plaintiff in error to rule the prosecuting attorney to furnish a bill of particulars, which was denied, and this is assigned for error. Without reference to the point made by the people that the motion was too late, it was properly denied. It is well understood that whether or not the state shall be ruled to furnish a bill of particulars in a particular case is a matter within the sound legal discretion of the court. Here we are at a loss to perceive wherein a bill of particulars was necessary in order to protect the rights of the defendants. In *Morton v. People*, 47 Ill. 468, on the question whether it was sufficient to charge the crime in the language of the statute, it is said (page 473): "It is insisted by counsel for the plaintiff in error that the accused can not know, from this indictment, the exact charge against him and the outer lines within which the evidence must be confined, and cannot know what evidence he will be required to meet; nor could a conviction under this indictment be pleadable in bar of another indictment for the same offense, nor can the court see in it that a legally defined crime has been committed. They insist that the term 'confidence game' has no definition 'in law or literature,' and that 'no fifty men can be found who will define alike the confidence game.' They further insist that the indictment should specify all the facts with such certainty that the offense may judicially appear to the court." After refer-

ring to the statute, the second section of which provides "that in every indictment under this act it shall be deemed and held a sufficient description of the offense to charge that the accused did, on, etc., unlawfully and feloniously obtain, or attempt to obtain (as the case may be), from A B his money by means and by use of the confidence game," it is further said: "The ¹⁰⁰ nature and character of the so-called confidence game has become popularized in most of the cities and large towns, and even in the rural districts of this broad Union, and is well understood, and this defendant was distinctly apprised by the indictment of what he was called upon to defend. The accusation is sufficiently identified by the name of the victim. This name must appear in every indictment on this statute, and appearing there no second indictment for the same offense could be successfully prosecuted. The conviction on this indictment could be always pleaded in bar of a second. We are of opinion that the offense is so set forth in the indictment that the accused can be at no loss to know what it is with which he is charged, and can so prepare his defense." And so in this case, the judgment of conviction here sought to be reversed could be successfully pleaded in bar of a second prosecution for the same offense. It is idle to say that a bill of particulars was necessary in order to enable the defendants to prepare their defense. When they were apprised of the fact that they were charged with obtaining money of Laura G. Fixen by means and use of the confidence game, they were apprised of every fact connected with that transaction, as they clearly show by their own testimony in attempting to relieve it of its criminality.

Complaint is made of the conduct of the court in making remarks, during the trial, prejudicial to the rights of the defendants. We think this point is without substantial merit. He instructed the jury fully and fairly as to the law of the case, and, we think, protected the defendants in all their legal rights, securing them a fair and impartial trial.

The judgment of the criminal court is clearly right, and it will be affirmed.

The Offense of Obtaining Money by false pretenses is considered in the monographic note to Barton v. People, 135 Ill. 405, 25 Am. St. Rep. 378-392. Larceny by obtaining possession of property by fraud, trick, or artifice is considered in the monographic note to People v. Miller, 88 Am. St. Rep. 569-571. Criminal use of the United States mails is considered in the monographic note to State v. McCabe, 58 Am. St. Rep. 595-603.

Bill of Particulars.—The granting or refusing of a motion for a bill of particulars is within the sound discretion of the trial court: *Turner v. Great Northern Ry. Co.*, 15 Wash. 213, 55 Am. St. Rep. 883, 46 Pac. 243; *Tilton v. Beecher*, 59 N. Y. 176, 17 Am. Rep. 337. It is only when it appears that the defendant cannot properly prepare his defense without a bill of particulars, that the court will order the prosecuting attorney to furnish it: *Kelly v. People*, 192 Ill. 119, 35 Am. St. Rep. 323, 61 N. E. 425.

CHICAGO AND ALTON RAILROAD COMPANY v. CITY OF CARLINVILLE.

[200 Ill. 314, 65 N. E. 730.]

RAILWAYS—Speed of—Municipal Ordinances Regulating—Cities and villages have the power by ordinance to regulate the speed of trains within their corporate limits, provided the regulation is reasonable. (p. 193.)

MUNICIPAL CORPORATIONS—Ordinances—When Cannot be Declared Void Because Unreasonable.—Where an ordinance is passed in pursuance of the power expressly conferred by the legislature, and the details of such municipal legislation are prescribed by the legislature, the ordinance cannot be held invalid by the courts as being unreasonable, but when the details of such legislation are not prescribed, an ordinance passed in pursuance of such power must be a reasonable exercise of the authority, or it will be pronounced invalid. (p. 194.)

MUNICIPAL ORDINANCES Regulating the Speed of Trains—Power of the Courts to Question as Unreasonable.—A statute giving municipal corporations the right to regulate the speed of trains within their limits, but providing that no passenger train shall be limited to less than ten, nor any freight train to less than six, miles per hour, does not preclude the courts from declaring that an ordinance limiting trains to the speed designated in the statute is invalid, if it clearly appears to be an unreasonable exercise of the power given to the municipality. (p. 195.)

MUNICIPAL CORPORATIONS—Presumption in Favor of Ordinances of.—The presumption is in favor of the validity and reasonableness of an ordinance, and it is therefore incumbent on one who claims it to be invalid to show wherein its unreasonableness consists. It should be manifest that the discretion imposed in the municipal authorities has been abused by exercising the power in an arbitrary manner. (p. 195.)

MUNICIPAL ORDINANCES Limiting Speed of Trains—Interference with Trade.—The mere fact that an ordinance may operate to restrain trade or retard transportation will not justify the court in holding invalid an ordinance regulating the speed of trains, when the speed is not below the limit prescribed by the legislature, and when it does not clearly appear that the ordinance is unreasonable and unnecessary for the safety of the public, and for the protection of life and property. (p. 196.)

RAILWAYS—Speed of Trains.—A Municipal Ordinance Limiting the Speed of Passenger Trains Within a City to Ten Miles Per Hour will not be declared void and unreasonable. (p. 197.)

CONSTITUTIONAL LAW — Municipal Limitations upon Speed of Railway Trains.—A municipal ordinance limiting the speed of passenger trains within a city to ten miles per hour is not invalid as imposing an unreasonable restraint on interstate commerce and the speedy transportation of the United States mails. (p. 198.)

Patton & Patton and William Brown, for the appellant.

William H. Steward, city attorney, and A. J. Duggan, for the appellee.

216 HAND, J. This was a suit brought by the appellee against the appellant, before a police magistrate, to recover a penalty for a violation of the following ordinance of the city of Carlinville:

"Sec. 261. No railroad company, or conductor, engineer or other employé of such company managing or **217** controlling any locomotive engine, car or train upon any railroad track, shall run, or permit to be run, within the limits of said city, any passenger train or car at a greater rate of speed than ten miles per hour, nor any freight train or car at a greater rate of speed than six miles per hour, under a penalty, in either case, of not exceeding twenty-five dollars for each offense."

A trial was had, and judgment was rendered against the appellant, from which it appealed to the circuit court, where a jury was waived and a trial had before the court, which resulted in a judgment against the appellant for five dollars and costs, which judgment has been affirmed by the appellate court for the third district, and a further appeal has been prosecuted to this court.

The appellant objected to the introduction of said ordinance in evidence on two grounds: 1. That said ordinance was unreasonable, and therefore void; 2. That said ordinance is an unreasonable restriction upon interstate commerce and an unnecessary hinderance to the speedy carrying of the United States mail, and in conflict with the constitution of the United States. The court overruled said objections and admitted the ordinance in evidence, to which ruling of the court the appellant excepted and has assigned the same as error in this court. The objections will be disposed of in the order in which they were made and are here presented.

The city of Carlinville is located upon the main line of the appellant's railroad, and is about midway between the cities

of Springfield and East St. Louis. It has a population of about three thousand six hundred and is the county seat of Macoupin county. The tracks of appellant run through the incorporated limits of the city from the northeast toward the southwest for about one mile and a quarter. The principal part of the city is located on the east side of its tracks, which cross four streets within the city, two of which are among the principal thoroughfares of the city. The city has the usual residences, stores, shops ³¹⁸ and public buildings common to a county seat of its size, and a coal shaft, grain elevator and pickle factory are located within the city near the main line of appellant, which obstruct, to a considerable extent, the view of its tracks and approaching trains. The "Alton Limited" is a fast train, which was equipped for the accommodation of through passengers between the cities of Chicago and St. Louis. It makes but few stops, and runs in competition with similar trains operated between said points by the Illinois Central and Wabash railroads, which very nearly parallel its route. The distance between Chicago and St. Louis by appellant's line is about two hundred and eighty miles, about sixty-five miles of which is within incorporated cities, towns and villages in the state of Illinois. The distance between said cities by the other railroads referred to is about the same as that over appellant's line, but the Illinois Central and Wabash railroads have a less amount of track within the limits of incorporated cities, towns and villages. The Alton Limited schedule time between Chicago and St. Louis is seven and three-fourths hours. It carries the United States mail, and runs to make connection with railroad lines from the east and northwest entering and leaving Chicago, and from the west and southwest entering and leaving St. Louis, carrying through passengers and the United States mail. It was admitted that the Alton Limited had been run by the appellant within the incorporated limits of the city of Carlinville at from fifty to sixty miles per hour, and at a prohibited rate of speed, and in violation of said ordinance, if said ordinance was valid and binding upon it.

The city of Carlinville is organized under the general law providing for the incorporation of cities and villages, and passed the ordinance in question under and by virtue of the power conferred upon it by that act, subject to the limitation imposed by the act in regard to fencing and operating railroads. Paragraph 21 of section 1 of ³¹⁹ article 5 of the general incorporation act (Hurd's Stats. 1899, p. 275) provides

that cities shall have the right "to regulate the speed of . . . cars and locomotives within the limits of the corporation," and section 24 of the act in regard to fencing and operating railroads (Hurd's Stats. 1899, p. 1332), provides "that no such ordinance shall limit the rate of speed in case of passenger trains to less than ten miles per hour, nor in any other case to less than six miles per hour." Subject to the limitation that no ordinance shall be passed which limits the speed of a passenger train to less than ten miles per hour, and in any other cases to less than six miles per hour, the matter of regulating the speed of trains within incorporated cities and villages is left entirely to the municipal authorities: *City of Lake View v. Tate*, 130 Ill. 247, 22 N. E. 791. That cities and villages have the power, by ordinance, to regulate the speed of trains within their corporate limits is recognized by the courts of this country, so far as we have been able to discover, without exception, provided such regulation is reasonable: *Toledo etc. Ry. Co. v. Deacon*, 63 Ill. 91; *Chicago etc. R. R. Co. v. Haggerty*, 67 Ill. 113; *Meyers v. Chicago etc. R. R. Co.*, 57 Iowa, 555, 42 Am. Rep. 50, 10 N. W. 896; *Crowley v. Burlington etc. Ry. Co.*, 65 Iowa, 658, 20 N. W. 467, 22 N. W. 918; *Whitson v. City of Franklin*, 34 Ind. 392; *Cleveland etc. Ry. Co. v. Harrington*, 131 Ind. 426, 30 N. E. 27; *Weyl v. Chicago etc. Ry. Co.*, 40 Minn. 350, 42 N. W. 24.

In *Toledo etc. Ry. Co. v. Deacon*, 63 Ill. 93 it is said: "Though the legislature has granted franchises to railway corporations, and authorized them to procure the right of way and operate their trains by the power of steam, yet they have not unlimited discretion in the regulation of the speed of trains. They cannot act recklessly and in disregard of the safety and rights of others. The state has reserved to itself the power to enact all police laws necessary and proper to secure and protect the life and property of the citizen. ³²²⁰ Prominent amongst the rights reserved, and which must inhere in the state, is the power to regulate the approaches to and the crossing of public highways and the passage through cities and villages, where life and property are constantly in imminent danger by the rapid and fearful speed of railway trains. The exercise of their franchises by corporations must yield to the public exigencies and the safety of the community."

In *Chicago etc. R. R. Co. v. Haggerty*, 67 Ill. 113, an objection was made to the admission in evidence of an ordinance of the town of Camp Point prohibiting the running of trains

within the town at a greater rate of speed than six miles per hour. On page 115 the court say: "It is contended that the ordinance is null and void because the town had no authority to pass such an ordinance, and because the company was expressly authorized by law to fix and regulate the rate of speed of trains upon its road. There is no grant of power to this town, in express terms, to regulate the rate of speed of railway trains passing through the town, but by its charter (Private Laws 1857, pp. 540, 541) the board of trustees of the town have the power to declare what shall be considered as nuisances, and to prevent and remove the same, and to regulate the police of the town, and to make such ordinances as the good of the inhabitants of the town may require. Under these powers we think the town possessed the authority so to order the use of private property within its limits as to prevent its proving dangerous to the safety of the persons and property of citizens; and we view the ordinance in question as but a police regulation for the preservation of the safety of persons and property, the adoption of which was no more than a fair exercise of the police power vested in the town."

The books and reported cases seem to agree that courts may declare void an ordinance passed by a city or village by virtue of its implied powers, if, in the opinion ³²¹ of the court, it is unreasonable; but when the ordinance is passed by express authority conferred upon the municipality by the legislature such power is not so clear, and there is conflict of authority upon that proposition: *Burg v. Chicago etc. Ry. Co.*, 90 Iowa, 106, 48 Am. St. Rep. 419, 57 N. W. 680. The rule adopted in this state is, that where the ordinance is passed in pursuance of power expressly conferred by the legislature and the details of such municipal legislation are prescribed by the legislature, an ordinance passed in pursuance of such power cannot be held invalid by the courts as being unreasonable; but when the details of such legislation are not prescribed, an ordinance passed in pursuance of such power must be a reasonable exercise thereof or it will be pronounced invalid: *City of Lake View v. Tate*, 130 Ill. 247, 22 N. E. 791; *Hawes v. City of Chicago*, 158 Ill. 653, 42 N. E. 373; *Wice v. Chicago etc. Ry. Co.*, 193 Ill. 351, 61 N. E. 1084. It is said in the *Tate* case, on page 252 of 130 Ill., and page 793 of 22 N. E.: "Where the power to legislate on a given subject is conferred and the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power

or it will be pronounced invalid." In *Hawes v. City of Chicago*, 158 Ill. 653, 42 N. E. 373, Mr. Justice Baker, in speaking for the court, in discussing the question when a court may rightfully hold an ordinance unreasonable, on page 658 said: "Where the power to legislate on a given subject is conferred on a municipal corporation, yet if the details of such legislation are not prescribed by the legislature, there the ordinance passed in pursuance of such power must be a reasonable exercise thereof or it will be pronounced invalid." The *Hawes* case was cited in *Wice v. Chicago etc. Ry. Co.*, 193 Ill. 351, 61 N. E. 1084, and the language thereof quoted with approval.

The legislature did not distinctly say what may be done by municipalities in regulating the speed of trains passing through their limits. It only said that the speed of trains should not be limited below a certain rate per ^{hour} hour, and with that exception left the matter wholly within the discretion of the municipal authorities, and we think it clear the legislature did not prescribe the details to be observed in the passage of an ordinance regulating the speed of trains in their passage through incorporated cities and villages, and that the court has the power to decide such an ordinance as this invalid, if it clearly appear that it be an unreasonable exercise of such power. This ordinance, to be valid, must not, therefore, be unreasonable. The presumption, however, is in favor of its validity and that it is reasonable and it is incumbent upon appellant to point out and show affirmatively wherein such unreasonableness consists: *People v. Cregier*, 138 Ill. 401, 28 N. E. 812. Ordinances of the character of the one under consideration are passed under and by virtue of the police power, which has been defined, in general terms, "as comprehending the making and enforcement of all such laws, ordinances and regulations as pertain to the comfort, safety, health, convenience, good order and welfare of the public": *Culver v. City of Streator*, 130 Ill. 238, 22 N. E. 810. The determination of the question whether or not the ordinance in question was reasonably necessary for the protection of life and property within the city was committed, in the first instance, to the municipal authorities thereof by the legislature. When they have acted and passed an ordinance it is presumptively valid, and before a court would be justified in holding their action invalid, the unreasonableness or want of necessity of such a measure for the public safety and for the protection of life and property should be clearly made to appear. It should be manifest that the discretion im-

posed in the municipal authorities has been abused by the exercise of the power conferred, by acting in an arbitrary manner: *Knobloch v. Chicago etc. Ry. Co.*, 31 Minn. 402, 18 N. W. 106; *Evison v. Chicago etc. Ry. Co.*, 45 Minn. 370, 48 N. W. 6. The argument of appellant amounts to but this: if this ordinance and ³²³ similar ordinances in the other municipalities along its line are valid and are enforced, its schedule time must be lengthened, the effect of which will be that it will be unable to give to its patrons the service which they demand and which its competitors offer them, and it can not successfully operate its road. This may seem, in some degree, to be true; but a requirement that it stop its trains at railroad crossings and drawbridges has the same effect, still such regulations are held valid. The mere fact that an ordinance may operate to restrain trade or retard rapid transportation will not justify a court in holding an ordinance invalid regulating the speed of trains when the speed limit is not below that prescribed by the legislature, and when it does not clearly appear that such ordinance is unreasonable and unnecessary for the safety of the public and for the protection of life and property. "An ordinance of this character may restrain trade and yet be necessary and reasonable as a police regulation. The rapid transaction of business by the railway company may be hindered and trammled by an ordinance controlling and regulating the rate of speed with which railway trains may be sent over and through the streets and populous portions of our towns and cities, but when necessary for the proper protection of life and property, the celerity and dispatch with which business may be accomplished is but secondary": *Weyl v. Chicago etc. Ry. Co.*, 40 Minn. 350, 42 N. W. 24.

In *Knobloch v. Chicago etc. Ry. Co.*, 31 Minn. 402, 18 N. W. 106, which was an action for damages, the supreme court of Minnesota held an ordinance limiting the speed of trains within the city of St. Paul to four miles per hour not to be unreasonable, although the accident took place at a crossing in a sparsely settled portion of the city. To the same effect is *Weyl v. Chicago etc. Ry. Co.*, 40 Minn. 350, 42 N. W. 24. The court of appeals of the state of New York, in *City of Buffalo v. New York etc. R. R. Co.*, 152 N. Y. 276, 46 N. E. 496, held ³²⁴ an ordinance limiting the speed of trains in the city of Buffalo to six miles an hour reasonable. In *Whitson v. City of Franklin*, 34 Ind. 392, the supreme court of Indiana held an ordinance limiting the speed of trains in the city of

Franklin to four miles per hour reasonable. In *Larkin v. Burlington etc. Ry. Co.*, 85 Iowa, 492, 52 N. W. 480, the supreme court of Iowa sustained an ordinance prohibiting passenger trains from running at a higher rate of speed than ten miles per hour through the corporate limits of West Liberty, where it appeared the crossing at which the injury took place was three-fourths of a mile from the depot, the principal part of the town on the east side of the railroad, and the land upon the west side of the track used mainly for agricultural purposes.

The appellant has cited three cases, in each of which a speed ordinance was held invalid by reason of the limitation as to the time per hour in which trains were permitted to run within the corporate limits of a city: *Evison v. Chicago etc. Ry. Co.*, 45 Minn. 370, 48 N. W. 6; *Meyers v. Chicago etc. R. R. Co.*, 57 Iowa, 555, 42 Am. Rep. 50, 10 N. W. 896; and *Burg v. Chicago etc. Ry. Co.*, 90 Iowa, 106, 48 Am. St. Rep. 419, 57 N. W. 680. In each of these cases the train was running through a sparsely settled section of the outskirts of the city, at a point where the court held there was no necessity that the speed of the train be decreased for the safety of the public or the protection of life and property. In each case (they being actions to recover damages) the ordinance was held void as applied to the particular place where the injury occurred, and not as to the entire ordinance, while here the ordinance is challenged as a whole. We have no doubt an ordinance may provide for different rates of speed upon the same line of railroad in different sections of a city or village, as one part thereof may run through a thickly settled section, while another part may run through a sparsely populated section, where there are but few inhabitants and where ³²⁰⁵ the possibilities that an injury to persons or property would occur would be extremely improbable: *City of Lake View v. Tate*, 130 Ill. 247, 22 N. E. 791.

Taking into consideration the existing circumstances and conditions, the necessity for its adoption, the object sought to be accomplished and the effect upon the business of the appellant, we are unable to say the ordinance is unreasonable, but are of the opinion that it is a valid exercise of the police power by the city.

The next question which presents itself for consideration is, Does the ordinance in question impose an unreasonable restriction upon interstate commerce and the speedy transporta-

tion of the United States mail? We are of the opinion it does not. The ordinance was passed as a police regulation for the preservation of the safety of the public and the protection of life and property, and was no more than a fair exercise of the police power vested in the city: *Toledo etc. Ry. Co. v. Deacon*, 63 Ill. 91; *Chicago etc. R. R. Co. v. Haggerty*, 67 Ill. 113. The ordinance does not undertake to regulate commerce between the states or interfere with the transportation of the mail, and amounts to but a reasonable regulation of the speed of trains within the corporate limits of the city, and such legislation has uniformly been held to be valid.

In *Sherlock v. Alling*, 93 U. S. 99 (approved in *Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. Rep. 564), it was held that a statute of Indiana giving a right of action to the personal representatives of the deceased, where his death was caused by the wrongful act or omission of another, was applicable to the case of a loss of life occasioned by a collision between steamboats navigating the Ohio river, engaged interstate commerce, and did not amount to a regulation of commerce in violation of the constitution of the United States. On this point the court said (page 103): "General legislation of this kind, prescribing the liabilities or duties of citizens of a state, without distinction as to pursuit ~~and~~ or calling, is not open to any valid objection because it may affect persons engaged in foreign or interstate commerce. Objection might with equal propriety be urged against legislation prescribing the form in which contracts shall be authenticated or property descend or be distributed on the death of its owner, because applicable to the contracts or estates of persons engaged in such commerce. In conferring upon Congress the regulation of commerce it was never intended to cut the states off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce, and persons engaged in it, without constituting a regulation of it within the meaning of the constitution. . . . And it may be said, generally, that the legislation of a state not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit."

In *Stone v. Farmers' Loan etc. Co.*, 116 U. S. 307, 6 Sup. Ct. Rep. 334, it was held that in case of a railroad whose construction had been aided by Congress so as to establish a route of travel through several states, a state has the power to make all needful regulations, of a police character, for the government of the company operating the road within the jurisdiction of the state, and it was there said: "By the settled rule of decision in this court . . . it may make all needful regulations, of a police character, for the government of the company while operating its road in that jurisdiction. In this way it may certainly require the company to fence so much of its road as lies within the state; to stop its train at railroad crossings; to slacken speed while running in a crowded thoroughfare; ³²⁷ to post its tariffs and timetables at proper places; and other things of a kindred character affecting the comfort, the convenience or the safety of those who are entitled to look to the state for protection against the wrongful or negligent conduct of others."

In *Crutcher v. Kentucky*, 141 U. S. 61, 11 Sup. Ct. Rep. 851, the court, speaking through Mr. Justice Bradley, said: "It is also within the undoubted province of the state legislature to make regulations with regard to the speed of railroad trains in the neighborhood of cities and towns; with regard to the precautions to be taken in the approach of such trains to bridges, tunnels, deep cuts and sharp curves; and, generally, with regard to all operations in which the lives and health of people may be endangered, even though such regulations affect, to some extent, the operations of interstate commerce. Such regulations are eminently local in their character, and, in the absence of congressional regulations over the same subject, are free from all constitutional objections and unquestionably valid."

In *Cleveland etc. Ry. Co. v. Illinois*, 177 U. S. 514, 20 Sup. Ct. Rep. 722, wherein the court held the statute of this state requiring all regular passenger trains to stop at county seats to be unconstitutional, as constituting a direct burden upon interstate commerce, so far as it required through interstate passenger trains to stop at such stations when adequate train service had otherwise been provided for local traffic, in distinguishing that case from a class of cases similar to the case at bar the court said: "The distinction between this statute and regulations requiring passenger trains to stop at railroad crossings and drawbridges, and to reduce the speed of trains when

running through crowded thoroughfares, requiring its tracks to be fenced and a bell and whistle to be attached to each engine, signal lights to be carried at night, and tariff and timetables to be posted at proper places, and other similar requirements ³²³ contributing to the safety, comfort, and convenience of their patrons, is too obvious to require discussion."

We think it clear that the supreme court of the United States, as shown by the above decisions, is committed to the doctrine announced by this court in numerous cases, to the effect that the passage of this ordinance was a valid exercise of the police power. In *Whiteon v. City of Franklin*, 34 Ind. 392, it was ruled that the ordinance passed upon in that case, which limited the speed to four miles per hour, was not invalid on the ground that the railroad company was engaged in carrying the mail under a contract with the United States, and was required, by its contract, to transport the mail within a prescribed time, which could not be done if the towns and cities through which the road ran were allowed to regulate the speed of trains in passing through them. And in *Clark v. Boston etc. R. R. Co.*, 64 N. H. 323, 10 Atl. 676, the supreme court of New Hampshire held the fact that a railroad was engaged in interstate commerce does not deprive the legislature of the state through which it passes of the power to limit the rate of speed to six miles an hour across a highway in or near the compact part of a town.

We find nothing in *Illinois Cent. R. R. Co. v. Illinois*, 163 U. S. 142, 16 Sup. Ct. Rep. 1096, and *Cleveland etc. Ry. Co. v. Illinois*, 177 U. S. 514, 20 Sup. Ct. Rep. 722, in conflict with the former decisions of the supreme court of the United States or the views hereinabove expressed. Those cases held the statute requiring passenger trains to stop at county seats in Illinois, as applied to the facts then before the court, an unreasonable restriction upon interstate commerce and the speedy transportation of the mail, but recognized the right of the state to make all necessary police regulations, and particularly pointed out legislation of the character of this as being within the police power.

The judgment of the appellate court will be affirmed.

Reasonableness of Ordinance.—Courts are not inclined to inquire into the reasonableness of an ordinance passed under an express grant of power, though, as to ordinances passed under the general powers of a city, they do not hesitate to declare them void when they appear to be unreasonable: *Ex parte McCarver*, 39 Tex. Cr. Rep. 448, 46 S. W. 936, 73 Am. St. Rep. 946, and cases cited in

the cross-reference note thereto. Ordinances are presumed to be reasonable: *Ex parte Wygant*, 39 Or. 429, 87 Am. St. Rep. 673, 64 Pac. 867; *Mayor v. Drydock etc. R. R. Co.*, 133 N. Y. 104, 28 Am. St. Rep. 609, 30 N. E. 563.

The Validity of Ordinances limiting the speed of railroad trains in a city to six miles an hour is considered in *Burg v. Chicago etc. Ry. Co.*, 90 Iowa, 106, 48 Am. St. Rep. 419, 57 N. W. 680; *Bluedorn v. Missouri Pac. Ry. Co.*, 108 Mo. 439, 32 Am. St. Rep. 615, 18 S. W. 1103. Such an ordinance passes unquestioned in *Hutchinson v. Missouri Pac. Ry. Co.*, 161 Mo. 246, 84 Am. St. Rep. 710, 61 S. W. 635, 852. As to an ordinance limiting the speed to four miles an hour, see *Meyers v. Chicago etc. R. R. Co.*, 57 Iowa, 555, 42 Am. Rep. 50, 10 N. W. 896. A city may regulate the speed of trains under a general grant of police powers usually found in municipal charters: *Western etc. R. R. Co. v. Young*, 81 Ga. 397, 12 Am. St. Rep. 320, 7 S. E. 912.

FLANNIGAN v. HOWARD.

[200 Ill. 396, 65 N. E. 782.]

ADOPTION.—The Failure of the Petition for the Adoption of a Child to state the place of residence of its parents, where the written consent of such parents is filed with the petition, in which their residence is stated, does not avoid the adoption. (p. 203.)

ADOPTION.—The Construction of a Statute Authorizing the Adoption of Children should not be so narrow and technical as to invalidate proceedings where every material provision has been complied with. (p. 203.)

ADOPTED CHILD—Right of to Inheritance as Against Pre-existing Will.—If a child is adopted after the making of a will by its subsequently adopting parent, in which it is not mentioned, it takes the same share in his estate as would a child born to him after the execution of his will. (p. 204.)

Butters & Carr, for the plaintiff in error.

E. J. Kelly and D. B. Snow, for the defendants in error.

see **CARTWRIGHT**, J. Bridget Howard, of La Salle county, made her last will and testament in October, 1894, by which she disposed of all her property. By the will certain specific bequests were made and the residue was given to three children, Catherine, Peter and William. No provision was made for any child that might be born afterward, and it did not appear by the will that it was her intention to disinherit such child if there should be one. On December 21, 1898, she filed in the county court of La Salle county her petition for

the adoption of her grandchild, Anna Flannigan, plaintiff in error, then thirteen years old, and asked the court to make an order declaring said child to be her adopted child and capable of inheriting her estate. The petition was accompanied by the written consent of Thomas Flannigan and Mary A. Flannigan, parents of plaintiff in error who thereby waived service of notice of the application for adoption. On the same day the cause was heard and the court ³⁹⁹ entered an order that plaintiff in error should be from thenceforth the adopted child of said Bridget Howard and capable of inheriting her estate. Bridget Howard died February 18, 1899, leaving said last will and testament, which was admitted to probate in the probate court of La Salle county. Plaintiff in error filed her petition in said probate court alleging said facts, and praying that the several devises and legacies granted and given by the will should be abated in equal proportions to raise a portion for her equal to that which she would have been entitled to receive out of the estate of testatrix if she had died intestate. Upon a hearing the probate court dismissed the petition. An appeal was taken to the circuit court of La Salle county, where the cause was heard and the petition was again dismissed. The estate consisted, in part, of lands, and the writ of error in this case was sued out from this court to review the judgment of the circuit court.

It is contended by defendants in error that plaintiff in error was not legally adopted by Bridget Howard. In order to sustain that claim it would be necessary to show that the county court of La Salle county never acquired jurisdiction to enter an order of adoption, and it is conceded that if the county court had jurisdiction the order cannot be collaterally attacked in this proceeding. The only objection going to the jurisdiction of that court is, that the petition failed to state the place of residence of the parents of the plaintiff in error. The statute provides that the petition shall state the name, sex and age of the child sought to be adopted, and if it is desired to change the name, the new name, the name and residence of the parents of the child, if known to the petitioner, and of the guardian, if any, and whether the parents or the survivor of them, or the guardian, if any, consents to such adoption: 1 Starr and Curtis' Annotated Statutes, ed. 1896, 353. The petition gave the names of the parents of plaintiff in error and alleged that they consented to her adoption ⁴⁰⁰ by petitioner, as would appear from their written consent filed therewith.

The written consent filed with the petition gave as the residence of the parents, Lostant, in the county of La Salle, state of Illinois. There must be a substantial compliance with the provisions of the statute, but the construction of the statute should not be so narrow or technical as to invalidate proceedings where every material provision has been complied with. Every purpose of stating the place of residence of the parents was fully satisfied by the statement in the written consent, which was referred to in the petition and filed with it as a part of the application. The statute was substantially complied with. The court had jurisdiction over the petitioner, the plaintiff in error, who resided with petitioner in La Salle county, and the natural parents. All the jurisdictional facts appeared from the record of the county court, and the order is not open to collateral attack in this proceeding.

The remaining question is whether plaintiff in error is within the terms of section 10 of chapter 39 of the statute in regard to the descent of property: 2 Starr and Curtis' Annotated Statutes, ed. 1896, 1433. That act was in force July 1, 1872, and said section provides as follows: "If, after making a last will and testament, a child shall be born to any testator, and no provision be made in such will for such child, the will shall not on that account be revoked; but unless it shall appear by such will that it was the intention of the testator to disinherit such child, the devises and legacies by such will granted and given shall be abated in equal proportions to raise a portion for such child equal to that which such child would have been entitled to receive out of the estate of such testator if he had died intestate." The act of 1867 providing for the adoption of children was then in force: Gross' Stats., ed. 1869, 319. That act provided that the relation between a person adopting a child and such child should be, as to their rights and liabilities, the same as ⁴⁰¹ if the relation of parent and child existed between them, except that the adoptive father or mother should never inherit from the child. Afterward, the law in relation to the adoption of children was revised by the act in force July 1, 1874, constituting chapter 4 of the Revised Statutes: 1 Starr and Curtis' Annotated Statutes, ed. 1896, 353. Section 5 of that act is as follows: "A child so adopted shall be deemed, for the purpose of inheritance by such child, and his descendants and husband or wife, and other legal consequences and incidents of the natural relation of parents and children, the child of the parents by adoption, the same as if he had been

born to them in lawful wedlock, except that he shall not be capable of taking property expressly limited to the body or bodies of the parents by adoption, nor property from the lineal or collateral kindred of such parents by right of representation."

By this section an adopted child, for the purpose of inheritance and other legal consequences and incidents of the natural relation of parents and children, is declared to be, in law, the child of the parents, the same as if he had been born to them in lawful wedlock, except as therein stated. By the plain and unambiguous language of the statute the right of plaintiff in error to inherit from Bridget Howard is made identical with the right of a child born to her, and when plaintiff in error became her child by adoption after the making of the will, the effect, in law, was precisely the same as the birth of a child to the testatrix. The argument against the rights of plaintiff in error is solely on the ground that she was not, as a matter of fact, born to the testatrix, and therefore not the sort of a child mentioned in the statute of descent. This argument would apply with equal force to other sections of the same act which provide for the descent of intestate property to children of the decedent, making no reference to children by adoption. By accepted definitions a child is the immediate progeny of human parents, ⁴⁰² and in its natural meaning the word applies to offspring born to such parents. By the statute, however, the relation of parent and child is recognized and declared as legally existing between persons not so related by nature. The statute of descent does not, in any case, mention this legal relation of an adopted child and the adopting parent, but the right of the adopted child is fixed by the act providing for adoption, which creates, in law, the relation of parent and child. The purpose of section 10 of the act in regard to descent is to give to a child who shall come into existence after the making of a will, and who would inherit but for the will, the same rights it would have if the estate were intestate, where no provision is made in the will for such child and no contrary intention is expressed in the will. The act says that if a child shall be born to a testator after the making of a will, such child shall have the rights of inheritance therein specified, and the act providing for the adoption declares that the adopted child shall have the same right as a child born to such testator. So far as inheritance is concerned, the adopted child is to be deemed the child of the testator, precisely the same as though

born to the testator. This is the construction given to a statute in all material respects like our own by the supreme court of Iowa in *Hilpibre v. Claude*, 109 Iowa, 159, 77 Am. St. Rep. 524, 80 N. W. 332. The Iowa statute provides that "the subsequent birth of a legitimate child to the testator before his death will operate as a revocation." The statute providing for the adoption of children confers upon the adopted child "all the rights, privileges and responsibilities which would pertain to the child if born to the person adopting, in lawful wedlock," and that "the rights, duties and relations between parent and child by adoption shall thereafter in all respects, including the right of inheritance, be the same that exists by law between parents and children of lawful birth." In that case it was held that the adoption of a child subsequent to the making of a will by the adopting parent operated as a ⁴⁰⁸ revocation of the will. Our statute is copied from the Massachusetts act, and under that act it was held that, so far as the right of inheritance is concerned, an adopted child must be regarded in the light of a child born to the adopting parent: *Sewell v. Roberts*, 115 Mass. 262. An adopted child becomes the lawful child of the adopting parent for all purposes of inheritance, and is in the eyes of the law as much the child of such parent as though it had been his own child: *Keegan v. Geraghty*, 101 Ill. 26; *Sayles v. Christie*, 187 Ill. 420, 58 N. E. 480. The authorities are generally to the effect that for all purposes of inheritance an adopted child is the lawful child of the adopting parent, except as otherwise provided by the statute. We are of the opinion that plaintiff in error is within the provisions of the statute and entitled to its benefits.

The judgment of the circuit court of La Salle county is reversed and the cause is remanded to that court, with directions to enter an order granting the prayer of the petition.

The Adoption of children is purely a statutory matter, and the proceedings therefor must be in substantial conformity with the provisions of the statute: Nugent v. Powell, 4 Wyo. 173, 62 Am. St. Rep. 17, 33 Pac. 23; *Non-She-Po v. Wa-Win-Ta*, 37 Or. 213, 82 Am. St. Rep. 749, 62 Pac. 15. Some authorities hold that adoption proceedings must be in strict accordance with the statute: *Watts v. Dull*, 184 Ill. 86, 75 Am. St. Rep. 141, 56 N. E. 303; *Ferguson v. Jones*, 17 Or. 204, 11 Am. St. Rep. 808, 20 Pac. 842.

An Adopted Child is, in a legal sense, the child of its natural and of its adopting parent, and is entitled to inherit from each as his child: *Clarkson v. Hatton*, 143 Mo. 47, 65 Am. St. Rep. 635, 44 S. W. 761. See, too, *Butterfield v. Sawyer*, 187 Ill. 598, 79 Am. St. Rep. 246, 58 N. E. 602; monographic note to *Van Matre v. Sankey*, 39 Am. St. Rep. 223-225.

PEOPLE v. SMITH.

[200 Ill. 442, 66 N. E. 27.]

CRIMINAL LAW—Advertising for Divorces.—One who published in a newspaper the following advertisement: "Loyal, wealthy atty. guarantees family freedom in month; no advance cost; witnesses quietly volunteered.—K. 333, Tribune office," is guilty of a criminal offense under the Illinois act to punish the offense of advertising for divorces. (p. 207.)

AN ATTORNEY AT LAW may be Disbarred whenever he ceases to have a good moral character. (pp. 207, 208.)

Charles S. Deneen, state's attorney, Willard M. McEwen, Frank B. Pease, David S. Geer and John T. Richards, for the petitioner.

Willard C. Smith, pro se.

442 CARTWRIGHT, J. On February 9, 1886, the respondent, Willard C. Smith, was admitted by this court to practice as an attorney at law. A license was issued to him and his name was placed on the roll of attorneys. Since his admission he has been engaged in the practice of law in Cook county. By leave of court the information in this case against **443** him was filed by the state's attorney of Cook county, and a rule was entered requiring him to show cause why his name should not be stricken from the roll of attorneys. He appeared, and a stipulation was entered into by which the case was submitted for decision. By this stipulation respondent admitted the truth of the charge set out in the information, that on August 10, 1902, he inserted in the "Chicago Tribune," a newspaper published in Chicago, and of general circulation throughout said city and a large number of states of the United States, the following advertisement: "Loyal, wealthy atty. guarantees family freedom in month; no advance costs; witnesses quietly volunteered.—K. 33, Tribune office." Another charge contained in the information was waived and withdrawn by the state's attorney. It was further stipulated that prior to the happening of the transaction alleged in the information the conduct of respondent as a practicing attorney had never been brought in question.

The meaning of this advertisement, as it was intended to be understood by the public to which it was addressed, is perfectly clear. It represented that respondent was loyal and wealthy; that he guaranteed family freedom in one month; that no ad-

vance costs would be required, and that he would quietly furnish witnesses to secure the desired result. The guaranty of family freedom referred to the marital relation, and respondent proposed to insure that which would frequently be impossible by the use of honorable and lawful methods. Family freedom could mean nothing else than freedom from family ties, and the suggestion from respondent that the reference might have been to some other relation, such as the deprivation of personal and property rights or duress of minors, is not reasonable. The public, whose business was solicited, would not understand it in that way. It was an advertisement to aid in procuring divorces, and its publication by respondent was a criminal offense under the provisions of "An act to punish the offense of advertising ⁴⁴⁴ for divorces": Hurd's Stats. 1901, p. 681. The disreputable character of the proposal to act as attorney and furnish the necessary evidence by quietly volunteering witnesses is beyond question, and the attempts of respondent to explain this and other features of the advertisement consistently with his duty as an attorney to his client and the courts are wholly unsuccessful. It seems useless to enlarge upon the meaning or nature of the advertisement. The respondent either intended to mislead and deceive clients, or to do what he proposed by the advertisement.

By statute and the rules of court it is made a prerequisite of admission to the bar that the applicant shall possess a good moral character, and if it is shown that he has ceased to possess such a character it is good ground for disbarment. "Any conduct on the part of the attorney evidencing his unfitness for the confidence and trust which attend the relation of attorney and client and the practice of the law before the courts, or showing such a lack of personal honesty or of good moral character as to render the same unworthy of public confidence, constitutes good ground for disbarment": 3 Am. & Eng. Ency. of Law, 2d ed., 302. "As good character is an essential qualification for admission to practice, he may be removed whenever he ceases to possess such a character": 4 Cyc. 906. It was agreed by the stipulation that the professional character of respondent had never been brought into question prior to this charge. That fact would be important and relevant to the question of the truth or falsity of the charge, but it is admitted by respondent that the charge is true.

We are of the opinion that the admitted facts clearly show such a lack of good moral character and such unfitness for the

practice of law that the rule must be made absolute, and it is done accordingly.

An Attorney may be Disbarred when he has forfeited his good, moral character: See the monographic note to *In re Philbrook*, 45 Am. St. Rep. 76, on the grounds for disbarring attorneys. An advertisement by an attorney to the effect that divorces can be legally obtained very quietly, which are good everywhere, may constitute ground for disbarment: *People v. McCabe*, 18 Colo. 186, 36 Am. St. Rep. 270, 32 Pac. 280.

CARLE v. PEOPLE.

[200 ILL. 494, 66 N. E. 32.]

MURDER—Instruction to the Jury to Find the Accused Guilty. If the instructions of the court are full and adequate on the subject of self-defense, it is not error to instruct the jury that if they believe from the evidence, beyond a reasonable doubt, that the defendant, with malice aforethought, express or implied, inflicted upon the deceased the mortal wound charged in the indictment, not in self-defense, as it is defined in these instructions, and not upon any sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible, from which wound the deceased afterward died, then defendant should be found guilty of murder. (p. 213.)

CRIMINAL TRIALS—Failure to Call all the Eye-witnesses. The Prosecution is not Compelled to call all the eye-witnesses to a shooting whose names appear on the back of an indictment for murder. (p. 214.)

CRIMINAL TRIALS—Eye-witnesses, Calling of by the Court When the Prosecution Announces that It will not Vouch for Their Testimony.—If on a trial for murder, just before the close of the case for the prosecution, the state's attorney announces that there is another eye-witness whom he requests the court to call, so that both sides can cross-examine him, and declares that the state will not call him, because it will not vouch for the truth of his testimony, the court may call and examine such witness, permitting both sides to cross-examine, and the remarks of the prosecuting attorney cannot be regarded as improper. (p. 215.)

MURDER.—Evidence that the Deceased was a Dangerous, Vicious Man, Accustomed to go Armed, and that the defendant had knowledge of this fact, is properly excluded, if, at the time it was offered, no evidence had been introduced tending to show that the deceased had made any attack on the defendant, nor does the action of the court become erroneous on the subsequent introduction of such evidence, unless defendant recalls the witness whose testimony was excluded, and the court again refuses to receive it. (p. 216.)

EVIDENCE.—On a Trial for Murder the Defendant is not Entitled to Put in Evidence Statements Made by Himself to a third person in reference to his purpose in going to the place where the

killing occurred, the decedent not being present when the statement was made. (p. 217.)

WITNESS—Impeaching.—Whether or not, on a trial for murder, a witness is sufficiently impeached by the evidence offered for that purpose is a question for the jury. (p. 217.)

Indictment and conviction for murder, with punishment of imprisonment for twenty-five years awarded. Motions for a new trial and in arrest of judgment were overruled. The facts are sufficiently stated in the opinion of the court.

John C. King and William J. King, for the plaintiff in error.

H. J. Hamlin, attorney general, Charles S. Deenen, state's attorney, and Harry Olson, for the people.

408 **MAGRUDER, C. J.** 1. It is first claimed on the part of the plaintiff in error that he killed McKenzie in self-defense, and that the proof clearly shows the case to be one of self-defense. The testimony in reference to this matter was conflicting, and was left to the jury to determine under proper instructions from the court.

On the part of the state, the testimony on the trial below tended to show the following facts:

Plaintiff in error, although he had been at one time the keeper of a saloon on the west side in Chicago, was, at the time of this occurrence, engaged in running a tailor-shop at 302 Thirty-first street, in the south division of the city. The plaintiff in error came into Kelly's saloon on the evening of October 10, 1899, about 8 o'clock, and inquired for a package of tailor's samples. He claimed 407 that these samples had been left at the saloon for him by a customer. Plaintiff in error, later in the evening, between 10 and 11 o'clock, returned to the saloon with a woman named Mamie Morrissey, alias Mary Mollway, alias Mary Young. She had been in the saloon with the plaintiff in error before this time. When he and the woman came into the saloon, they went into one of the wineroms, sat down at a table, and were engaged in drinking. While they were in the winerom, McKenzie came into the saloon laughing and humming a song. When he saw Carle in the winerom, he said, "I can lick all the Carles in Chicago." The saloon-keeper, fearing that a difficulty was about to occur between Carle and McKenzie, ordered them out of the saloon. Carle left the saloon, and McKenzie was put out. In about half an hour McKenzie returned with the engineer already referred to, and then Carle came into the saloon, or to the door of the saloon, and

shot him in the manner already stated. Kelly says that, when he turned around after drawing the beer, he saw Carle going out of the door with a smoking revolver in his hand. After the shooting the engineer, who was with McKenzie, left the saloon and crossed the street and disappeared, and, so far as this record shows, has never since been heard of. The officers of the law then came and closed the saloon and searched the body. No weapon was found upon McKenzie when his body was so searched. Nothing was found upon his body except a few matches, a comb, a lead-pencil, and a few pieces of paper. At the time the shooting occurred there were in the saloon, besides the saloon-keeper, Kelly, and the deceased and the engineer, a man named Charles Marshall, who was a bartender, and two women, named Ellen Mills and Tillie Martell, who were in one of the wineroms. When the plaintiff in error visited the saloon the second time about half-past 10 or 11 o'clock with the woman called Mary Morrissey, the latter left the saloon before Carle did, and he was ~~was~~ alone in the saloon when McKenzie came in laughing and humming a song. A trunkmaker named Joseph McNamara was on the corner of Lake and Clark streets waiting for a car, standing about ten or twelve feet from the saloon, which was lighted. McNamara says, that he saw a man enter the saloon, and heard a shot fired immediately; that the man came from the east; that, just as the shot was fired, the man came out again "so quick I couldn't hardly tell it." He also says, "It seemed he just no more than got in when the shot was fired, and out again." This man was the plaintiff in error. McNamara did not know either McKenzie or Carle, or anyone connected with the saloon. He says that he went at once to the entrance of the saloon, and saw that McKenzie was shot; that the door was open, and he looked in, and saw the man just as he dropped down on the floor, and saw the bartender put a towel around his neck; that he then went to an officer, and told the officer, and that then they all rushed into the saloon; that there were two officers, standing on the northwest corner and waiting for a car.

On the part of the defense, testimony was introduced with a view of showing, and tending to show, that, prior to the shooting, there had been some difficulty between McKenzie and Carle, and that the former had threatened to shoot the latter. Mary Mollway, or Morrissey, who had kept rooms at 25 North State street, and from whom, at different times, both McKenzie and Carle had rented rooms stated that, about the 1st of September,

Carle had come to her house and had there been attacked by McKenzie and another man, and thrown over the bannisters and injured. She also appears to have been in the company of McKenzie on the evening of October 10th, and went over to the north side with him, before she met plaintiff in error, and went into Kelly's saloon with the latter. The testimony of Mary Mollway, and of Marshall, and of the plaintiff in error himself, tends to show that, at the second visit of Carle to the saloon that evening, ⁴⁹⁹ when the deceased said, "I can lick all the Carles in Chicago," McKenzie was armed and advanced toward Carle with a revolver. This testimony, however, is contradicted by the testimony of the state. Mary Mollway did not witness what took place at this time, inasmuch as she left the saloon before Carle did, but she claims that she went up the steps of the elevated railroad in front of the saloon, and from there saw something of what took place in the saloon. She says that the revolver, which McKenzie had at that time, was taken from him, and handed to a man by the name of Egan. Egan, however, was placed upon the stand and denied that any revolver was handed to him. Several witnesses were produced, who swore that the reputation of the plaintiff in error for truth and veracity was bad, and that they would not believe him upon oath; and one of these witnesses swears that plaintiff in error had at one time shot at him. One of the witnesses in behalf of the defense was shown to have been convicted and sentenced to the penitentiary in 1883. The parties testifying in the case were for the most part frequenters of the saloon in question, and some of them, both men and women, were criminal and abandoned characters. The jury heard their testimony, and it was for them to determine whether the witnesses for the state or the witnesses for the defense were worthy of belief. After plaintiff in error left the saloon when he visited it in company with the woman, Mary Mollway, he came back in half an hour, armed with a revolver, and entered the saloon, and shot the deceased and killed him. Whether, as he claims and as his evidence tends to show, he went there merely for the purpose of getting a package of tailor's samples which had been left there, and because he had been informed that McKenzie had left the saloon, or whether he returned to the saloon for the express purpose of killing the deceased, was a matter to be decided by the jury from all the testimony and the circumstances developed by ⁵⁰⁰ the evidence. It is not denied that the court gave to the jury clear and full instructions upon the subject of

self-defense, and defining what constituted self-defense. Evidently they believed the witnesses of the state, tending to show that the killing was murder, and not in self-defense. The verdict is not so far contrary to the weight of the evidence, as to induce us to set it aside upon that ground.

2. It is claimed on the part of the plaintiff in error that the court gave three instructions to the jury in behalf of the state upon the subject of reasonable doubt, which were erroneous. It is not necessary to set out these instructions in full in this opinion. They give the ordinary and common definitions of reasonable doubt, which have so often been passed upon by this court. After a careful examination of the instructions thus complained of, we are of the opinion that all the statements and definitions contained in them upon the subject of reasonable doubt are fully sustained by the following cases: *Miller v. People*, 39 Ill. 457; *May v. People*, 60 Ill. 119; *Connaghan v. People*, 88 Ill. 460; *Dunn v. People*, 109 Ill. 635; *Spies v. People*, 123 Ill. 1, 3 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898; *Collins v. People*, 194 Ill. 506, 62 N. E. 902.

It is also claimed by the plaintiff in error that the following instruction, given by the trial court for the state, was erroneous, to wit: "You are further instructed that, if you believe from the evidence in this case beyond a reasonable doubt that the defendant, Carle, with malice aforethought, either expressed or implied, inflicted upon the deceased, Hector McKenzie, the mortal wound or wounds in manner and form as charged in the indictment not in self-defense as the same is defined in these instructions, and not upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible, and that the said Hector McKenzie did thereafter die from said mortal wound or wounds in manner and form as charged in the indictment, then the jury should find the defendant Carle guilty of murder."

⁵⁰¹ The objection made to this instruction is that, after presupposing the existence of certain facts, the instruction concludes as follows: "Then the jury should find the defendant, Carle, guilty of murder." It is said that this form of instruction has been condemned in the cases of *Steiner v. People*, 187 Ill. 244, 58 N. E. 383, *Panton v. People*, 114 Ill. 505, 2 N. E. 411, and *Lynn v. People*, 170 Ill. 527, 48 N. E. 964. The instruction here under consideration differs materially from those given in the cases referred to, and those cases are clearly distinguishable from the case at bar.

The instruction in the case at bar, unlike that in Steiner's case, contains this clause: "Not in self-defense as the same is defined in these instructions." This clause contains the element of apparent danger, which was wanting in the instruction in Steiner's case. In the latter case the instruction, before the conclusion thereof, did not contain every material element necessary to warrant the conclusion thereof. Here, instruction numbered 11 does contain all the elements of the crime of murder in the facts which it assumes to exist; and if those elements were established by the testimony, it was the duty of the jury to find the defendant guilty of murder. This being so, the concluding words were proper. It is not error to give an instruction, reciting every essential fact necessary to constitute the crime of murder, and authorizing the jury to find the accused guilty thereof, if they believe the facts recited therein to have been proved beyond a reasonable doubt, because, if all the facts constituting such crime have been proved beyond a reasonable doubt, the law does not authorize a conviction for a less offense. The distinction between such an instruction as that in the case at bar, and such instructions as were under consideration in the three cases referred to by counsel, is pointed out in the recent case of *Crowell v. People*, 190 Ill. 508, 60 N. E. 872. In the latter case, this court, in speaking of Steiner's case said (page 518 of 114 Ill., and page 875 of 60 N. E.): "The instruction was condemned for ⁵⁰² ignoring the doctrine of apparent danger in cases of self-defense, and the facts stated were for that reason not sufficient to constitute murder. For aught that was stated in that instruction it might have been apparently necessary to inflict the mortal wound in self-defense, and a direction to find the defendant guilty of murder or anything else upon such an hypothesis was erroneous. No authority has been cited where an instruction was condemned which was free from objection and applied to the facts of the particular case, and which contained every element necessary to constitute the particular crime." Here, the court not only instructed the jury "that, under an indictment for murder, they may find the defendant guilty of murder, or they may find the defendant guilty of manslaughter," but the court gave, both in behalf of the state and in behalf of the plaintiff in error, full and clear instructions defining self-defense, as referred to in the above quoted clause from instruction numbered 11.

For example, the court gave, on behalf of the plaintiff in error, instruction numbered 2, which is as follows:

"The court further instructs the jury that a person need not be in actual imminent peril of his life, or of great bodily harm, before he may slay his assailant; it is sufficient if, in good faith, he has a reasonable belief, from the facts as they appeared at the time, that he is in such imminent peril. The rule of law on the subject of self-defense is this: Where a man in the lawful pursuit of his business is attacked, and when, from the nature of the attack, there is reasonable ground to believe that there is a design to take his life or to do him great bodily harm, and the party attacked does so believe, then the killing of the assailant under such circumstances will be excusable or justifiable homicide, although it should afterward appear that no injury was intended and no real danger existed."

Several other instructions to the same effect were given to the jury upon this subject. We are of the opinion ^{ours} that the court committed no error in giving instruction numbered 11, here objected to.

3. It is furthermore contended, on the part of the plaintiff in error, that the trial court erred in not compelling the state to call Charles S. Marshall, an eye-witness of the shooting, and whose name was indorsed upon the back of the indictment. The court committed no error in this respect. It has been held by this court that, under the practice in this state, the prosecution is not compelled to introduce all the witnesses whose names are on the back of the indictment: *Bressler v. People*, 117 Ill. 422, 8 N. E. 62.

It is claimed, however, that the court erred "in allowing the state's attorney to discredit him [Marshall] in advance with the jury." The charge that the state's attorney discredited the witness, Marshall, is based upon the fact that the state's attorney, just before closing his case, announced to the court as follows: "If the court please, there is another witness, Charles Marshall, who, the evidence discloses, was in the saloon at the time, and whom the state does not want to call as a witness. He is here, and either side can call him, or the court can call him. I shall request the court to call him, so both sides can cross-examine him. He is a witness at the scene and I think ought to be called." The attorney for the defense then said: "I think it is the duty of the state to place upon the witness stand all witnesses present at the shooting, especially such as are placed upon the back of the indictment." The court then said: "Is there any reason why this

course should be pursued?" The state's attorney replied: "Because the state will not vouch for his testimony—will not guarantee its truth." The court then stated that "the court will call him." Marshall then took the stand, and was examined by the court, and was cross-examined both by counsel for the plaintiff in error and by the state's attorney.

504 We are unable to say that there was anything improper in the remarks of the state's attorney upon this subject. Where the state's attorney knows that a witness was present at the scene of the killing, but for some reason, either because he has no confidence in the witness, or for any other reason, he may doubt his veracity or integrity, he is not obliged to call such witness. In such case the court may call the witness, and leave him open for cross-examination by either side. The state's attorney is invested with a certain discretion in the matter of calling witnesses for the state. Inasmuch as the court made it necessary for the state's attorney to announce the ground, upon which he exercised his discretion, the statement, that the people would not vouch for the testimony of the witness or guarantee its truth, was not improper, and was not a challenge of the truth or veracity of the witness.

4. The defense charges that the trial court erred in excluding evidence that the deceased was a dangerous, vicious man, accustomed to go armed, and that the plaintiff in error had knowledge of this fact.

The rule upon this subject, as stated by Wharton in his work on Criminal Evidence, section 84, is as follows: "It is admissible for the defendant, after having first established that he was assailed by the deceased, and in apparent danger, to prove that the deceased was a person of ferocity, brutality, vindictiveness and excessive strength." In *Cannon v. People*, 141 Ill. 270, 30 N. E. 1027, this court, in commenting upon the statement thus made by Wharton, said (page 281 of 141 Ill., and page 1029 of 30 N. E.): "When the defendant is the assailant or commences the affray, he will not be entitled to show in defense the vicious or wicked disposition of the person whom he has slain. Having sought and brought on the affray, he cannot shield himself from punishment for the homicide by showing that he aroused the vicious or wicked passions of the party killed. But when evidence is submitted from which the court can see that the jury ^{may} may, if they give it credence, find that the party killed was the assailant, and that the defendant acted in self-defense, such evidence becomes

admissible, as tending to show the circumstances by which the defendant was surrounded, and the extent of the apparent danger to his life or person, and from which he might be justified in believing that his life was in danger, or that he was in danger of suffering great bodily harm at the hands of the assailant, and illustrating to the jury the motive by which he was influenced. It appears, however, that the evidence was offered before the defendant testified, and was rejected, and that it was not again offered after his testimony. At the time it was offered there was no evidence showing that the deceased was the assailant, and the evidence was then properly excluded. If the defendant desired the evidence to go to the jury, it should have been offered after the introduction of the evidence tending to show the assault by the deceased."

At the time when counsel for plaintiff in error sought to call out evidence of this character upon cross-examination of one or more of the witnesses of the state, no evidence had been introduced that in any way tended to show that the deceased, McKenzie, had made an attack upon the plaintiff in error. On the contrary, it appeared up to that time, that McKenzie was shot while he was unarmed and standing at the bar of the saloon, and had his back turned to the plaintiff in error. After plaintiff in error had introduced testimony tending to show that the deceased had threatened to shoot the plaintiff in error, and had drawn a revolver upon him, then it was proper for the plaintiff in error to introduce evidence showing that the deceased was a dangerous and vicious man; and thereafter such evidence was introduced, and was admitted. The trial court did not exclude proper evidence, when offered at the proper time, that the deceased was a dangerous and vicious man and accustomed to go armed; nor was evidence of the defendant's knowledge ⁵⁰⁶ of this fact excluded. On the contrary, all the evidence offered upon this subject at the proper time was admitted by the court. If there was evidence to be had upon this subject which is not now in the record, it is because counsel for plaintiff in error failed to recall the witnesses on this subject after the condition of the testimony made the evidence of such witnesses admissible.

5. Several other objections are made by counsel for plaintiff in error to the action of the court below, one of which is that the court excluded the testimony of a witness, named Neil O'Brien, as to what was said by plaintiff in error to him and by him to plaintiff in error, in reference to going into Kelly's

saloon to get the package already spoken of. Plaintiff in error sought to show that, after he had been twice in the saloon of Kelly that evening, and at about 11 o'clock, he met O'Brien near the saloon, and had a conversation with him in reference to going after the package. There was no error in excluding this testimony, as it was not competent. O'Brien was a witness called by the defense, and it was sought to show by him what Carle had said to him in the absence of the deceased, and while they were alone together, standing upon the street. To admit proof of this kind would have been to permit the plaintiff in error, Carle, to make evidence for himself by proving statements that he made to third persons, not in the presence of the deceased. Plaintiff in error was permitted to state, when he was on the stand, that he went to the saloon, as well when he visited it the third time as when he visited it the first time, in order to get the package already referred to. He thus succeeded in placing before the jury his own statement, that his object in going there was to get the package, and not to provoke a difficulty with the deceased, or to kill the latter.

It is also claimed by plaintiff in error that the court erred in permitting the state, upon the cross-examination of the woman Mary Mollway, to ask her about her ⁵⁴⁷ separation from her husband, and about the fact of her living apart from her husband. An examination of her testimony upon this subject shows that she volunteered the answer that she was living apart and separate from her husband, without being asked questions which were necessarily calculated to elicit such a reply. Her answers upon the subject were not strictly responsive to the questions asked her upon the cross-examination, and were volunteered on her part.

It is insisted upon by plaintiff in error that the attempt to impeach the plaintiff in error was unsuccessful. Two witnesses testified that the reputation of plaintiff in error for truth and veracity in the neighborhood in which he lived was bad, and that they would not believe him under oath; and no testimony was offered by the defense to contradict or offset this impeaching testimony, introduced by the state. Whether or not the effort to impeach plaintiff in error was successful was a matter for the determination of the jury, and was entirely a question of fact.

It is also strenuously urged by the plaintiff in error that he was a reputable citizen working for his living as a tailor. Whatever evidence there was, showing that he was a reputable

citizen, was presented to the jury, and was for their consideration. There was evidence tending also to show that he was an associate of criminal characters, both men and women, and a frequenter, at all hours of the night, of saloons where intoxicating liquors were sold. No ruling of the trial court is called to our attention upon the question, whether the plaintiff in error was a reputable character or a disreputable character, that requires any action on our part.

We discover no error, which would justify us in reversing the judgment of the criminal court of Cook county. Accordingly, that judgment is affirmed.

In a Criminal Trial, the prosecution is not bound to call witnesses at the request of the accused. If he requires their testimony, he must call them himself: *Keller v. State*, 123 Ind. 110, 18 Am. St. Rep. 318, 23 N. E. 1188.

Evidence of the Bad or Dangerous Character of the deceased is admissible in trials for murder only when it is shown prima facie that the accused was assailed, or that some act on the part of the deceased was done which would arouse a reasonable belief of imminent peril to life or limb: *Garner v. State*, 28 Fla. 113, 29 Am. St. Rep. 232, 19 South. 835; *Karr v. State*, 100 Ala. 4, 46 Am. St. Rep. 17, 14 South. 851; *State v. Vallery*, 47 La. Ann. 182, 49 Am. St. Rep. 363, 16 South. 745.

On the Impeachment of Witnesses, see the monographic note to *Lodge v. State*, 82 Am. St. Rep. 25-68.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY v. BATES MACHINE COMPANY.

[200 Ill. 636, 66 N. E. 326.]

CARRIERS—Liability of for Connecting Lines.—Under a bill of lading constituting a through freight contract, the receiving carrier is answerable for any injury or damage occurring to the goods during the transit, though on the line of a connecting carrier. (p. 220.)

CARRIERS—Through Freight Contract, What is.—A bill of lading showing the receipt by the carrier of goods to be transported "to destination, if on its road, or otherwise to the place on its road, where the same is to be delivered to any connecting carrier," but not stating any point where the goods are to be delivered to another carrier, nor the portion of the freight that was to be paid the receiving or the connecting carrier, is a through freight contract. (p. 220.)

J. L. O'Donnell, for the appellant.

Garnsey & Knox, for the appellee.

ESS RICKS, J. This was a suit begun by appellee in the circuit court of Will county, against appellant, for the recovery of the value of a fly-wheel shipped by appellee from Joliet to Louisville, Kentucky. The shipment was made via appellant's railway, and was mounted and loaded by appellee on a car furnished by appellant. The receipt for the shipment was as follows:

"Joliet, Ill., July 14, 1899.

"Received from Bates Machine Company by the E., J. & E.—C. G. & L. R. R. in apparent good order, except as noted, the packages described below (contents and value unknown), marked and consigned as indicated, which said company agrees to transport with as reasonable dispatch as its general business will permit, to destination, if on its road, or otherwise to the place on its road where same is to be delivered to any connecting carrier. Through rate of freight as designated below is hereby guaranteed by this company. Rate 15c per cwt. Joliet, Ill., to Joliet via Louisville, Ky.

CONSIGNEE.	DESTINATION AND MARKS.	DESCRIPTION.	WEIGHT Subject to Correction.
Hope Worsted Mills Co. Louisville, Ky.	E. J. & E. Stacy Eng's O. & L. S. L. & C.	Car No. 1528 } 117 }	48,000

"P. L. McMANUS, Agent."

The wheel was carried by appellant to Dyer, Indiana. At that point the car containing said wheel was turned over to the Monon road, and while in the care of the latter road the wheel was broken and totally destroyed in value. The cause was submitted to the court without a jury, and there was a finding and judgment in favor of appellee for twelve hundred dollars. Upon appeal to the appellate court the judgment was affirmed.

Two reasons are urged why the case should be reversed: 1. That the court erred in refusing to find that the liability of appellant be limited to its own line; ³³⁰ and 2. That the proof shows that the proximate cause of the injury to the fly-wheel was the improper loading of the same by appellee.

The bill of lading offered in evidence was a "through freight" contract, and the undertaking of the appellant was to carry the fly-wheel safely from Joliet to Louisville, Kentucky, and it was liable for any injury or damage that might occur to the goods in transit, either upon its own line or that of a connecting carrier, unless its liability was limited by contract: *Chicago etc. Ry. Co. v. Simon*, 160 Ill. 648, 43 N. E. 596; *Toledo etc. Ry. Co. v. Merriman*, 52 Ill. 123, 4 Am. Rep.

590; Chicago etc. Ry. Co. v. Calumet Stock Farm, 194 Ill. 9, 88 Am. St. Rep. 68, 61 N. E. 1095; Illinois Central R. R. Co. v. Carter, 165 Ill. 570, 46 N. E. 374.

In Toledo etc. Ry. Co. v. Merriman, 52 Ill. 123, 4 Am. Rep. 590, the bill of lading provided that appellant would transport the freight "over the line of this railway to the company's freight station at its terminus, and deliver in like good order to the consignee or owner, or to such company (if the same are to be forwarded beyond the limits of this railway), whose line may be considered a part of the route to the place of destination of said goods or packages, it being distinctly understood that the responsibility of this company as a common carrier shall cease at the station where such goods are delivered to such persons or carrier." In that case, as in this, it was contended that appellant was not liable as common carrier beyond the terminus of its road, and that as it was not shown the loss happened on its road appellee could not recover. In discussing this question the court said: "This defense is utterly groundless, as the receipt or bill of lading offered in evidence shows upon its face it was a 'through freight contract,' and it was in proof by the defendant's agent that freight received by this company as through freight was never unloaded or delivered at their terminus, but forwarded on to its place of destination in the cars in which it was received."

⁶⁴⁰ We regard the contract in the case cited as a contract much more favorable to appellant's position than is the one now before us. We are unable to find anything in the bill of lading which limits the liability to loss or damage occurring upon its own line. Neither the point of destination on appellant's road was mentioned in the contract, nor was the road to which appellant intended to deliver the car for carriage from its terminus to the point of destination mentioned, nor was the proportion of freight that was to be paid to appellant and to the connecting carrier stated. In fact, there was simply a through freight rate of fifteen cents per hundred-weight fixed. The undisputed evidence in this case shows that the car in which this wheel was loaded was treated by appellant as a through car, and, in fact, the wheel was sent therein to the point of destination, and there is no evidence tending to show that any other rule obtained with this company in shipping through freight that was to be delivered to connecting lines. We think Toledo etc. Ry. Co. v. Merriman, 52 Ill. 123, 4 Am. Rep. 590, decisive of the case at bar.

The defense that the proximate cause of the injury to the fly-wheel was the improper loading by appellee was an issue of fact, and this has been determined adversely to appellant by the trial and appellate courts. There is a conflict of evidence upon this issue, hence the finding of the trial and appellate courts is conclusive.

Finding no error in the record the judgment will be affirmed.

A Railroad Company receiving goods consigned to a place beyond the terminus of its own line undertakes to convey them safely to the point of destination, and is liable for their loss on connecting lines: *Falvey v. Georgia R. R.*, 76 Ga. 597, 2 Am. St. Rep. 58; *Alabama etc. R. R. Co. v. Thomas*, 89 Ala. 294, 18 Am. St. Rep. 119, 7 South. 762; *Savannah etc. Ry. Co. v. Pritchard*, 77 Ga. 412, 4 Am. St. Rep. 92, 1 S. E. 261; *Cavallaro v. Texas etc. Ry. Co.*, 110 Cal. 348, 52 Am. St. Rep. 94, 42 Pac. 918; *Central R. R. Co. v. Hasselkus*, 91 Ga. 323, 44 Am. St. Rep. 87, 17 S. E. 333.

CASES
IN THE
SUPREME COURT
OF
IOWA.

STATE v. BARKER.

[116 Iowa, 96, 89 N. W. 204.]

MUNICIPAL CORPORATIONS—City Officers—Quo Warranto.
A citizen and taxpayer residing in a city, who contributes to the support of its water supply system, is interested in the appointment of trustees therefor, so as to be entitled to maintain quo warranto proceedings to test the validity of their appointment, under a statute conferring such right upon any citizen having an "interest" upon the refusal of the county attorney to act. (p. 224.)

MUNICIPAL CORPORATIONS—City Officers—Quo Warranto.
The superintendent of a city waterworks system has such interest in the validity of a statute providing for the appointment of trustees and a new superintendent for such system, as to entitle him to maintain a quo warranto proceeding to test the validity of such statute. (p. 224.)

CONSTITUTIONAL LAW—Municipal Control.—A statute authorizing a district court to appoint trustees for city waterworks in cities of the first class is unconstitutional, as taking from the city the right of local self-government, and as divesting the city of the management and control of its property. (p. 230.)

CONSTITUTIONAL LAW.—Powers not in Themselves Judicial, and not to be exercised in the discharge of the functions of the judicial department cannot be conferred on courts or judges designated by the constitution as part of the judicial department of the state. (p. 232.)

CONSTITUTIONAL LAW—Appointment of Municipal Officers.—A statute authorizing the appointment of trustees for a city water supply system by a district court, in advance of litigation or dispute concerning the management or control of such system, is unconstitutional, as authorizing the performance by such court of non-judicial functions, foreign to the exercise of judicial powers conferred on such court by the constitution. (p. 233.)

F. E. Gill, Quick & Carter, and Swan, Lawrence & Swan, for the appellant.

R. J. Chase, for the appellees.

⁹⁷ DEEMER, J. The twenty-sixth, twenty-seventh and twenty-eighth general assemblies passed acts creating a board of waterworks trustees for cities of the first class, and authorizing the appointment of such board by the district court of the county in which such cities are located: See Code, sec. 742-750; Acts 27th General Assembly, c. 23; Acts 28th General Assembly, c. 25. Sioux City is a city of the first class, and has owned and operated its waterworks system since the year 1885. In the year 1898 the then mayor made application to the district court of Woodbury county for the appointment of a board of trustees for the system, under the provisions of the acts of the legislature hitherto mentioned. Pursuant to this application, the four judges of the fourth judicial district, in which Woodbury county is situated, met in Sioux City, and appointed the defendants as trustees of the system. Defendant Spaulding refused to serve, and defendant Allison ⁹⁸ was appointed in his place. Three of the judges who participated in the conference and assisted in the selection of the trustees were and are nonresidents of Woodbury county, but the other was and is a resident of Sioux City. The persons so appointed filed bond in a sum fixed by the district court, and at once assumed control of the waterworks system, entered upon the discharge of their duties, and have since been in the exclusive possession, control and management of the system. The relator is a resident citizen and taxpayer of the city of Sioux City, and a contributor to the support of the waterworks system. Intervener was, on the third Monday of March, in the year 1899, appointed by the city council of the city of Sioux City to the office of superintendent of the waterworks system. He duly qualified as such, and he and the plaintiff, before the commencement of this proceeding, each made demand on the county attorney to bring action to test the validity of the defendants' appointment, and the constitutionality of the acts under which the appointments were made. The city council also passed a resolution authorizing the commencement of the action. As the county attorney refused to bring the suit, the relator commenced it, and Robson, the superintendent appointed by the council, intervened, and asked the same relief as relator. Such, in brief, is a statement of the more important facts in the case, and the questions of law involved are so well stated by appellees counsel that we use them as a basis for this opinion. They are as follows: "1. Has the legislature of Iowa the constitutional power to take away from the city council the control and man-

agement of the waterworks, and place such control and management in a board of trustees? 2. Assuming that the legislature has such power, are the acts of the legislature in question unconstitutional by reason of the manner of the execution of the power? In other words, do the provisions placing the power of appointment of the members of the board of trustees with the district court of Woodbury county infringe any provision of the constitution? ** 3. Has Win S. White such an interest in the questions involved as will enable the court to render judgment in this case upon the merits thereof?"

As a third proposition involves a question of practice, it is perhaps well to settle that before proceeding with the merits of the case. Section 4316 of the Code, relating to quo warranto proceedings, reads as follows: "Sec. 4316. By Private Persons.—If the county attorney, on demand, neglects or refuses to commence the same, any citizen of the state having an interest in the question may apply to the court in which the action is to be commenced, or to the judge thereof, for leave to do so and, upon obtaining such leave may bring and prosecute the action to final judgment." It is admitted that the county attorney refused to bring the action, and the only question for decision on this branch of the case is, Has the relator such an interest in the question as that he may apply to the court for leave to do so? We think he has such interest. A private citizen and taxpayer is undoubtedly interested in the duties required of the several public officials who are authorized to levy taxes. This is not a contest over an office, as were many of the cases cited in appellees' brief, but a matter of public interest in which relator has a special interest by reason of being a contributor to the funds: *State v. City of Des Moines*, 96 Iowa, 521, 59 Am. St. Rep. 381, 65 N. W. 818; *Cochran v. McCleary*, 22 Iowa, 75; *State v. School Dist.*, 29 Iowa, 264; *State v. Fidelity Casualty Co.*, 77 Iowa, 648, 42 N. W. 509; *Ford v. Town of North Des Moines*, 80 Iowa, 637, 45 N. W. 1031; *State v. Bailey*, 7 Iowa, 390; *Brockman v. City of Creston*, 79 Iowa, 587, 44 N. W. 822, *State v. City of Des Moines*, 96 Iowa, 521, 59 Am. St. Rep. 381, 65 N. W. 818, is conclusive of the point. As we have said, if this were a contest over the right to hold office, relator should have shown that he was elected or appointed to that office; or if it had been an action to dissolve the corporation, perhaps he could not have maintained the suit. But it is neither, and under our statute there seems to be no doubt of his right to sue. In

any event, the intervener was entitled to ¹⁰⁰ maintain the action, because he had been appointed to the office of superintendent of the system pursuant to an ordinance adopted by the city. See, as further sustaining our conclusions on this point: *Darrow v. People*, 8 Colo. 417, 8 Pac. 661; *Churchill v. Walker*, 68 Ga. 681; *State v. Martin*, 46 Conn. 479; *Taggart v. James*, 73 Mich. 234, 41 N. W. 262; *Commonwealth v. Meeser*, 44 Pa. St. 341; *People v. Londoner*, 13 Colo. 303, 22 Pac. 764.

The other points presented involve constitutional questions that, to some extent at least, are new to the courts of this state. Preliminary to a discussion of the propositions involved, it is well to determine the powers, duties and functions of a municipal corporation. Judge Dillon, in his masterly work on such corporations, gives an interesting and exhaustive history of their origin, growth, and development. Within the limits of a judicial opinion it is manifestly impossible to do more than state in the most general way some well-established historical facts regarding the development of municipalities. Man has ever been gregarious by nature, and, emerging from a state of barbarism, he naturally sought the society and fellowship of his kind. Rude gatherings and somewhat formless centers of population were the result, and from these were evolved better forms of organization and higher degrees of compactness, until even in remote antiquity great cities were established, which could only have been maintained by a system of municipal government, crude and incompetent at first, but certainly by no means contemptible. The storied splendors of the prehistoric cities of the old and new world are not wholly mythical. Indeed, the general trend has been from the unorganized to the organized; from the protoplasmic to the more complex and higher and more efficient forms of life. In the earlier Hellenic civilization the city was the state, governed in general by the whole body of free citizens, who met and discussed all questions of policy. The history of Rome is simply an account of the greatest municipal corporation ¹⁰¹ the world has ever seen. The Roman republic took its origin from the city of the Tiber, and was but a development and extension of that city; and the empire erected on its foundations was remarkable for the power, influence, and wealth of the municipalities. During the dark ages the cities preserved what was left of knowledge, culture, and art. With the dawn of the Renaissance came Christianity and the feudal system, and the castle of the baron became the unit of government. The germ of the municipal corporation in England is

to be traced to the "farmer commonwealths" of the early Teutons, and each "wick," "ham," "stead," or "tun," took its name from the kinsmen who dwelt together therein. "Each, judged by witness of the kinsfolk, made laws in the assembly of its freemen, chose leaders for its governance, and the men who were to follow headman or ealdorman to hundred, court, or war": Green's Short History of English People, p. 15, sec. 2, p. 93, sec. 6; Angell and Ames on Corporations, sec. 21. As to the growth of English guilds and boroughs, see Dillon on Municipal Corporations, c. 1; 3 Hallam Middle Ages, c. 8; Green's Short History of English People, c. 4. Our own towns were established in accordance with the English principles of liberty, but they generally possess greater powers of local self-government than their English prototypes; and, as said by Cooley in his work on Constitutional Limitations (page 223): "In contradistinction to those governments where powers are concentrated in one man, or in one or more bodies of men, whose supervision and active control extends to all the objects of government within the territorial limits of the state, the American system is one of complete decentralization, the primary and vital idea of which is that local affairs shall be managed by local authorities, and general affairs only by the central authorities." See, also, De Toqueville on Democracy in America, tome 1, 64, 96, wherein it is said that municipal corporations form the principle of American liberty existing to this day. The history of New ¹⁰² England towns is quite generally understood, and we need only cite the following cases for an epitome of their origin and powers: Warren v. Mayor etc., 2 Gray, 84; Town of Bloomfield v. Charter Oak Bank, 121 U. S. 121, 7 Sup. Ct. Rep. 865; Hill v. City of Boston, 122 Mass. 344, 23 Am. Rep. 332; Dillon on Municipal Corporations, secs. 28-30; Local Constitutional History of United States, by George E. Howard, vol. 1, c. 2. The result of all this discussion is a definition of the term as follows: "We may, therefore, define a municipal corporation in its historical and proper sense to be the incorporation by the authority of the government of the inhabitants of a particular place or district, and authorizing them in their corporate capacity to exercise subordinate specified powers of legislation and regulation with respect to their local and internal concerns. This power of local self-government is the distinctive purpose and the distinguishing feature of a municipal corporation proper": Dillon on Municipal Corporations, sec. 20. The only fault with this definition, if there be any, is that

it does not embrace the inhabitants as well as the territory, for the term embraces both the territory and its inhabitants: *Kelly v. City of Pittsburgh*, 104 U. S. 78; *City of Galesburg v. Hawkinson*, 75 Ill. 156. Under our form of government the legislature creates municipal corporations, defines and limits their powers, enlarges or diminishes them at will, points out the agencies which are to execute them, and possesses such general supervision over them as it shall deem proper and needful for the public welfare. As to all matters of public concern, such as relate to the performance by the city of functions as an agent of the state, the legislature is unlimited in its power: *State v. Mason*, 153 Mo. 23, 54 S. W. 524; *People v. Mahaney*, 13 Mich. 481. Neither the charter of a municipal corporation nor any legislative act regulating the use of property held by it for governmental purposes is a contract ¹⁰⁸ within the meaning of the constitutional inhibition of laws impairing the obligation of contracts and where there is no constitutional restriction, either express or implied, upon the action of the legislature, it has absolute control to create, change, modify, or destroy such corporations at pleasure: *City of Covington v. Kentucky*, 173 U. S. 231, 19 Sup. Ct. Rep. 383; *Meriwether v. Garrett*, 102 U. S. 472; *City of St. Louis v. Shields*, 52 Mo. 351; *City of Mt. Pleasant v. Beckwith*, 100 U. S. 514. But the legislative control of municipal corporations is not without limitations. This immunity from unlimited legislative control has been expressly recognized by the supreme court of the United States in *City of New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79, 12 Sup. Ct. Rep. 142, where it is said "that the municipality, being a mere agent of the state, stands in its governmental or public character in no contract relation with its sovereign, at whose pleasure its charter may be amended, changed, or revoked without the impairment of any constitutional obligation, while with respect to its private or proprietary rights and interests it may be entitled to the constitutional protection." The dual capacity of such a corporation has long been recognized; in other words, it is in part a public agency of the state, and in part possessed of local franchises and rights, which pertain to it as a legal entity for its corporate advantage. The right of a municipal corporation to hold and manage property, to sue and to be sued, and to act generally as a private corporation in supplying local needs and conveniences, has been distinctly recognized by a long line of well-considered cases: *Western Sav. Fund Soc. v. City of Philadelphia*,

31 Pa. St. 175, 72 Am. Dec. 730; *People v. Common Council of Detroit*, 28 Mich. 229, 15 Am. Rep. 202; *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *People v. Draper*, 15 N. Y. 561, as explained in *People v. Albertson*, 55 ¹⁰⁴ N. Y. 50; *Glover on Municipal Corporations*, 1, 2, 4, 18, 19; *Dillon on Municipal Corporations*, 4th ed., 3a, 8a, 8d, 28; *City of St. Louis v. Dorr*, 145 Mo. 479, 68 Am. St. Rep. 575, 41 S. W. 1094, 46 S. W. 976; *State v. Denny*, 118 Ind. 382, 21 N. E. 252; *State v. Moores*, 55 Neb. 480, 76 N. W. 175; *Proprietors of Mt. Hope Cemetery v. City of Boston*, 158 Mass. 509, 35 Am. St. Rep. 515, 33 N. E. 695; *Elliott on Municipal Corporations*, sec. 28; *Illinois Trust etc. Bank v. City of Arkansas City*, 22 C. C. A. 171, 76 Fed. 271; *People v. Mayor etc. of City of Chicago*, 51 Ill. 17, 2 Am. Rep. 278; *Davock v. Moore*, 105 Mich. 120, 63 N. W. 424; *State v. Hunter*, 38 Kan. 578, 17 Pac. 177; *State v. Kolsem*, 130 Ind. 434, 29 N. E. 595; *Wagner v. City of Rock Island*, 146 Ill. 139, 34 N. E. 545. Some of the cases cited proceed on the theory that the legislature has no power, after creating a municipal corporation, to take away from it the right of local self-government. The argument is that the intention to preserve and perpetuate the ancient right of local self-government, which the law recognized as of common-law origin, and having no less than common-law franchises, is apparent throughout the scope of most American constitutions. Some of the judges even go so far as to say "that, local self-government having always been a part of the English and American systems, we shall look for its recognition in any such instrument [constitution]; and, if not expressly recognized, it is still to be understood that all these instruments are framed with its present existence and anticipated continuance in view"; "that back of all constitutions are certain usages and maxims that have sprung from the habits of life, mode of thought, methods of trying facts, and mutual responsibility in neighborhood interests; precepts that have come from revolutions which overturned tyrannies; sentiments of manly independence and self-control, ¹⁰⁵ which impelled our ancestors to summon the local community to redress local evils, instead of relying upon king or legislature at a distance to do so; that form the living spirit of the lifeless skeleton known as the constitution; that gives it force and attraction, and that distinguishes it from the numberless so-called constitutions of Europe; and that this so-called living spirit should supply the interpretation of the words of the written charter." We are not to be

understood as fully approving all that is said in some of the cases regarding the right of local self-government, nor do we mean to hold that there is an unwritten constitution complete and comprehensive in itself. All that we intend to announce is that written constitutions should be construed with reference to and in the light of well-recognized and fundamental principles lying back of all constitutions, and constituting the very warp and woof of these fabrics. A law may be within the inhibition of the constitution as well by implication as by expression: *Page v. Allen*, 58 Pa. St. 338, 98 Am. Dec. 272; *People v. Gillette*, 159 N. Y. 125, 53 N. E. 755; *Bailey v. Philadelphia etc. Co.*, 4 Harr. (Del.) 389, 44 Am. Dec. 593. But we will not elaborate this thought. Suffice it to say that we have already recognized the principles announced in *State v. City of Des Moines*, 103 Iowa, 76, 64 Am. St. Rep. 157, 72 N. W. 639, wherein it was held, after referring with approval to many of the cases we have cited, that the legislature could not delegate the power of municipal taxation to a board not elected by and immediately responsible to the people to be affected thereby. This court, speaking through Kinne, J., said there was an implied limitation on the power of the legislature to delegate the power of taxation. Right of local self-government was also recognized in *State v. Forkner*, 94 Iowa, 1, 62 N. W. 772. Section 25 of article 1 of the constitution provides that "this enumeration of rights shall not be construed to impair or deny others retained by the people." Some of the cases we have cited hold to the doctrine that the rights of the inhabitants of a municipal ¹⁰⁸ corporation to local self-government is one of the rights retained by the people. But we need not and do not go to this extent, except in so far as private and proprietary rights and interests are concerned, as will hereinafter appear. Municipal corporations are recognized by the constitution, and certain limitations placed on the power of the legislature with reference thereto. Thus it is provided that "no corporation shall be created by special laws, but the general assembly shall provide by general law for the organization of all corporations hereafter to be created": Const., art. 8, sec. 1. Section 12 of the same article, authorizing the repeal or amendment of all laws relating to corporations, has no application to municipal corporations: *Ex parte Pritz*, 9 Iowa, 30. Section 30 of article 3 prohibits the passage of local or special laws for the incorporation of cities and towns. It thus appears that municipal corporations are recognized by our

fundamental law, and that no special or local law relating thereto may be passed. We are also of opinion that there are other well-defined limits on the power of the legislature in dealing with such bodies. But we need not further elaborate on these points. Any other conclusion than the one we have reached would necessitate the overruling of the case in 103 Iowa, 76, 64 Am. St. Rep. 157, 72 N. W. 639, and that we are not prepared to do.

2. There are other considerations, however, that lead to the same conclusion. We have already called attention to the dual nature of municipal corporations, and have discovered that with respect to private and proprietary rights and interests they are entitled to constitutional protection. It is quite clear that the establishment and control of waterworks for the benefit of the inhabitants of the city is a matter that pertains to the municipality, as distinguished from the state at large: *Dillon on Municipal Corporations*, sec. 58; *Proprietors of Mt. Hope Cemetery v. City of Boston*, 158 Mass. 509, 35 Am. St. Rep. 515, 33 N. E. 695; *Western Sav. Fund Soc. v. City of Philadelphia*, 31 Pa. St. 175, 72 Am. Dec. 730; *City of Kansas City v. Marsh Oil Co.*, 140 Mo. 472, 107 41 S. W. 948. In *President etc. of City of Paterson v. Society for Establishing Useful Manufactures*, 24 N. J. L. 385, it is held, in substance, that a municipal corporation exercising powers conferred, not for public purposes, but for its private benefit and emolument, will be regarded quoad hoc as a private corporation: See, also, *Town of Montpelier v. Town of East Montpelier*, 29 Vt. 12, 67 Am. Dec. 748; *Atkins v. Town of Randolph*, 31 Vt. 226; *Dartmouth College v. Woodward*, 4 Wheat. 694; *City of Detroit v. Detroit etc. R. Co.*, 43 Mich. 140, 5 N. W. 275; *Helena Consol. Water Power Co. v. Steele*, 20 Mont. 1, 49 Pac. 382; *City of Newport v. Horton*, 22 R. I. 196, 47 Atl. 312; *City of Louisville v. President etc. of University*, 15 B. Mon. 642; *Town of Milwaukee v. City of Milwaukee*, 12 Wis. 94. Having, then, a proprietary and private interest in its waterworks system granted to it by the legislature, or incident to its power to acquire and hold property, the question recurs, may the management and control of this property be taken out of its hands by the legislature, and invested in trustees appointed by the district court, especially where, as in this case, the trustees so appointed are in no respect responsible to the appointing power, and are not required to make reports thereto? We think not. If the city were a

mere private corporation, it would need no argument to show that the legislature could not take the management of its property out of the hands of its officers and directors, and place it in the custody and control of officials, even if they be stockholders, selected by persons who had no interest in the corporate entity, and who were in no manner responsible to those interested in the welfare of the organization. Such divestiture of property, or, what is the same thing of its management and control, would be unconstitutional and void. The same rules have applied to property held by a municipal corporation in its private and proprietary capacity: ¹⁰⁸ See cases heretofore cited, and Dillon on Municipal Corporations, 4th ed., secs. 68, 68a, 69; Orr v. Bracken Co., 81 Ky. 593; Small v. Inhabitants of Danville, 51 Me. 359; Western College v. City of Cleveland, 12 Ohio St. 375; Oliver v. City of Worcester, 102 Mass. 489, 3 Am. Rep. 485; De Voss v. City of Richmond, 18 Gratt. 338, 98 Am. Dec. 647; Niles Waterworks v. City of Niles, 59 Mich. 311, 26 N. W. 525; County Commissioners v. Duckett, 20 Md. 468, 83 Am. Dec. 557. This view appears to us to be based on the soundest of reasons, and to be supported by the weight of authority. It is alone sufficient to dispose of the case, but there is another objection, even stronger than the ones we have been considering.

8. The division of the powers of government into three different departments—legislative, executive, and judicial—lies at the very foundation of our constitutional system. The fathers had in mind "Montesquie's Dissertation on the Spirit of the Laws," in which he said: "There is no liberty if the power of judging be not separated from the legislative and executive powers. When the legislative and executive powers are united in one body or person, there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner." He further said: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive the judge might behave with all the violence of an oppressor." Recognizing the dangers to be feared from concentration of power, our constitution builders not only created the three departments, but especially provided, in section 1, article 3, that "no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others,

except in cases hereinafter expressly directed and permitted." The act in question authorizes ¹⁰⁰ the district court to appoint trustees for the waterworks system, and, strangely enough, requires the concurrence of more than one judge, failing to recognize that the district court can only be presided over by one judge. The appointment is to be made for a going concern, and without regard to dissensions or contests regarding the control or management of the system; and the inquiry naturally arises, Is this a judicial function? If it is, then the judiciary may be authorized, empowered, and required to select any or all municipal officers. In the further discussion of the question it must be borne in mind that the district court is created by the constitution, and what is said has reference to a constitutional court. Courts which are not provided for by the constitution may be authorized to discharge functions that are executive or legislative in character. Thus the county courts of this state, when they existed, not only were authorized to perform judicial functions, but executive and legislative as well. This is permissible under all the authorities: *Stone v. Wilson*, 19 Ky. Law Rep. 126, 39 S. W. 49; *State v. Judges of Common Pleas*, 21 Ohio St. 1; *Walker v. City of Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24; *Phinizy v. Eve*, 108 Ga. 360, 33 S. E. 1007. But powers not in themselves judicial, and that are not to be exercised in the discharge of the functions of the judicial department, cannot be conferred on courts or judges designated by the constitution as a part of the judicial department of the state: *Hayburn's Case*, 2 Dall. 409; *United States v. Ferreira*, 13 How. 40, 14 L. ed. 42; *United States v. Todd*, 13 How. 52, and note; *Supervisors of Election Case*, 114 Mass. 247, 19 Am. Rep. 341; *Appeal of Norwalk St. R. Co.*, 69 Conn. 576, 37 Atl. 1080; *Houseman v. Judge*, 58 Mich. 364, 25 N. W. 369; *Smith v. Strother*, 68 Cal. 194, 8 Pac. 852; *Stevens v. Truman*, 127 Cal. 155, 59 Pac. 397; *People v. McKee*, 68 N. C. 429; *State v. Barbour*, 53 Conn. 85, 55 Am. Rep. 65, 22 Atl. 686; ¹¹⁰ *Taylor v. Commonwealth*, 3 J. J. Marsh. (Ky.) 401; *State v. Young*, 29 Minn. 474, 9 N. W. 737; *McRae v. Grand Rapids etc. R. R. Co.*, 93 Mich. 399, 53 N. W. Rep. 561; *Muhlenburg Co. v. Morehead*, 20 Ky. Law Rep. 376, 46 S. W. 484; *State v. Sioux City etc. R. R. Co.*, 46 Neb. 682, 65 N. W. 766; *Ex parte Griffiths*, 118 Ind. 83, 10 Am. St. Rep. 107, 20 N. E. 513; *Rees v. City of Watertown*, 19 Wall. 107. Of course, the act itself need not be judicial in character. If the general power be judicial, or if the act itself be in aid of some

judicial function, it is sufficient. Thus the exercise of judicial power may be essential in the discharge of executive functions: *Sawyer v. Dooley*, 21 Nev. 390, 32 Pac. 437; *People v. Simon*, 176 Ill. 165, 68 Am. St. Rep. 175, 52 N. E. 910. And courts, in the discharge of their duties, may be required to exercise executive or administrative powers. They may be authorized to make contracts to keep courtrooms in repair: *Board of Commra. v. Gwin*, 136 Ind. 562, 36 N. E. 237; may appoint commissioners to apportion and assess damages for the opening of a highway; *Salem etc. Bridge Corp. v. Essex County*, 100 Mass. 282; *City of Terre Haute v. Evansville etc. R. Co.*, 149 Ind. 174, 46 N. E. 77; *Tuolumne County v. Stanislaus County*, 6 Cal. 440; may appoint jury commissioners: *State v. Kendle*, 52 Ohio St. 346, 39 N. E. 947; may determine whether a municipal corporation shall be created, or adjoining territory annexed: *City of Burlington v. Leebrick*, 43 Iowa, 253; *Wahoo v. Dickinson*, 23 Neb. 426, 36 N. W. 813; *Winfield v. Linn*, 60 Kan. 859, 57 Pac. 549; *Ford v. Town of North Des Moines*, 80 Iowa, 626, 45 N. W. 1031. But in each and all of these cases the powers are either judicial in character, or are to be exercised in the discharge of functions pertaining to the judicial department. If the matter is one requiring some judicial ¹¹¹ determination, it may be left to the court or to the judges, although it is not involved in the determination of an actual case litigated in the ordinary manner. Thus the propriety and necessity of the construction of a bridge over railway tracks may be left to a judge for decision: *State v. New York etc. R. R. Co.*, 71 Conn. 43, 40 Atl. 925. So may the power to pass on a liquor license: *McCrea v. Roberts*, 89 Md. 238, 43 Atl. 39. Courts cannot fix railroad, telegraph, telephone, water, and other rates, although they may pass on the reasonableness thereof: *Steenerson v. Great Northern Ry. Co.*, 69 Minn. 353, 72 N. W. 718; *State v. Sioux City etc. R. R. Co.*, 46 Neb. 682, 65 N. W. 766; *Nebraska Tel. Co. v. State*, 55 Neb. 627, 76 N. W. 171; *State v. Johnson*, 61 Kan. 803, 60 Pac. 1068. Fixing rates in such instances is purely a legislative act, which cannot be delegated to a constitutional court. With a few dissenting voices, these seem to be the conclusions reached by the courts of the country, and they fully accord with our views. The appointment of trustees to manage and control a system of waterworks belonging to a municipal corporation in advance of litigation or of any dispute concerning their management or control is surely not a judicial function. It is more nearly administrative; but

with the affairs of the corporation and the management of its property courts have nothing to do in advance of some dispute. If courts are to select city officials, they may also select those who are to administer the affairs of the county; and it is not going too far to say that they may also be authorized to select state officials. Such a union of power would, as said by Chancellor Kent, in *Dash v. Van Kleeck*, 7 Johns. 477, 5 Am. Dec. 291, "result in tyranny." See, also, *Kilbourn v. Thompson*, 103 U. S. 168; 1 Blackstone's Commentaries, 269. "That which distinguishes a judicial from a legislative act is that the one is a determination of what an existing law is in relation ¹¹² to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of future cases falling under its provisions." So wrote Judge Cooley in his invaluable work on Constitutional Limitations (108). Generally speaking, appointment to an office is an executive function. True, not every appointment is executive in character, for appointments may be made by judicial officers in the discharge of their official duties, and the legislature may appoint the officers necessary to enable it to discharge its duties and to maintain its separate existence. These do not involve an encroachment on the function of any other branch. The appointments authorized by the act in question are in no manner connected with the discharge of judicial duties, and to our minds clearly fall within the prohibition of the article of the constitution hitherto quoted. Much more might be said in support of the conclusion reached, but this opinion has already outgrown proper limits. Judges of courts created by the constitution should not be burdened with executive or administrative duties. They should, as nearly as possible, be freed from everything not judicial in character. Respect for the position has materially lessened whenever judges have attempted to discharge duties of an executive character. The judge should have no favors to grant, no patronage to dispose of, and no friends to reward. The spoils system should have no place in the selection of judicial officers. The manifest purpose of the legislature in passing the act in question and placing the appointing power in the hands of the judiciary is a compliment that speaks loudly of the integrity, fairness, and independence of judicial officers; but, if they are put on a plane with other officials, who are compelled to, or who, at least, in many instances do, use their appointing power to further their own interests, will they not sacrifice their standing

as judges, and defeat the very objects intended to be secured? Let us adhere to the traditions ¹¹⁸ and history of the past; let the judge be supreme in his field, the legislator in his, and the executive remain where the constitution placed him; let the three co-ordinate departments of government be preserved intact; let neither trench upon the other; and our liberties will be preserved, and our rights duly maintained. Municipal reforms must come from within, and not from without. Good government can only be secured by the active co-operation of good citizens. Those who remain away from the primary and the election and refrain from voting are not only forgetful of their duties, but through neglect they suffer crime to flourish and corruption to reign supreme. They put themselves on a level with the worst elements by consenting to their practices, and in some instances profiting from them, and are morally, if not legally, responsible for existing conditions. The property owning taxpaying classes, who suffer most, from a material point of view, under mismanagement and corruption, have the remedy in their own hands if they choose to exercise it. This remedy is not by placing all municipal affairs under the control of the judiciary, but by taking the same interest in the administration of local affairs that they manifest in the conduct of their private business. All the authorities seem to agree that legislative and judicial interference in purely municipal matters "has tended very greatly to lessen the sense of responsibility on the part of local officials and upon the part of communities themselves": Goodnow on Municipal Problems, 38, 39; Seth Low's article on "Municipal Home Government" in 1 Bryce's American Commonwealth, c. 52.

We have given the case the care and attention its importance demands, and, while fully recognizing the rule that an act of the legislature should not be declared unconstitutional unless plainly and clearly within its limitations, are nevertheless constrained to hold that the act cannot be sustained. Reversed.

The Power of Appointment to public office is considered in the monographic note to *People v. Freeman*, 13 Am. St. Rep. 125-147. A statute authorizing the appointment by the supreme court of a state board to examine and grant certificates to applicants for admission to the bar, is held unconstitutional in *State v. Hocker*, 39 Fla. 477, 63 Am. St. Rep. 174, 22 South. 721. And see *State v. Washburn*, 167 Mo. 680, 67 S. W. 592, 90 Am. St. Rep. 430, and cases cited in the cross-reference note thereto. A statute creating a board of police commissioners for a town, to be appointed by the governor, and authorizing them to appoint, remove, equip, and fix the pay of police officers, is held not unconstitutional as taking from the

town control of local affairs: *Gooch v. Exeter*, 70 N. H. 413, 85 Am. St. Rep. 637, 48 Atl. 1100. But see *Bedell v. Moores*, 63 Neb. 219, post, p. 431, 88 N. E. 243; *Commonwealth v. Moir*, 199 Pa. St. 534, 85 Am. St. Rep. 801, 49 Atl. 351.

The Right to Public Office, generally speaking, is exclusively a public question, and can be raised by the attorney general only: *Commonwealth v. Cluley*, 56 Pa. St. 270, 94 Am. Dec. 75. But if he refuses to act, one claiming to be elected to an office may, upon leave of court, bring an action in quo warranto in the name of the state on his own relation, when there is no other remedy: *State v. Sadler*, 25 Nev. 121, 83 Am. St. Rep. 573, 58 Pac. 284.

STATE v. WHEELER.

[116 Iowa, 212, 89 N. W. 978.]

RAPE—Corroboration—Evidence of Mere Opportunity.—The existence of marks and bruises on the genital organs of the prosecutrix for rape, and her complaint, not so recently made as to form part of the *res gestae*, are not enough to make her evidence "corroborated by other evidence tending to connect defendant with commission of the offense," as required by statute. (pp. 236, 237.)

Whitaker & Dale, for the appellant.

C. W. Mullan, attorney general, and C. A. Van Vleck, assistant attorney general, for the state.

²¹² LADD, C. J. The prosecutrix, at the time of trial, was nearly fourteen years old; the defendant past sixty-eight, and had been married forty-nine years. She had been stopping temporarily at his home for about five weeks, and left early Friday morning before Christmas, 1900. She testified that defendant had attempted to have sexual intercourse with her that morning and several times previous. The bed in which she slept was in the same room as that occupied by defendant and his wife, and, according to her story, these attempts were made, not only when the wife was in the room and in the neighboring bed, but with her connivance and encouragement. All this was denied by defendant and his wife, but their credibility, as well as that of prosecutrix, was solely for the jury to pass upon. Her testimony alone could ²¹³ have been accepted as establishing the *corpus delicti*: *State v. McLaughlin*, 44 Iowa, 82. But was it "corroborated by other evidence tending to connect the defendant with the commission of the offense?" Code, sec. 5488. Mere opportunity was not enough: *State v. Chapman*, 88 Iowa, 254, 55 N. W. 489; nor was the fact of her genital

organs being bruised and the making of complaint: *State v. Stowell*, 60 Iowa, 538, 15 N. W. 417. Evidently the existence of marks and bruises on the person do not alone even tend to point out the person who caused them; and, while evidence of complaint by the prosecutrix, if recently made, has uniformly been received, it has never been regarded, unless forming part of the *res gestae* as original or independent evidence: *State v. Emleigh*, 18 Iowa, 122; *State v. Mitchell*, 68 Iowa, 116, 26 N. W. 44; *Lawson v. State*, 17 Tex. App. 292; *Johnson v. State*, 17 Ohio, 593; *State v. De Wolf*, 8 Conn. 93, 20 Am. Dec. 90; *Griffin v. State*, 76 Ala. 29; *Thompson v. State*, 38 Ind. 39. Failure to complain, or delay in the prosecution because of the nature of the accusation, is looked upon as a suspicious circumstance; and, to repel the inference that the story may have been a mere fabrication, which otherwise might be drawn, such evidence is admitted as tending to confirm or corroborate the statements of the injured party: *State v. Cook*, 92 Iowa, 483, 61 N. W. 185. As said in 2 Starkie on Evidence, page 699: "It is a test applicable to the accuracy as well as the veracity of the witness." "Such evidence is received to show constancy in the declaration of the witness. If a female testifies that such an outrage has been committed upon her person, an inquiry is at once suggested why it was not communicated to her female friends. To satisfy this inquiry, it is reasonable that testimony shall be received to confirm her story": *State v. De Wolf*, 8 Conn. 93, 20 Am. Dec. 90. However much the authorities may be in conflict as to the extent particulars of the complaint may be detailed, all seem to agree that the effect of such testimony is limited to testing the accuracy and veracity of the witness. Thus Baron Parke, in *Regina v. Guttridge*, 214 9 Car. & P. 471, where the prosecutrix was called, but did not appear, to the proposal to make proof of the complaint, said: "I think the safest course to reject the evidence, as it is not part of the *res gestae*, but merely confirmatory evidence." And, in *Phillips v. State*, 9 Humph. 246, 49 Am. Dec. 709, the court declared that: "It is certainly true that proof of the particulars of the complaint made by the injured party cannot be admitted as original evidence to prove the truth of the statements, or to establish the charge made against the prisoner, because not made in his presence, and likewise because the ordinary tests which the law has provided for the ascertainment of truth are wanting, viz., the sanction of a judicial oath and the opportunity

for cross-examination. And if this be the proper meaning and extent of the rules as laid down in the last authorities referred to, it is unquestionably correct. Such evidence is only admissible in confirmation of the witness, or to repel the presumption that her statement is a fabrication." And, generally, if for any reason—as incompetency, immature age, or death—the injured female is not produced as witness, proof of statements by her are not received: *People v. McGee*, 1 Denio, 19; *Weldon v. State* 32 Ind. 81; *People v. Graham*, 21 Cal. 261; *Regina v. Nicolas*, 3 Car. & K. 246; *State v. Myers*, 46 Neb. 152, 64 N. W. 697. See note to *Smith v. State*, 12 Ohio St. 466, 80 Am. Dec. 371. In view of the object of such evidence, it would seem that proof of the fact of complaint and of what made, save when particulars are elicited on cross-examination or in confirmation of her testimony after it had been impeached, would fully meet its purpose, and such is the rule in this state: *State v. Richards*, 33 Iowa, 420; *State v. Mitchell*, 68 Iowa, 116, 26 N. W. 44; *State v. Watson*, 81 Iowa, 380, 46 N. W. 868; *State v. Clark*, 69 Iowa, 294, 28 N. W. 606. Thereby the injured party is shielded from unjust inferences, and society guarded, in a measure, against the possible machinations of designing and evil-minded females. Of course, the complaint may be so closely ²¹⁵ connected with the transaction as to form part of the *res gestae*: See *People v. Gage*, 62 Mich. 271, 4 Am. St. Rep. 854, 28 N. W. 835; *McMath v. State*, 55 Ga. 303. No claim of the kind, however, is made in this case. The evidence of complainants, being so limited, cannot be treated as substantive evidence tending to point out the accused as the one guilty of the commission of offense. Indeed, many decisions are to the effect that the name, even of the alleged ravisher, may not be shown to have been disclosed in the complaint: *Griffin v. State*, 76 Ala. 29; *People v. McGee*, 1 Denio, 19; *Regina v. Osborne*, Car. & M. 622. See *Burf v. State*, 23 Ohio St. 394. Such a restriction seems to have been regarded as impracticable in this state: See *State v. Watson*, 81 Iowa, 380, 46 N. W. 868; *State v. Cook*, 92 Iowa, 483, 61 N. W. 185. Nevertheless, mention of the name of the accused furnishes no substantive proof of his guilt, and, like other portions of the complaint, is simply corroborative of the accuracy of the recollection and veracity of the accused. Save for this purpose, it was mere hearsay, and entitled to no consideration. As the record contains no evidence, other than that of the prosecutrix,

tending to connect the accused with the commission of the offense, the judgment must be reversed, and the cause remanded for new trial.

A Conviction for Rape may be sustained on the uncorroborated testimony of the prosecutrix: *State v. Tuttle*, 67 Ohio St. 440, post, p. 635, 66 N. E. 524; *State v. Knighten*, 39 Or. 63, 64 Pac. 866, 87 Am. St. Rep. 647, and cases cited in the cross-reference note thereto. But see the monographic note to *Smith v. State*, 80 Am. Dec. 369-372, on the corroboration of the prosecutrix.

WATSON v. DILTS.

[116 Iowa, 249, 89 N. W. 1068.]

DAMAGES FOR FRIGHT Causing Nervous Prostration.—Nervous prostration arising from fright to a woman caused by stealthily entering her home in the night-time and committing a trespass on her husband's property justifies a recovery in damages against the trespasser, as the physical injury is the proximate result of his wrong. (p. 241.)

Palmer & Kopp and Watson & Weber, for the appellant.

McCord & Finley, for the appellee.

249 SHERWIN, J. The petition alleges that the plaintiff is a married woman, and that on the ninth day of February, she resided, with her husband and child, on a farm remote from the traveled highway; that in the night-time of said day, at about the hour of 11 o'clock, and after she, her husband, and her child had gone to bed, the defendant 250 wrongfully, surreptitiously, and stealthily entered her said home, and went upstairs to the second story thereof, as the plaintiff then believed, to commit a felony; that the identity of the defendant was not known to her at the time she heard him enter the house and go upstairs, and that she called to her husband to follow him, which he did; that in her apprehension for her own, her child's and her husband's life, from what appeared to her a threatened danger, she followed her husband up to the room where the defendant was found, and where she found him and her husband in what appeared to her to be an encounter, and an assault upon her husband; that she became greatly terrified thereat, and was attacked with a violent, nervous chill of such severity that her nervous system completely gave way, and she became

prostrated, and was confined to her bed with threatened neurosis, or paralysis, and suffered great mental and physical pain for nearly six weeks, during all of which time she was confined to her bed, and unable to attend to her household duties. The demurrer to the petition is based on the ground that the damages claimed are too remote and speculative, and that the plaintiff seeks recovery for fright and injuries resulting therefrom without any physical injury to her which caused the fright. The petition alleges physical injuries resulting from the fright caused by the defendant, and the demurrer thereto raises the question whether recovery may be had for physical injuries so caused.

Many cases have been before the courts in which the question of a recovery for mental pain alone, and for physical disability produced by fright, unaccompanied by physical impact, have been decided; and the decisions on these questions are in conflict, though it is probably true that the numerical weight of authority denies the right of action. But the cases so holding are not in harmony as to the reasons given for denying the right of action; some of them hold that the injury is not the proximate result of the alleged ²⁵¹ negligent or wrongful act, while others refuse a recovery for the reason that it is practically impossible to satisfactorily administer any other rule and serve the purposes of justice. The latter rule is the one adopted in *Massachusetts: Spade v. Lynn etc. R. R. Co.*, 168 Mass. 285, 60 Am. St. Rep. 393, 47 N. E. 88. We shall not take the time to review the cases in detail which hold to the doctrine that no recovery can be had. A large majority of them are cases in which the simple charge of negligence was made, and in many of them no claim was made for physical disability resulting from the fright. A review of some of the cases will be found in *Braun v. Craven*, 175 Ill. 401, 51 N. E. 657. See, also, note in *Ewing v. Pittsburgh etc. Ry. Co.*, 147 Pa. 40, 30 Am. St. Rep. 709, 23 Atl. 340. Our attention has not, however, been called to any case in which the facts averred are precisely parallel to the facts in this case, and in no case to which we have been cited, and in no case which our own investigation has discovered, have we found facts alleged which so strongly condemn the unlimited application of the rule contended for by the appellee as do the facts pleaded in the case at bar. This defendant, in the night-time, stealthily and unbidden, invaded the home of the plaintiff and her husband and family. When he entered the house and went to an upper room, she did not know who it was, nor his purpose

and intent in thus breaking and entering their home. It was an unlawful and lawless trespass on his part, no matter whether he entered with the intent to steal the personal property of the inmates of the house, or whether he was in quest of other game. Nor does it matter, in our judgment, that the trespass was committed on property belonging to the husband. It was her home as well as that of her husband; her right to its peaceful and quiet enjoyment day or night was equal to that of her husband; and any unlawful entry or invasion thereof which produced physical injury to her ²⁵³ was a wrong for which she ought to recover. Let us go a little further with the case, and suppose that his purpose had been to ransack the house, and steal therefrom; that he went in masked, and with a deadly weapon in his hand. His discovery there under such circumstances might well cause alarm to the boldest man, and, if it produced nervous prostration, and physical disability, the theory, no matter what its reason, that would say there was no actionable wrong, would be too finespun and too cold for our sanction. Nor could it be said, under such circumstances, that the prostration resulting from the fright so caused was not the proximate or probable result of the defendant's act. "Proximate cause is probable cause; and the proximate consequence of a given act or omission, as distinguished from a remote consequence, is one which succeeds naturally in the ordinary course of things, and which, therefore, ought to have been anticipated by the wrongdoer": 1 Thompson on Negligence, 156. It is within the common observation of all that fright may, and usually does, affect the nervous system, which is a distinctive part of the physical system, and controls the health to a very great extent, and that an entirely sound body is never found with a diseased nervous organization; consequently, one who voluntarily causes a diseased condition of the latter must anticipate the consequences which follow it. The nerves being, as a matter of fact, a part of the physical system, if they are affected by fright to such an extent as to cause physical pain, it seems to us that the injury resulting therefrom is the direct result of the act producing the fright: *Spade v. Lynn etc. R. R. Co.*, 168 Mass. 285, 47 N. E. 88, 60 Am. St. Rep. 393; *Hill v. Kimbell*, 76 Tex. 210, 13 S. W. 59; *Mack v. South Bound R. R. Co.*, 52 S. C. 323, 29 S. E. 905, 68 Am. St. Rep. 913; *Purcell v. St. Paul etc. Ry. Co.*, 48 Minn. 134, 50 N. W. 1034; *Larson v. Chase*, 47 Minn. 307, 50 N. W. 238, 28 Am. ²⁵³ St. Rep. 370; *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759; *Lombard v. Lennox*, 155 Mass. 70, 28

N. E. 1125, 31 Am. St. Rep. 528; *Mentzer v. Western Union Tel. Co.*, 93 Iowa, 752, 57 Am. St. Rep. 294, 62 N. W. 1. It is undoubtedly true that the door should not be thrown wide open for trumped-up claims on account of injuries resulting from fright, and we do not intend to so open it in this case. Each case must, of necessity, depend on its own facts. We held in *Lee v. City of Burlington*, 113 Iowa, 356, 86 Am. St. Rep. 379, 85 N. W. 618, that no recovery could be had for the death of a horse alleged to have been caused by fright, because death therefrom could not be anticipated, and hence it was not the proximate result of the defendant's negligence. In *Mahoney v. Dankwort*, 108 Iowa, 321, 79 N. W. 134, the question before us was not decided. That case was disposed of on the facts there presented, and was a case of simple negligence. The reasoning of the Massachusetts cases should not be applied to this case, for greater evil would result from a holding of no actionable wrong than can possibly follow the rule we announce. We do not concern ourselves with what the trial of this case may disclose, but hold a cause of action stated in the petition.

The demurrer should therefore have been overruled.

Reversed.

Damages for Fright and mental shock are considered in the monographic note to *Gulf etc. Ry. Co. v. Hayter*, 77 Am. St. Rep. 856. See, also, *Lee v. Burlington*, 113 Iowa, 356, 86 Am. St. Rep. 379, 85 N. W. 618; *St. Louis etc. Ry. Co. v. Bragg*, 69 Ark. 402, 86 Am. St. Rep. 206, 64 S. W. 226; *St. Louis etc. Ry. Co. v. Wilson*, 70 Ark. 186, 91 Am. St. Rep. 74, 66 S. W. 661; *Homans v. Boston etc. Ry. Co.*, 180 Mass. 456, 91 Am. St. Rep. 324, 63 N. E. 737.

FLAM v. LEE.

[116 Iowa, 289, 90 N. W. 70.]

MALICIOUS PROSECUTION—*Damages for Distress of Mind.* Evidence is admissible in an action for malicious prosecution to show that on the arrest of plaintiff in his home his mother fainted or was prostrated by the shock, thereby causing him to suffer great distress of mind. (p. 244.)

MALICIOUS PROSECUTION—*Damages for Mental Suffering.* Evidence of a description of the place or prison in which plaintiff was confined, and of his mental suffering while in custody is admissible in an action for malicious prosecution to enhance the damages. (p. 246.)

MALICIOUS PROSECUTION—Evidence.—In an action for malicious prosecution on a charge of attempting to murder the defendant's daughter, the defendant cannot, without special plea, give evidence of statements by plaintiff that such daughter was unhaste, to mitigate the damages, nor are such statements admissible to show that plaintiff was probably guilty of making the assault on the daughter, nor to rebut the presumption of malice arising from causing the plaintiff's arrest, especially when it is not shown that such statements were known to the defendant at the times in question. (pp. 246, 247.)

APPELLATE PRACTICE.—Objections to the admissibility of evidence presenting no definite ruling for consideration cannot be reviewed on appeal. (p. 247.)

APPELLATE PRACTICE—Nonprejudicial Error.—If, in an action for malicious prosecution, the testimony of plaintiff's father as to his statements to the sheriff in reference to plaintiff's whereabouts on the evening of his arrest, though immaterial or hearsay, if not clearly prejudicial, does not justify a reversal of the verdict. (p. 248.)

MALICIOUS PROSECUTION—Loss of Social Standing as Element of Damage.—In an action for malicious prosecution where loss of social standing is alleged as cause for damages, evidence that immediately after plaintiff's arrest he ceased to be invited to social entertainments, as he had formerly been, is admissible without showing that such arrest caused the loss of such social favor. (p. 248.)

IN MALICIOUS PROSECUTION, Probable Cause depends upon the question whether the defendant as an ordinarily prudent and careful man, under the facts as they appear to him, in the exercise of reasonable care to ascertain the true facts, would be justified in believing that plaintiff committed the crime alleged, and to arrest him therefor. (p. 249.)

MALICIOUS PROSECUTION—Exemplary Damages—Instructions.—In an action for malicious prosecution an instruction on exemplary damages that if the defendant in instituting such prosecution was actuated solely by personal malice against "defendant" is not so misleading or prejudicial as to require a reversal of the verdict and judgment. (pp. 249, 250.)

Blake & Blake and Palmer & Kopp, for the appellant.

McCord & Finley, for the appellee.

²⁹¹ **WEAVER, J.** The plaintiff alleges that on October 9, 1899, the defendant made complaint to the sheriff of Henry county, charging plaintiff with the crime of assault with intent to commit murder; that, acting upon such charge, the sheriff without writ arrested plaintiff at his home at a late hour of night, and took him before a magistrate, where the defendant also appeared, and swore out and filed an information formally charging plaintiff with said alleged crime; that upon such charge, being unable to give bail, plaintiff was cast into jail until the following day, when he was released upon bond; that, against plaintiff's objections, said cause was continued ²⁹² from time to time until October 23, 1899, when it was called for

hearing, and the defendant not appearing to prosecute said charge, and there being no evidence against him, he was discharged, and the prosecution dismissed. He further says that the accusation made by the defendant was false, malicious, and without probable cause; that in defending against the same he was put to much expense and loss of time, and was made to suffer much pain in body and mind, and was injured in reputation and social standing, for all of which he asks damages. The defendant answers in denial.

The evidence shows, without material contradiction, the charge of crime, the arrest, the incarceration in jail, the adjournment of the hearing, the defendant's failure to appear as a witness, and the final discharge of the plaintiff by the magistrate, substantially as alleged in the petition. The evidence in the record has no tendency to show plaintiff guilty of the crime charged against him, but defendant insists that in instituting the prosecution he acted without malice and with probable cause. These being matters for the consideration of the jury, the verdict is conclusive, unless we find substantial error in some of the rulings made or proceedings had in the trial court. We therefore proceed to a consideration of the errors assigned and argued by counsel.

1. The plaintiff was permitted to show that at the time of the arrest he was living at home with his parents; that his mother was in poor health; and that upon the sheriff making known his purpose to arrest her son, she fainted, or was prostrated by the shock, and that plaintiff was thereby caused to suffer great distress of mind. It is urged that this ruling, in effect, permits the plaintiff to recover damages for injuries sustained by his mother. We do not so view it. Plaintiff's recovery must be restricted, of course, to the injuries suffered by himself. But the principal basis of recovery in most actions of this kind is mental suffering and anguish arising from the wrongful charge and arrest, and, ²⁰³ if the arrest be made in the presence of one's family or friends bringing him into shame and humiliation before them, it is a proper matter to be considered as bearing upon the pain inflicted upon him. If, then, in addition to the indignity of his arrest, he sees, as the effect of such act, his wife or mother fall in a faint, and he is forced to leave her in such prostrate and suffering condition, we see no reason why this increased pain, which naturally follows such a situation, shall not be an element in assessing his damages, if he is found

entitled to recover at all. It is not a recovery of damages sustained by the mother that is asked or allowed, but the condition and sickness of the mother, from whom plaintiff was forcibly removed, are among the facts and circumstances immediately surrounding the arrest, and were properly shown, as bearing upon the suffering which he has been made to undergo on account of his alleged wrongful prosecution.

2. Plaintiff was also allowed, over defendant's objection, to describe to the jury the place in which he was confined, the manner in which his mind was affected by the experience, and to state that certain other prisoners called him by name, and asked him, "What in hell are you doing here?" It may be conceded that so much of the testimony as repeats what was said to him by a fellow-prisoner is incompetent and immaterial, but we cannot conceive it possible that it could have had any influence upon the verdict of the jury, or that the error in admitting it was prejudicial. The facts that plaintiff was placed in jail, and that he was hemmed in by iron bars, and surrounded by the usual gloomy and depressing features which are characteristic of prisons, were proper to be called to the attention of the jury. Not that any neglect or any abuse of power by the sheriff would be chargeable to the defendant. Such we do not understand to be the purpose or effect of the testimony. No such abuse or neglect is alleged, but it must be presumed that in causing plaintiff's arrest on charge of a grave crime defendant contemplated ^{and} his possible or probable confinement, and that in such confinement he would have the surroundings and receive the treatment and fare which are inseparable from prison experience. If, for instance, the sheriff, instead of putting plaintiff in jail had entertained him at his own home, as a trusted friend or guest it would have been a fact which the defendant could properly have shown in mitigation of damages. Why, then, should the jury not be made acquainted with the usual and necessary characteristics of the entertainment which a jail affords, in order that they may determine for themselves whether plaintiff's detention there can reasonably be said to have occasioned the discomforts of mind or body of which he complains? The cases upon which appellant relies as supporting this exception go simply to the extent of saying that a person who wrongfully institutes a criminal prosecution cannot be held liable for the wrongful acts of the magistrate or other official over whom he has no control in respect to the prosecution

thus begun. The rule of these cases is manifestly correct, but it is not applicable to the facts under consideration.

In this same connection may be taken up the objections raised to plaintiff's attempt to describe his mental suffering while in custody. We know of rule of law which prohibits such testimony. It is true, perhaps, the jury may properly be left to infer such sufferings from the circumstances of his situation, and it is also true that the average witness finds it difficult to describe mental conditions in apt terms. But does it follow that such description, when made, is not proper evidence. If a man who has been wrongfully prosecuted for crime feels a sense of shame and humiliation that such a charge should be laid at his door, or that he has been disgraced in the eyes of his neighbors and friends, or is tormented with fear that his incarceration in jail may bring sorrow and disgrace to his home, we think he should be permitted to say it. There was no error in the ruling here complained of.

205 3. Many of the assignments of error are based upon the ruling of the court in refusing to permit testimony tending to show statements made by the plaintiff reflecting upon the chastity of defendant's daughter for the alleged attempt to murder whom the plaintiff was arrested. The questions were first propounded to plaintiff upon cross-examination. We think they were not relevant to anything he had said in his direct examination, and were properly ruled out upon that ground, if no other. It is said this should have been admitted as having a bearing upon plaintiff's social standing, which he claims was injuriously affected by his arrest. If offered for this purpose, then it was an attempt to mitigate damages, and, under a familiar statutory rule, matters in mitigation must be specially pleaded: Code, sec. 3593; *Hanners v. McClelland*, 74 Iowa, 318, 37 N. W. 389. The same line of testimony was offered upon direct examination of witnesses for the defendant and excluded, and we think correctly. Proof that plaintiff had slandered the defendant's daughter by insinuations or charges against her character for chastity could have no tendency to point him out as the person who attempted to shoot her, nor is it a circumstance which could afford reasonable cause to so believe. If this testimony was further intended, as was claimed, as an explanation of the defendant's attitude toward the plaintiff prior to the arrest, and to rebut any presumption of malice on his part, it is to be observed that the offer of the evidence is not accompanied by any offer to show that such conversations were

reported to the defendant, or that he knew anything of them at the time in question. Moreover, if it should be held that such explanations are of any avail, defendant had the benefit of them in being himself permitted to testify that plaintiff had made substantially the same statements to him in person. But, giving such testimony all its legitimate weight, it tends, at most, to explain the cause of defendant's malice, if ²⁹⁶ any, and not to disprove its existence. The bearing of the offer upon the question of plaintiff's social standing we have already discussed.

4. Mrs. Lee, wife of the defendant and mother of the young lady who was alleged to have been murderously assaulted, was a witness, and testified to plaintiff's calling at her home in January, 1899, and to certain conversations had between him and her husband. In the course of her testimony, the following colloquy occurred (we quote from the abstract): "Q. Well, what did he say? Give the conversation between them. (Objected to as incompetent, irrelevant, and immaterial.) Mr. Blake: I offer to prove by this witness that at this time and place and in this conversation, that the question of the veracity of Flossie Peterson and Jennie Lee about some things that were talked about were mentioned, in which Mr. Flam said that what they had said was not true, and they would not say so; when Mr. Lee replied that the children were truthful; that he had tried to raise them right, and he believed what they told him; that thereupon Flam flew into a passion and said: 'Yes; you have raised them right. Every hired man you have has done just as he pleased with Jennie, and I got her in the family way, and helped her to get rid of it. I paid the doctor bill for it'—and thereupon Mr. Lee told him to go, or words to that effect; and he arose and opened the door, and told Flam to get out; and as Flam went out the door he said, in substance, 'I will get even with you and with her.' (Objected to as incompetent, irrelevant, and immaterial.) The Court: The latter part is admissible. (Both parties except.)" This, as will readily be seen, presents no definite ruling for our consideration. The objection to the offer was neither sustained nor overruled. The court stated that the "latter part" of the offer was proper, but just how much of it may be included in that designation is not explained. Defendant's counsel do not appear to have pressed the matter further though the remark of the court left it open to them ²⁹⁷ to proceed by proper interrogation of the witness, and develop her answers so far as admissible. The offer con-

tained several distinct propositions, some of which, at least, were clearly immaterial and an offer in bulk should not be sustained where any part of it is objectionable: *Hidy v. Murray*, 101 Iowa, 69, 69 N. W. 1138.

5. Plaintiff's father testified to being at home when the arrest of his son was made, and that plaintiff was in bed when the officers arrived. Error is assumed, because in the course of this testimony the witness was permitted to relate the conversation between himself and the sheriff in reference to the plaintiff's whereabouts that evening, which was the same evening on which the alleged shooting occurred. Assuming the evidence to be immaterial or hearsay, it is not so clearly prejudicial as would justify us in disturbing the verdict. At the time this conversation took place, the sheriff was acting on the request of the defendant and without warrant, and the circumstances accompanying the arrest, so far as they had any relevancy to the suspicion of plaintiff's guilt of the crime charged, were open to the inquiry of defendant before he filed the information. We do not say as a matter of law that it was his duty to make such inquiry, but whether as a reasonable man he ought to have made it was a proper question for the jury.

6. Appellant assigns error upon the ruling of the district court in admitting the evidence of plaintiff to the effect that after his arrest he immediately ceased to be invited to houses and social entertainments at which he had up to that time been accustomed to be a guest. The fact that he does not, in express terms, show the cause of the alleged loss of social favor, does not render the evidence objectionable. The witness could not be expected to say as a matter of actual knowledge that the change, if any, in the attitude of society toward him, was the result of his criminal prosecution; but if, as he claimed, such change was coincident with that event—an event which, in the nature of ²⁰⁸ things, tends to the loss of social standing—the jury may properly be left to say, in view of all the facts, whether the relation of cause and effect was established.

7. The remaining errors assigned are based upon certain instructions to the jury. After defining "probable cause" in the usual and approved terms, the court in the fourth paragraph of its charge added: "It does not depend upon the question whether or not the person so prosecuted was actually guilty of the crime, but whether or not an ordinarily prudent and careful man, under the facts as they appeared to him *in the exercise of reasonable care to ascertain the facts*, and from the knowledge or honest

belief of the facts then had, would be justified in the honest belief that a crime had been committed, and the person accused was guilty of such crime." In the fifth paragraph of the charge the court said that if defendant, in beginning the prosecution, *"did not use the means which an ordinarily careful and prudent man would exercise, under like conditions, to ascertain the facts connecting the plaintiff with the crime* alleged to have been committed, and if you find from the facts and circumstances as they at the time were known or appeared to the defendant that he was not justified in honestly believing that the plaintiff had committed the crime for which he was afterward arrested, then such proceedings would have been commenced without probable cause." The same thought is embraced in the sixth paragraph. It is said that the language above italicized imposes too high a degree of care upon a person beginning a criminal prosecution. We think the criticism is not well founded. All that is required of an informant in criminal proceedings by this instruction is that he shall exercise the care of an ordinarily prudent man. This is not too high a standard of action for the government of one who is about to institute a prosecution which, if not well founded, may work incalculable injustice to an innocent person. The rule announced ²⁰⁰ by these instructions we regard as in harmony with the well-established principles of the law in reference to actions for malicious prosecutions: *Walker v. Camp*, 63 Iowa, 630, 19 N. W. 802.

In the twelfth paragraph of its charge the court, in stating the grounds upon which exemplary damages might be allowed, made use of the expression: "If you find that in the commencement of such [criminal] proceedings the defendant was actuated solely by feelings of personal malice against the defendant," etc. Complaint is made of this language. The court evidently intended to use the word "plaintiff" where the word "defendant" is last employed in this sentence, but the mistake is one which could not have misled the jury. It should be remembered, too, that the language which is above quoted refers to the criminal proceeding, and in that proceeding the person who is here plaintiff was there defendant, and with that in mind the use of the latter term by the trial court, while probably inadvertent, was not inappropriate. In the case of *Rich v. Moore*, 114 Iowa, 80, 86 N. W. 52, where the word "plaintiff" being mistakenly used for "defendant," was held reversible error, the instruction as written was calculated to mislead the jury upon the rule there

being considered. The real meaning of the court in this case is too apparent to prejudice either party. Upon the whole record, we think the case was fairly tried, and the verdict has sufficient support in the evidence.

The judgment of the district court is affirmed.

Malicious Prosecution of civil actions is considered in the monographic note to *McCormick et al. Co. v. Willan*, post, pp. 454-474. *Malicious prosecution* of criminal actions is considered in the monographic note to *Ross v. Hixon*, 26 Am. St. Rep. 127-164. Mental suffering is a proper element of damages for the malicious prosecution of an action and so is injury to reputation: See the note to *Ross v. Hixon*, 26 Am. St. Rep. 163. The plaintiff may show, on the question of mental anguish, that when arrested he had a dependent family, one of whom was sick, crippled, and in need of his care and attention: *Davis v. Seeley*, 91 Iowa, 533, 51 Am. St. Rep. 356, 60 N. W. 183. Probable cause within the meaning of the law of malicious prosecution, is such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe, or entertain an honest and strong suspicion, that the person arrested is guilty: See the note to *Ross v. Hixon*, 26 Am. St. Rep. 138-149; *Burk v. Hawley*, 179 Pa. St. 539, 57 Am. St. Rep. 607, 36 Atl. 337.

HANNABALSON v. SESSIONS.

[116 Iowa, 457, 90 N. W. 93.]

ASSAULT—Evidence *Res Gestae*.—In an action to recover for an assault evidence of a quarrel between the parties to the suit immediately preceding and leading up to the alleged assault is admissible as a part of the *res gestae*. (p. 252.)

TRESPASS—Force to Repel.—A landowner may use all reasonable and necessary force to expel a trespasser from his premises. (p. 253.)

TRESPASS—What Constitutes.—A person who extends his arm over a division fence into the premises of another is a trespasser, though his body remains on his side of the fence. (p. 253.)

TRESPASS—What is not.—It is not a trespass for one of two adjoining owners to hang his property on the boundary or division fence between them, although such fence is erected entirely by the other owner. (p. 253.)

Lindt & Mynster, for the appellant.

J. Sims, for the appellee.

⁴⁵⁹ **WEAVER, J.** Plaintiff and defendant live upon adjoining lots. There is frequent war between the families. The *casus belli* in the present instance is to be found in the following circumstances: Upon the boundary line between the lots is a

tight board fence, a part of which was built by plaintiff's husband; but, unfortunately, this barrier, while all sufficient to prevent the passage of the dove of peace, is neither high enough nor tight enough to prevent the interchange of brickbats, or the bandying of opprobrious epithets. On May 30, 1898, the defendant, while at work in his garden, claimed to have narrowly escaped a brick hurled in his direction by one of plaintiff's children, and, in his indignation at the unprovoked bombardment, threatened the lad with arrest. Plaintiff and her husband, being at work near by, heard the threat, and took up the quarrel. About this time plaintiff's husband discovered that a ⁴⁵⁹ ladder belonging to defendant was hanging upon a peg or block attached to the partition fence, and, conceiving this to be a cloud upon his title, he forthwith attempted to remove it, while defendant, seeing the peril in which his property was placed, rushed to its defense. Whether plaintiff herself laid violent hands on the ladder is a matter of grave dispute. She denies it, and says that the height and depth of her offending consisted in her leaning up against the fence with one arm hanging quietly over the top thereof, and in stimulating her husband's zeal by audible remarks about the "crazy fool" who was bearing down upon them from the other side. She further avers that while occupying this position of strict neutrality, the defendant assaulted her *vi et armis*, and with his clenched first struck the arm which protruded over the fence top into his domain. Defendant denies the striking, and says that plaintiff, instead of being a peaceable and impartial observer of the skirmish, was herself a principal actor, and that in aid of her husband she climbed upon some convenient pedestal, and, hanging herself across the fence, reached down, and with malice aforethought, seized the ladder and wrenched it from its resting place. Thereupon, actuated by a natural and lawful desire to protect his property from such ravishment, and being goaded on by statements from the other side of the fence reflecting upon his mother and casting doubt upon his proper rank in the animal kingdom, he gently, and without unreasonable force, laid his open hand upon plaintiff's arm, and mildly but firmly suggested the propriety of her "keeping on her own side of the fence." As is usual in cases of this kind, the testimony of the principal parties is entirely irreconcilable, and, as is also usual, each is supported by partisan witnesses in a very emphatic manner. More than a year after this alleged assault, this action for damages was be-

gun, and plaintiff swears that, as a result of the blow upon her arm, she has during all that time been sick, weak, nervous, suffering great pain and anguish, and is, to a great extent a ⁴⁰⁰ physical and nervous wreck. On the other hand, some of the defendant's witnesses testify, in effect, that, whatever may be plaintiff's bodily ills, they have existed for many years, while others tell us that since the alleged assault they have seen her performing outdoor labor with all the apparent strength of an athlete. Her physician, who was a witness in her behalf, says that, "while she is not quite so fleshy as she was a year ago, she is still fleshy enough," and the jury, who saw her at the trial, seem to have adopted his conservative estimate.

1. Reading the whole record in the case, one feels the justice of the old saying that "it is not so easy to find the truth as it is to discover the falsehood." As a rule, these petty suits are prosecuted and defended, not so much with hope of pecuniary advantage as with desire to achieve triumph over an enemy, and in that desire, and under such circumstances, parties seldom fail to rise to the emergency upon the witness stand. The common sense of the jury may, however, ordinarily be relied upon to reach a conclusion which works substantial justice. The issue presented here is one of simple fact, and, the testimony being conflicting, it was for the jury to say whether the alleged assault was committed as charged. With the verdict rendered thereon we have neither the right nor the disposition to interfere, unless there be found prejudicial error in the ruling of the trial court to which exceptions have been taken.

2. Complaint is made of the overruling of plaintiff's objections to certain questions propounded to plaintiff's husband concerning the wordy quarrel between him and the defendant at and about the time of the alleged assault. Similar exceptions are taken to the admission of defendant's testimony as to said conversation, and of the previous wrangles leading up to the struggle over the ladder. We think it was all admissible, either as part of the *res gestae* or as tending to explain the conduct of the parties ⁴⁰¹ on both sides at the time of the controversy immediately under consideration.

3. It is also said that the court erred in instructing the jury that, if plaintiff leaned over the partition fence and attempted to interfere with the ladder, defendant had the right to use such force upon her as was reasonably necessary to cause her to desist, and to expel her from his premises. It is claimed this instruc-

tion is wrong, not only as a matter of legal principle, but because no such defense was pleaded. As to the matter of pleading, we have to say, without attempting to decide whether this defense is not available under the general denial, that the defendant did, before verdict, amend his answer and plead specifically that he was acting in justifiable defense of his property. There was no error in permitting the amendment. The general doctrine announced in the instruction is, in our judgment, correct. The mere fact that plaintiff did not step across the boundary line does not make her any less a trespasser if she reached her arm across the line, as she admits she did. It is one of the oldest rules of property known to the law that the title of the owner of the soil extends, not only downward, to the center of the earth, but upward *usque ad coelum*, although it is, perhaps, doubtful whether the owners as quarrelsome as the parties in this case will ever enjoy the usufruct of their property in the latter direction. The maxim, "*Ubi pars est ibi est totum*"—that where the greater part is, there is the whole—does not apply to the person of a trespasser, and the court and jury could therefore not be expected to enter into any inquiry as to the side of the boundary line upon which plaintiff preponderated, as she reached over the fence top. It was enough that she thrust her hand or arm across the boundary to technically authorize the defendant to demand that she cease the intrusion, and to justify him in using reasonable and necessary force required for the expulsion of so much of her person as he found upon his side of the line, being careful to keep within the limits ⁴⁶³ of the rule, "*Molliter manus imposuit*," so far as was consistent with his own safety. Under the instructions of the court, the jury must have found that defendant kept within the scope of his legal rights in this respect and that the alleged assault was not established by the evidence.

We are not prepared to hold with counsel that the mere fact that this particular part of the fence was built by plaintiff's husband makes defendant a wrongdoer in hanging his ladder upon it. The entire fence, by whomsoever built, being placed upon the boundary, is, in a just sense, common property, and it would be an intolerable conclusion to say that neither party could touch the portion not built by himself without danger of a lawsuit. The law as it is affords sufficient opportunity for spiteful and contentious persons to harass their neighbors by strict insistence upon technical rights, and it would be little less

than a calamity to establish the precedent for which appellant contends. This case is one with which the court ought not to be burdened, and we can justify giving it the serious attention we have, only in the hope that an exhibition of its petty and ridiculous features may tend to check such litigation.

The judgment of the district court is affirmed.

EXPULSION OF TRESPASSER.

- I. Right to Expel Without Unnecessary Force.
- II. Duty to Warn Trespasser.
- III. Unnecessary Force.
- IV. Killing Trespasser.

I. Right to Expel Without Unnecessary Force.—There is no doubt that the owner or one who is in the rightful possession of property has a legal right to expel a trespasser therefrom after warning him to depart, provided that in so doing he does not use more force or violence than is reasonably necessary to effect that purpose. "We are aware of no rule of law that gives any person not having a special irrevocable license the right to enter and continue upon the premises of another when requested to depart. To permit all persons at their mere convenience and will to enter and remain in another's house, or even his close, so long as they may choose, and this, too, after being requested to depart, would well-nigh destroy the dominion of the owner over his property, and would render it almost useless as well as worthless. It would be monstrous to hold that a man's privacy may be so far infringed that any and all persons may at will enter his dwelling and remain after being requested to leave, until it suited their convenience to go; although it might not be so offensive to permit it on the close of the owner as upon his dwelling, it would be an outrage upon his rights. Such has never been the law, and so long as there is such a thing as individual ownership of property it is not probable that such ever will be": *Woodman v. Howell*, 45 Ill. 367, 92 Am. Dec. 231-233. The cases are generally agreed that the person in the rightful possession of real property or premises connected therewith may use sufficient force to remove therefrom a person who, being a trespasser, has no right to remain and refuses to depart after being requested to do so, and that he incurs no civil liability in so doing, but if in thus asserting his rights he uses more force than is necessary to eject the intruder or inflicts unnecessary injury, he becomes liable therefor. Whether the force or violence used to eject a trespasser was unnecessarily severe, or whether it was merely such as was "necessary" must, manifestly, depend to a great extent upon the circumstances of each particular case, and in this respect the courts seem very liberal toward the person seeking to eject the trespasser. In such cases courts cannot and will not undertake to pass upon the surroundings with very great nicety in determining just exactly the amount of

force which may be used by the owner in ejecting a trespasser from his property. Every case must be governed by its own particular circumstances, and they vary to such an extent and depend so much upon appearances and incidents occurring at the moment of the expulsion, that the owner must to a very great extent be left to determine for himself the means necessary to be used by him in the process of ejection, and in reviewing the discretion used by him, no great amount of speculation and refinement as to the probabilities can safely be indulged by the court. In the following cases the rule is maintained that if a person enters the premises of another after being ordered by the owner not to enter, or persists in remaining after he is ordered to depart he becomes a trespasser and such owner has a right to use enough force to eject him from such premises and to prevent his re-entering. In other words the owner of the premises has the right to use such force as is reasonably necessary to prevent a person from trespassing thereon, but no more. The rule here applied is not unlike the familiar rule in criminal law that one in repelling an attack may use such force as would appear to be reasonably necessary to a person of ordinary intelligence, carefulness, and prudence, acting under similar circumstances: *McDermott v. Kennedy*, 1 Harr. (Del.) 143; *Watson v. Hastings*, 1 Penna. (Del.) 47, 39 Atl. 587; *Woodman v. Howell*, 45 Ill. 367, 92 Am. Dec. 221; *Wharton v. People*, 8 Ill. App. 232; *Brebach v. Johnson*, 62 Ill. App. 131; *Illinois Steel Co. v. Waznius*, 101 Ill. App. 535; *Manning v. Brown*, 47 Md. 506; *Sampson v. Henry*, 11 Pick. 379; *Hamilton v. Arnold*, 116 Mich. 684, 75 N. W. 133; *Morgan v. Durfee*, 69 Mo. 469, 33 Am. Rep. 508; *State v. Howell*, 21 Mont. 165, 53 Pac. 314; *Harshman v. Rose*, 50 Neb. 113, 69 N. W. 755; *Markham v. Brown*, 8 N. H. 523, 31 Am. Dec. 209; *Scribner v. Beach*, 4 Denio, 448, 47 Am. Dec. 265; *Newkirk v. Sabler*, 9 Barb. 652; *Gyre v. Culver*, 47 Barb. 592; *Conway v. Carpenter*, 80 Hun, 428, 30 N. Y. Supp. 315; *Souter v. Codman*, 14 R. L. 119, 51 Am. Rep. 364; *Brothers v. Morris*, 49 Vt. 460; *Cuppert v. Morrison*, 27 Wis. 365, 9 Am. Rep. 439; *Wright v. Southern Express Co.*, 80 Fed. 85. If the owner of land wrongfully held by another enters and expels the occupant, but makes use of no more force than is reasonably necessary to accomplish this, he is not liable in a civil action for trespass, nor for assault and battery, nor for injury to the occupant's goods, although, to effect such expulsion and removal, it becomes necessary to use so much force and violence as to subject him to indictment for a breach of the peace, or for making a forcible entry: *Manning v. Brown*, 47 Md. 506; *Souter v. Codman*, 14 R. L. 119, 51 Am. Rep. 364. A person employed by a corporation to guard its premises from trespassers has a right to use such force as is reasonably necessary to prevent persons from trespassing upon such premises, but no more: *Illinois Steel Co. v. Waznius*, 101 Ill. App. 535. If, after the surrender of a lease of a church, the pastor of the former lessee enters the church, occupies the pulpit, and insists on preaching, the lessor is justified in having him removed by force from the pulpit

and from the church, using such force only as is necessary to eject him therefrom, if after notice he refuses to leave: *Conway v. Carpenter*, 80 Hun, 428, 30 N. Y. Supp. 315. Or if one undertakes to possess himself of the lands or goods of another without force, the owner must first request him to depart, and, if he refuses, may then use sufficient force to expel him, but he must not assault him in the first instance. If, however, the entry is made with force and violence, the owner may, in the first instance, use such force as may be necessary to subdue the violence of the aggressor: *Scribner v. Beach*, 4 Denio, 448, 47 Am. Dec. 265. A landlord may forcibly enter his premises and eject, without unnecessary force, a tenant holding over after the expiration of his tenancy and who has had reasonable notice to quit. Such tenant is merely upon the premises by will or sufferance, with no more right than a mere trespasser, and the landlord, if he acts within reason in ejecting such person, is not liable civilly nor in damages for an assault, although he is liable to indictment for a breach of the peace for the forcible entry: *Esty v. Baker*, 50 Me. 325, 79 Am. Dec. 616; *Winter v. Stevens*, 9 Allen, 526-530; *Low v. Elwell*, 121 Mass. 309, 23 Am. Rep. 373; *Stone v. Lahey*, 133 Mass. 426; *Overdeer v. Lewis*, 1 Watts & S. 90, 37 Am. Dec. 440. A person rightfully having the actual possession of land has a right to expel a trespasser, and to repel by force any attempt to molest him in the enjoyment of the premises, or in the free use of anything appertaining thereto, but such owner or possessor, in removing a trespasser from his premises, is entitled to use only so much force as is necessary for that purpose: *McCarty v. Fremont*, 23 Cal. 196; *Tribble v. Frame*, 7 J. J. Marsh. 599, 23 Am. Dec. 439; *Bliss v. Johnson*, 73 N. Y. 529; *O'Donnell v. McIntyre*, 118 N. Y. 156, 23 N. E. 455; *Comstock v. Dodge*, 43 How. Pr. 97. A person in the rightful possession of a house may legally assault and beat off anyone wrongfully forcing his way into it, but if he goes beyond defense and uses unnecessary force in such defense or in revenge or as punishment of the aggressor, he himself becomes a trespasser and is liable in damages for an assault: *Pitford v. Armstrong*, Wright (Ohio), 94.

An agent has the same right as his principal to defend the principal's possession and to expel trespassers: *Taylor v. Adams*, 53 Mich. 187, 24 N. W. 864.

A person has the right, with reasonable force, to defend his property or premises, as well as his person, against invasion by a trespasser and the fact that injury is inflicted upon the invader will not make the resisting and ejecting person liable in damages for an injury thus inflicted in the reasonable defense of his house, lands or goods: *Fossbinder v. Svitak*, 16 Neb. 499, 20 N. W. 866.

II. *Duty to Warn Trespasser.*—The rule is universal, we apprehend, that if a trespasser enters peacefully upon the land of another, and is discovered there, not doing any violence, a request to him to depart and a refusal to do so is necessary before the party

ejecting him can justify a resort to force and violence in expelling him. After such request and refusal, the party in possession has the right to use such force as is necessary to expel the trespasser, and no more: *Price v. State*, 72 Ga. 441; *Long v. People*, 102 Ill. 331; *Robinson v. Hawkins*, 4 T. B. Mon. 134; *State v. Woodward*, 50 N. H. 527; *People v. Osborn*, 1 Wheel. C. C. 97. An unarmed trespasser on one's premises must be requested to leave, and gentle means of removal must be employed before a resort to force: *State v. Burke*, 82 N. C. 521. In such case the owner is not justified in inflicting a violent battery upon the trespasser unless it is absolutely necessary in self-defense and to eject him: *State v. Lazarus*, 1 Mill Const. (S. C.) 34. A man cannot lawfully push a trespasser off his land without first requesting him to go off the premises: *Thompson v. Berry*, 1 Cranch C. C. 45, Fed. Cas. No. 13,943. An innkeeper has a right to request a person who visits his inn, not as a guest or on business with guests, to depart, and if he refuses, may gently lay his hands upon him to lead him out and expel him, and if he resists, may employ sufficient force to eject him, and for so doing he may justify on a prosecution for an assault and battery: *State v. Steele*, 106 N. C. 766, 19 Am. St. Rep. 573, 11 S. E. 478.

An assault on a trespasser is not justifiable when the trespass is not accompanied by violence, unless the trespasser is first requested to depart and, refusing this request, resists the effort made to remove or expel him; but if the trespass is committed with force, it may be resisted by violence adequate for the occasion without first requesting the trespasser to desist and depart: *Mellvoy v. Cochran*, 2 A. K. Marsh. 271; *Scribner v. Beach*, 4 Denio, 448, 47 Am. Dec. 265. Ordinarily, the occupant must resist the entrance of a trespasser with gentle hands and a request to leave, but if the intruder defiantly stands his ground, armed with a deadly weapon, the occupant may at once resort to physical force, and it is then for the jury to decide whether there was more force used than was necessary: *State v. Taylor*, 82 N. C. 554.

III. Unnecessary Force.—A mere trespass upon the land of another, even after the trespasser has been warned to depart and has refused, does not justify the land owner in using a dangerous or deadly weapon to resist the trespass, and if the land owner shoots or otherwise injures the trespasser with a deadly or dangerous weapon, not in necessary self-defense, he is liable for the damages caused thereby: *James v. Hayes*, 63 Kan. 133, 65 Pac. 241; *Elverton v. Esgate*, 24 Neb. 235, 38 N. W. 794; *Montgomery v. Commonwealth*, 98 Va. 840, 36 S. E. 371, 98 Va. 852, 37 S. E. 1. An assault with a gun or revolver for the purpose of removing a mere trespasser from the premises of the assailant cannot be justified: *Wharton v. People*, 8 Ill. App. 232; *Kunkle v. State*, 32 Ind. 220; *State v. Montgomery*, 65 Iowa, 483, 22 N. H. 639. A man has not the same right in repelling a trespasser from his outlying lands as he has from his residence lot, nor has he any right to take his gun as a means of running a trespasser off from his lands: *State v. Lightsey*, 43 S. C. 114, 20

S. E. 975. One who throws a stick of wood at a trespasser on his premises and strikes him with intent to inflict an unwarranted injury upon him is liable in damages therefor: *Carter v. Sutherland*, 52 Mich. 597, 18 N. W. 375; *Talmage v. Smith*, 101 Mich. 370, 45 Am. St. Rep. 414, 59 N. W. 656; *Hyatt v. Wood*, 8 Johns. 239. And if such owner misses the party intended to be struck he is liable for an injury inflicted upon another trespasser who is struck by such stick: *Talmage v. Smith*, 101 Mich. 370, 45 Am. St. Rep. 414, 59 N. W. 656. But it has been held that a landlord by shaking a walking-stick at a trespasser while within striking distance and threatening him therewith, in an attempt to repel and expel him, used no more force than was necessary to protect his possession: *State v. Austin*, 123 N. C. 749, 31 S. E. 731. Generally, however, an owner of property is justified in beating a trespasser only when the battery is necessary in defense of his property: *Stachlin v. Destrehan*, 2 La. Ann. 1019. Thus, if a trespasser enters a workshop and violently interferes with the machinery therein, the owner has a right to defend with all the force necessary to expel the trespasser, and although he is liable for the result of brutal force beyond what the occasion warrants, yet in determining such question due allowance must be made for the difficulty which a reasonable man would have in measuring under exciting circumstances the exact amount of force necessary: *Townsend v. Briggs*, 99 Cal. 481, 34 Pac. 116.

IV. **Killing Trespasser.**—No person is justified in taking human life to prevent the commission of a mere trespass, and if the land owner attacks and kills a mere trespasser in the first instance he is guilty of murder: *People v. Flanagan*, 60 Cal. 2, 44 Am. Rep. 52; *People v. Hecker*, 109 Cal. 451, 42 Pac. 307; *Powers v. People*, 42 Ill. App. 427; *People v. Horton*, 4 Mich. 67; *McDaniel v. State*, 8 Smedes & M. 401, 47 Am. Dec. 93; *People v. Devina*, 1 Edm. Sel. Cas. 594; *Wallace v. United States*, 162 U. S. 466, 16 Sup. Ct. Rep. 859. No mere entry or trespass on the lands or premises of another against his protest and command, however wrongful it may be, and no matter if accompanied with insulting and irritating words and gestures can justify or excuse a resort in the first instance to the use of a deadly weapon and the killing of such trespasser: *State v. Warren*, 1 Marv. (Del.) 487, 41 Atl. 190. A forcible entry into a tract of land by opening a closed gate, or pulling down fence, or cutting through a hedge, or breaking a wall, does not warrant or justify the possessor in resorting to any violence to expel the intruder incommensurate with or out of proportion to, that used or threatened, and before he can kill the trespasser in self-defense he must first have used every other means of escape. In the case of a mere trespass, killing the intruder is murder in the first degree, if the slayer, expecting a dangerous attack, arms himself to repel the trespasser and uses such arms without any serious resistance on the part of the intruder: *State v. Talley*, 9 Houst. 417. While the owner of land has a right to order a trespasser

therefrom, he has no right to follow him up until an attack is made upon himself so fierce as to compel him to take the life of the trespasser in self-defense: *Tiffany v. Commonwealth*, 121 Pa. St. 165, 6 Am. St. Rep. 775, 15 Atl. 462.

Deliberately killing a man to prevent a mere trespass upon property is murder, whether such trespass could or could not be otherwise prevented: *Harrison v. State*, 24 Ala. 67, 60 Am. Dec. 450; *State v. Woodward*, 1 Houst. C. C. 455; *State v. Buchanan*, 1 Houst. C. C. 79; *McDaniel v. State*, 8 Smedes & M. 401, 47 Am. Dec. 93; *Commonwealth v. Drew*, 4 Mass. 391; *State v. McDonald*, 4 Jones, 19; *State v. Brandon*, 8 Jones, 463.

Mere civil trespass upon a man's house, unaccompanied by such force as to make it a breach of the peace, is not sufficient provocation to reduce the killing of the trespasser to manslaughter, if committed under circumstances from which the law would imply malice: *Carroll v. State*, 23 Ala. 28, 58 Am. Dec. 282. Trespass is not such provocation as entitles one to use a deadly weapon, nor is it such as to reduce a killing below murder, nor is the throwing of a stick or club by the trespasser at the land owner without its hitting him, and before the fatal shot is fired, such provocation as will reduce a homicide from murder to manslaughter: *State v. Shippey*, 10 Minn. 223, 38 Am. Dec. 70. In *State v. Matthews*, 148 Mo. 185, 71 Am. St. Rep. 594, 49 S. W. 1085, it was, however, held that though a person while on his own land is not justified in killing another because the latter tears down his fence or carries it off, yet if the killing of the trespasser is done in a heat of passion, engendered by such acts, it is nothing more than manslaughter in the fourth degree.

If a trespass is forcible, the owner of the land may resist the entry, but he is not justified in killing the trespasser unless it is necessary to prevent a felonious destruction of his property, or to defend himself against loss of life or great bodily harm, and if, in such case, the trespasser is killed when there is not reasonable ground for apprehending imminent danger to person or property, it is manslaughter, and if the killing is accompanied with malice, express or implied, it is murder: *Carroll v. State*, 23 Ala. 28, 58 Am. Dec. 282; *People v. Hecker*, 109 Cal. 451, 42 Pac. 307. The owner of property in the possession thereof has a right to use so much force as necessary to prevent a forcible trespass and if the trespasser goes upon the premises with the intent and the means to commit a felony, if necessary to accomplish the end intended, the owner of the property may repel force by force even to the extent of killing the trespasser and he will be justified in so doing: *People v. Payne*, 8 Cal. 341; *People v. Flanigan*, 60 Cal. 2, 44 Am. Rep. 52; *People v. Hecker*, 109 Cal. 451, 42 Pac. 307; *Sims v. State*, 36 Tex. Crim. Rep. 154, 36 S. W. 256. The owner of property on his own premises has the right by force to evict a trespasser therefrom, or to restrain the trespasser from injuring his person or property, and he is justified in arming himself with any weapon and in using it to the extent of slaying the trespasser if it should become nec-

essary, in the progress of the difficulty, to protect his life or person from a felonious assault, and the fact that such owner assaults the trespasser to protect his person or property does not deprive him of his right to defend himself against the violence of the trespasser induced by such assault: *Ayers v. State*, 60 Miss. 709.

As has before been shown a mere civil trespass without force on property will in no case entirely justify a homicide, and in the case of a homicide of such a trespasser in defense of one's possessions, the trespass must be into the owner's or possessor's dwelling-house or his outbuilding, and all means of expulsion, both peaceable and forcible, must have failed, before there can be a justifiable homicide of the intruder: *Lee v. State*, 92 Ala. 15, 25 Am. St. Rep. 17, 9 South. 407; *State v. Becker*, 9 Houst. 411, 33 Atl. 178; *State v. Bartness*, 33 Or. 110, 54 Pac. 167. A person is not justified in taking human life to prevent a mere trespass on his real estate or property, except in the case of his dwelling-house, which he may defend even to the taking of such life, if necessary, or apparently necessary, to prevent a trespasser from forcibly entering it against his will and when warned not to enter and desist from the use of force. For all other trespasses to real estate the law affords an ample remedy without resort to the killing of the intruder: *Davidson v. People*, 90 Ill. 221; *State v. Zellers*, 7 N. J. L. 220.

One assailed by a trespasser in his dwelling-house is not obliged to flee therefrom, but is authorized to repel force by force, and protect himself and his house from intrusion, and, if in the reasonable exercise of his right of self-defense, as appears to him at the time, he kills his assailant, the killing is justifiable homicide: *People v. Coughlin*, 67 Mich. 466, 35 N. W. 72. If one is assaulted in his own home by a trespasser or the home itself is thus attacked, the owner may use such means as are necessary to repel the trespasser or to prevent his forcible entry or material injury to his home even to the taking of his life. But the homicide in such case is not justifiable, unless the slayer, in the proper and careful use of his faculties, bona fide believes, and has reasonable ground to believe, that the killing is necessary to repel the assailant or prevent his forcible entry: *State v. Peacock*, 40 Ohio St. 333. A trespasser assaulting a house can be lawfully resisted and repelled to the extent of using deadly weapons and taking life, only in case the assault is made either with the intent of taking the life of the inmate or of doing him great bodily harm, and such resistance is necessary to prevent such crime, or in case the inmate has reason to believe from the circumstances, and in fact does believe, that it is necessary to prevent the commission of such crime: *State v. Patterson*, 45 Vt. 308, 12 Am. Rep. 200. The rule is well summed up in *State v. Taylor*, 143 Mo. 150, 44 S. W. 785, where it is held that the "maxim 'Every man's house is his castle' does not mean that the owner of a dwelling-house has the right to take life because of trespass upon the dwelling-house alone, irrespective of the nature of the trespass.

To justify the taking of the life of the trespasser, the trespass must be with a design to commit a felony thereon or therein, or upon its inmates. A mere civil trespass upon one's dwelling-house does not justify him in killing the trespasser. The owner may resist such a trespass, opposing force against force, but he has no right to kill unless it becomes necessary to prevent a felonious destruction of property or the commission of a felony, or to defend himself against a felonious assault upon his person or that of some member of his family." In *Morgan v. Durfee*, 69 Mo. 469, 33 Am. Rep. 508, it appeared that a man who was reputed to be quarrelsome and carried concealed weapons and who was stronger than the owner of a business office entered therein and abused such owner with opprobrious epithets. The owner ordered him to leave, but he refused and continued his abuse, when the owner pushed him with his open hand toward the door. Thereupon, the trespasser throttled him and made a motion to draw his gun, whereupon such owner, reaching out his hand toward a safe to steady himself, grasped a seal, striking the intruder therewith, knocking him down, and thereby causing his death thereafter, and it was held that such owner's act was entirely justifiable.

TAYLOR v. ANCHOR MUTUAL FIRE INSURANCE CO.

[116 Iowa, 625, 88 N. W. 807.]

INSURANCE—Misstatement by Agent.—If an applicant for insurance truly states the condition of the property with reference to encumbrances to the insurance agent, who incorrectly states them in writing the application, such incorrect statement does not avoid the policy. (p. 262.)

INSURANCE—Severability—Breach of Condition.—Entirety of premium in a policy of insurance on a dwelling-house and livestock as separate items, with a certain amount of insurance on each, does not prevent the policy from being severable, and recovery may be had for loss on the house, although the policy is void as to the livestock, because of subsequent encumbrance thereon, if both classes of property are not exposed to the same risk. (p. 267.)

INSURANCE.—Entirety of Premium does not necessarily prove that a contract of insurance is indivisible, and if distinct items or classes of property are separately insured, the policy may be valid as to one item or class, although invalid as to another item or class by reason of breach of condition of the policy with reference thereto, provided it appears that the risk which it was intended to exclude by the condition which is broken does not apply to the other items or classes of property. (p. 267.)

INSURANCE—Waiver of Proof of Loss.—The finding of the jury as to waiver of proof of loss under a policy of insurance is conclusive, and binding upon the appellate court. (p. 267.)

Sullivan & Sullivan, for the appellant.

S. Gilliland and O. R. Patrick, for the appellee.

⁶²⁵ **McCLAIN, J.** The application upon which the policy was issued represented that insured owned ninety-three acres of land, ⁶²⁶ "on which the property to be insured is located," of the value of thirty-five dollars per acre; that there was nine hundred dollars encumbrance thereon; that he had a fee simple title to the land "on which the above-described property to be insured is situated"; and that his title was undisputed to the property proposed for insurance; and these representations were, in the policy, warranted to be correct. The policy specifies the risk assumed as follows: "two hundred and fifty dollars on frame dwelling-house; two hundred and fifty dollars on household furniture, beds and bedding while therein; fifty dollars on family wearing apparel therein; twenty-five dollars on sewing machines while therein; fifty dollars on silver and plated ware while therein, and family jewelry, books, pictures, picture frames; one hundred dollars on work horses, mules, and colts on premises (and against loss by lightning), at large or in use, not to exceed seventy-five dollars on each; one hundred dollars on cattle on premises; one hundred dollars on grain in building; twenty-five dollars on wagons, carriages, and harness." It is provided in the policy not only that it shall be void in case of false representations in the application, or change in title or possession, but also that it shall be void after any sale, conveyance, or encumbrance of the property insured, without the consent of the company.

1. It appears that the ninety-three acres described as the premises on which the buildings and other property insured were located, consisted, in fact, of two tracts—one of eighty acres, and another adjoining of thirteen acres—and that the property was all located on the latter of these two tracts. There was some contention as to breach of warranty with reference to the title of, and encumbrance upon, the eighty-acre tract; but it is shown that the true condition of the property with reference to title and encumbrance was truly stated to the agent, and that, if the application had been made out in accordance with the information given, there would have been no falsity in the statements. Therefore no defense is made out as to the title of, or encumbrance upon, the real estate.

2. Subsequent to the issuance of the policy, the insured gave a chattel mortgage on some of the cows and horses covered by the policy, and this is relied on by defendant as a breach of condition, avoiding the entire policy, and therefore preventing recovery for the loss, which was of the dwelling-house and furniture therein. We may concede that the giving of the chattel mortgage was a breach of the condition of the policy as to the property covered by the mortgage; and we are therefore at once confronted with the question whether a breach of condition as to a part of the property covered by the policy will avoid the policy as to other property enumerated, and covered by a separate stipulation thereof, as to the amount of the risk assumed on such property. It will be seen that if the house and furniture had been included in one policy, and the animals in another, a breach of the condition of the policy covering the animals would not prevent recovery under the policy covering the dwelling-house and furniture; but it is contended that, where an insurance on different classes of property is affected by a policy which states a gross premium, the contract is entire although the risks assumed on the different classes of property are distinct and separate. On this question the authorities are in hopeless confusion, and there are cases upholding without qualification, to the rule that the entirety of the premium is conclusive as to the entirety of the contract, so that a breach of condition as to one class of property will avoid the policy as to all, notwithstanding the two classes are included in separate clauses as to the amount of loss to be paid. On the other hand, there are cases in which it is held that if the risks are separately enumerated the policy is divisible, notwithstanding the entirety of the premium. We think however, the great weight of authority at the present time is to the effect that the question is one of the intention of the parties, and that if the condition of the property is such that the risk as to one class of property ⁶²⁸ would be affected by the destruction of the other, then it must be presumed that the breach of condition as to one class is a violation of the contract, also, as to the other class, because the company would not have insured the one except upon the condition imposed as to the other; while if the loss of the one class of property could not affect the risk as to the other, then it must be presumed that there was no intention that the conditions as to one should apply to the risk as to the other. In

support of this construction we find the following pertinent language used by the supreme court of New York in the case of *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 452, 29 Am. Rep. 184: "When there are several subjects of insurance (as there are fourteen here), separately valid, on which a gross sum is insured, not excepting the aggregate of that valuation, for the insurance of which a premium in gross is paid, it is easy to see what is the rate of premium on the whole valuation, and what is the amount of premium on each subject insured. This being so, it seems fanciful to say that, if the facts thus easily reached were stated in detail in the contract it would be severable, while not being specifically spread out it is entire. If there were anything in the terms or nature of the particular contract, or in the circumstances of the case, or in the nature of the different subjects of insurance, from which it was to be inferred that the insurer would not have been likely to have assumed the risk on one or several of them unless induced by the advantage and profit of having a risk on all, that would be a rational cause for deeming the contract entire. But when, for aught that appears—when, indeed, it is as likely that—the insurer would have taken a risk upon any one or any few of the subjects insured at the same rate of premium as upon the whole, and has in the policy so separated the subjects, and so singled them out by a specific valuation, as that there is no difficulty in distinguishing one of the subjects from the rest, and closing the contract as to that separately, and carrying forward ^{§29} the contract as to the rest, it does result that the contract is severable in practical operation, and hence in law. And so, also, that, though there may have been some conduct of the insured as to some of the property, not evil in itself, but working a breach of a condition in its letter, the effect of that breach may be confined to the insurance upon that property, the contract as to that may be held avoided, and as to the other subjects held valid. There is another rule—that in construing the consideration, as entire or distributed, the law will be guided by a respect to general convenience and equity, and by the good sense and reasonableness of the particular case; for it must be supposed that it was the intention of the parties that such a construction should take place, in the occurrence of contingencies not contemplated and provided for at the making of the contract." In *Phenix Ins. Co. v. Pickel*, 119 Ind. 155, 12 Am. St. Rep. 393, 21 N. E.

546, the court uses this language: "In this case, we are unable to see how the risk on the house named in the second and third paragraphs of the answer could affect the risk on the barn or the personal property, for the destruction of which the suit was prosecuted. The risks on the different items of property named in this policy are many of them separate and distinct. It is true that the risk on the household goods in the house would be affected by whatever would affect the risk on the house; so the risk on the grain in the barn would be affected by whatever would affect the risk on the barn; but we think it impossible to conceive how the risk on the barn could affect the risk on the house, or vice versa." And it was accordingly held in another action between the same parties (*Pickel v. Phenix Ins. Co.*, 119 Ind. 291, 21 N. E. 898), that while, under the former case, the policy should be treated as several with reference to the different buildings, it was indivisible with reference to the risk on the house and personal property contained therein, although they were enumerated under separate clauses in describing the loss to ^{be} paid. And the doctrine of these cases is reiterated by the same court in *Geiss v. Franklin Ins. Co.*, 123 Ind. 172, 18 Am. St. Rep. 324, 24 N. E. 99, where it was held that although different classes of personal property, involved in the same risk, were separately enumerated, a breach of condition as to one would be a breach as to all. To the same effect, it was held in *Loomis v. Rockford Ins. Co.*, 77 Wis. 87, 20 Am. St. Rep. 96, 45 N. W. 813, that "although the insurance is distributed to the different items of insured property, the contract is indivisible if the breach of contract as to an item of the property affects, or may reasonably be supposed to affect, the other items by increasing the risk thereon." In support of the same general proposition, see *Loehner v. Home Mutual Ins. Co.*, 17 Mo. 247; *Koontz v. Hannibal etc. Ins. Co.*, 42 Mo. 126, 97 Am. Dec. 325; *Phoenix Ins. Co. v. Lawrence*, 4 Met. (Ky.) 9, 81 Am. Dec. 521; *Hanover Ins. Co. v. Crawford*, 121 Ala. 258, 77 Am. St. Rep. 55, 25 South. 912; *Manchester Fire Assur. Co. v. Glenn*, 13 Ind. App. 365, 55 Am. St. Rep. 225, 40 N. E. 926, 41 N. E. 847. A recent case strongly supporting the proposition that the contract is indivisible, and a breach of condition as to one class of property will avoid it as to all the property covered, is *Southern F. Ins. Co. v. Knight*, 111 Ga. 622, 78 Am. St. Rep. 216, 36 S. E. 821.

But it is unnecessary to elaborate by quotations from or citations of the many cases in which this question has been considered. The citations found in several of the recent cases above referred to cover the whole ground. It may be said, further, that several cases in which courts have announced the unqualified rule that a breach of condition as to one class or item of property covered by the policy will constitute a breach of the contract as to all the property covered are cases where the different classes or items of property were so situated with reference to each other that the risk as to one constituted a risk as to all, and in these ^{cases} the same result might have been reached by adopting the rule which we have above announced as supported by the weight of authority: See, as illustrations, *Lee v. Havard Fire Ins. Co.*, 3 Gray, 583; *Fire Assn. v. Williamson*, 26 Pa. St. 196; *Agricultural Ins. Co. v. Hamilton*, 82 Md. 88, 51 Am. St. Rep. 457, 33 Atl. 429; *Cuthbertson v. North Carolina Home Ins. Co.*, 86 N. C. 480, 2 S. E. 258. It may be noticed, also, that the North Carolina court, in a later case than that last cited, although not involving the same question, has held that where the policy classifies and specifies numerous items of property, and the sums of money for which they are severally insured, the contract is not single, but severable: *Pioneer Mfg. Co. v. Phoenix Assur. Co.*, 110 N. C. 176, 28 Am. St. Rep. 673, 14 S. E. 731.

The question has not been full discussed in any cases which have been decided by this court. In *Garver v. Hawkeye Ins. Co.*, 69 Iowa, 202, 28 N. W. 555, the proposition is broadly laid down that where the premium is in gross the contract is not divisible, and a breach of warrant as to a part of the property will vitiate the policy as to the whole. But it is to be noticed that there the policy covered a barn and certain horses, and the court might well have held that the risk, so far as the horses were concerned, was involved in any risk affecting the barn; and the conclusion was therefore in accordance with the rule which we think to be the proper one, although we do not regard the reason given as satisfactory. In *Kahler v. Iowa State Ins. Co.*, 106 Iowa, 380, 76 N. W. 734, the view expressed in the *Garver* case was qualified so as to leave the way open for adopting the position which we now take. We therefore hold on this question, as involved in the case before us, that entirety of premium does not necessarily prove that the contract is indivisible, and that where it ap-

pears from the terms of the policy that distinct items or classes of property were separately insured the policy may ^{ess} be valid as to one item or class, although it is invalid as to another item or class by reason of breach of conditions of the policy with reference thereto provided it appears, also, that the risk which it was intended to exclude by the condition which is broken does not apply to the other items or classes of property. In this case a chattel mortgage on the cows and horses could not in any way affect the nature of the risk as to the dwelling-house and contents, and therefore we find that a breach of a condition in the policy as to the one class of property did not invalidate the insurance as to the other.

3. As to failure to furnish proofs of loss, the plaintiff relied upon a waiver contained in a letter from an officer of the company to the plaintiff with reference to an adjustment of the loss, and subsequent conduct of the adjuster with reference to the loss. Under the issues the question of waiver was properly submitted to the jury and their finding is conclusive upon us.

Affirmed.

The Agents of Insurance Companies, authorized to procure applications for insurance and forward them to the company for acceptance, are regarded as the agents of the insurer, and not of the insured. If, therefore, they make out applications incorrectly, when the applicant has stated the facts correctly, the errors are chargeable to the insurance company: See the monographic note to *Clark v. Union etc. Ins. Co.*, 77 Am. Dec. 724; *Triple Link etc. Assn. v. Williams*, 121 Ala. 138, 77 Am. St. Rep. 84, 26 South. 19; *German Ins. Co. v. Hayden*, 21 Colo. 127, 52 Am. St. Rep. 206, 40 Pac. 453; *Continental Ins. Co. v. Chew*, 11 Ind. App. 330, 54 Am. St. Rep. 506, 38 N. E. 417; *Sternaman v. Metropolitan Life Ins. Co.*, 170 N. Y. 13, 88 Am. St. Rep. 625, 62 N. E. 763, Compare *O'Rourke v. Hancock Mut. Life Ins. Co.*, 23 R. I. 457, 91 Am. St. Rep. 643, 50 Atl. 834.

A Policy Insuring both real and personal property is not avoided by mortgaging the personal property: *Born v. Home Ins. Co.*, 110 Iowa, 379, 80 Am. St. Rep. 300, 81 N. W. 676, And where a house and barn are covered by one policy, a sale of the barn does not affect the right to recover for the loss of the house: *Clinton v. Norfolk etc. Ins. Co.*, 176 Mass. 486, 79 Am. St. Rep. 325, 57 N. E. 998. But see *Southern Fire Ins. Co. v. Knight*, 111 Ga. 622, 78 Am. St. Rep. 216, 36 S. E. 821, on the entirety of insurance contracts.

CITY OF DES MOINES v. KELLER.

[116 Iowa, 648, 88 N. W. 627.]

BICYCLES—Ordinance Regulating Use of.—An ordinance entitled "an ordinance to regulate bicycles" has a title sufficient to cover a provision requiring the use of a light on a bicycle used on the streets of a city after dark. (p. 268.)

CONSTITUTIONAL LAW—Ordinance Regulating Use of Bicycles.—A city ordinance requiring all bicycles used on the city streets after dark to carry a light is not unconstitutional as applying only to bicycles, and not to other silently running vehicles, nor as abridging any of the privileges or immunities of the citizen. (p. 269.)

BICYCLES—Regulation of Use of.—The use of the bicycle on a public street or highway is subject to all just and reasonable requirements for the safety and convenience of other users of such streets and highways. (p. 269.)

BICYCLES—Ordinance Regulating Use of.—A city having power to provide for the safety of its inhabitants has authority to pass an ordinance requiring bicycles used on its streets after dark to carry lights. (p. 269.)

H. E. Long, for the appellant.

J. E. Mershon and M. H. Cohen, for the appellee.

640 SHERWIN, J. On the second day of July, 1894, the following ordinance was passed by the city council of Des Moines: "An Ordinance to Regulate Bicycles. . . . Sec. 290. Riding Without Light. That it shall be unlawful for any person to ride any bicycle upon the streets after dark and before daylight without carrying or having a sufficient light to be easily seen the distance of at least one block. Any person found guilty of violating this ordinance shall be fined not less than one dollar nor more than twenty dollars, and stand committed to jail until such fine and costs are paid."

The title of this ordinance is expressed with sufficient clearness, and is broad enough to cover the use of bicycles on the streets of the city: Dillon on Municipal Corporations, 3d ed., sec. 51; Marford v. Unger, 8 Iowa, 82; State v. Forkner, 94 Iowa, 733, 62 N. W. 722; State v. Barge, 82 Minn. 256, 84 N. W. 912.

Nor is the ordinance in conflict with and contrary to section 6 of article 1 of the constitution of this state, because it applies only to bicycles, and not to riders or users of other silently running vehicles. It applies to all riders of bicycles, as a class, and is for this reason sufficient and reasonable: Iowa etc. Land Co. v. Soper, 39 Iowa, 112; Pringhar State

Bank v. Berick, 96 Iowa, 238, 64 N. W. 801. In the early history of bicycles, some of the courts were inclined to the view that they were ⁶⁵⁰ such an innovation on the use of the highways that they were not entitled to the same protection as other vehicles: See State v. Yopp, 97 N. C. 477, 2 Am. St. Rep. 305, 2 S. E. 458. But they are now generally treated as vehicles having a common right to the use of the streets and highways: See 17 L. R. A. 289, note. And they are subject to all just and reasonable requirements for the safety and convenience of other users of such streets and highways. That a municipal corporation has absolute control of its streets is generally conceded, and it is equally as true that it may enact such ordinances governing the use thereof as shall be necessary, in its judgment, to protect the public, providing they are reasonable; and if it does this without undue discrimination, and all who are subject to the ordinance are treated alike, under similar circumstances and conditions, as to privileges conferred and liabilities imposed, equal protection of the laws is not denied. The noiseless, swift and light character of a bicycle distinguishes it from all other vehicles used on the highways. In the night, on a paved street, it is as silent as death. It glides along without any of the noise made by horses drawing a carriage. Its approach is generally unheralded, and pedestrians who are called upon to cross a street are usually without warning of its proximity until a "swish" advises them that it has passed. That vehicles that are more dangerous to the public than others may be regulated by ordinance, we do not doubt; and a requirement that bicycle riders use lamps during the night is but a just and reasonable exercise of control over the public highways for the protection of others whose rights thereon are as great as theirs. Tricycles, quadricycles, and rubber-tired buggies are not of the same class as bicycles: Wheeler v. City of Boone, 108 Iowa, 235, 78 N. W. 909.

Nor do we think the ordinance in question inhibited by section 1 of article 14 of the constitution of the United States. The privilege of using a public street is always to be regulated so as to protect the equal rights of others.

⁶⁵¹ We are clearly of the opinion that the council had implied if not direct, power to pass an ordinance regulating the use of its streets by vehicles before section 754 of the Code of 1897 was passed. Under section 482 of the Code of 1873, it had power to provide for the safety of its inhabitants, and

it must be conceded that this is the only purpose of the ordinance in question.

The judgment is affirmed.

The Riding of Bicycles on sidewalks by persons over twelve years of age may be prohibited by statute: *State v. Aldrich*, 70 N. H. 391, 85 Am. St. Rep. 631, 47 Atl. 602. And it has even been held that the legislature may exclude them from highways: *Twilley v. Perkins*, 77 Md. 252, 39 Am. St. Rep. 408, 26 Atl. 286. See, too, *State v. Yopp*, 97 N. C. 477, 2 Am. St. Rep. 305, 2 S. E. 458.

ARMOUR PACKING COMPANY v. DES MOINES PORK COMPANY.

[116 Iowa, 723, 89 N. W. 196.]

LANDLORD AND TENANT—Abandonment by Tenant—Set-off.—If a landlord, after abandonment of the leased premises by the tenant, takes possession thereof without indicating to the tenant an intention to hold him for the rent or to lease to others on his account, he thereby accepts the abandonment as a surrender of the lease, and cannot offset the difference in the rent stipulated for and what he was able to realize for the remainder of the term, against the claim of the tenant for goods sold to him. (p. 271.)

E. B. Evans, for the appellant.

Dunshee & Dorn, for the appellee.

⁷²⁴ LADD, C. J. The Des Moines Pork Company leased of Gates for one year from June 1, 1897, the building known as No. 506 East Walnut street, at the monthly rental of forty-one dollars and sixty-six cents, occupied it about two weeks as a meat market, and then, owing to financial troubles, quit business. One month's rent had been paid in advance. Negotiations were begun at once looking to a continuance of the business by one Holehan, a bill of sale of the meats on hand made to him, and a note drawn for their value for him to sign, and indorsed in blank. He refused to take the goods, and, though signing the note, retained it in his pocket. Thereupon Gates took possession of the building and meats, operated the market himself for a short time, and then leased it to a firm composed of himself and Holehan for twenty-five dollars a month. He appropriated the meats, and it is for their value that judgment is demanded. He insists that this should be offset by the diff-

erence in the rent stipulated in the lease and what he was able to realize during the remainder of the term. He claims that the note referred to was indorsed by the company to him as security for the payment of the rent to accrue, and practically that the bill of sale was made out, and the meats turned over for that purpose. On the other hand, Kirkpatrick, a member of the copartnership known as the "Des Moines Pork Company," testified that the sole purpose of the bill of sale and note was to dispose of the property to Holehan, and nothing was said or done with relation to securing rent to become due or transferring the meats or note to Gates; that the negotiations were conducted on the basis that the building was worth the rental stipulated, and giving it up would not involve loss. Evidently the trial court took this view, and found that the company had abandoned the premises, and that Gates had merely re-entered and taken possession for himself. This, without more, would constitute a surrender of the leasehold interest and an acceptance thereof: See *Rice v. Dudley*, 65 Ala. 68; *Brown v. Cairns*, 107 Iowa, 727, 77 N. W. 478; *Oastler v. Henderson*, L. R. 2 Q. B. Div. 575; *Stobie v. Dills*, 62 Ill. 432; *Phene v. Popplewell*, 12 Com. B., N. S., 334; *Shahan v. Herzberg*, 73 Ala. 59; *Kneeland v. Schmidt*, 78 Wis. 345, 47 N. W. 438; 1 Washburn on Real Property, 4th ed., 549, 18 Am. & Eng. Ency. of Law, 364. In such a case there is nothing to indicate a purpose on the part of the landlord in resuming possession to hold the tenant liable for the rent or to lease to others on account of the tenant. He merely accepts the abandonment as a surrender of the leasehold interests, and thereby puts an end to the contract. If appellant has any ground of complaint, it is with the findings of fact the district court must have made. With these we cannot interfere. The ruling by which the court refused to open the case and receive further evidence was not an abuse of discretion. There is no occasion to pass on the motions filed.

Affirmed.

The Surrender of a Lease may be made by the abandonment of the premises by the tenant and the entry of the landlord: *Williams v. Vanderbilt*, 145 Ill. 233, 36 Am. St. Rep. 486, 34 N. E. 476. If a landlord resumes possession with the acquiescence of the tenant, he will be estopped to dispute the surrender, and a formal surrender will be unnecessary: *Welcome v. Hess*, 90 Cal. 507, 25 Am. St. Rep. 145, 27 Pac. 369.

CASES
IN THE
SUPREME COURT
OF
KANSAS.

DENTON v. FYFE.

[65 Kan. 1, 68 Pac. 1074.]

PARTITION.—One Out of Possession cannot maintain partition against his cotenants in possession, if the petition contains no demand for possession. (pp. 273, 274.)

Albert Perry and A. S. Brewster, for the plaintiff in error.

Ryan & Reeder, for the defendants in error.

¹ SMITH, J. This was an action of partition brought in the court below by one tenant in common against her cotenants. The real estate in controversy consists ² of several tracts of land which, at the commencement of the action, were in the possession of defendants below. The petition contains no demand for possession. The question arises on these facts whether the action can be maintained. In *Scarborough v. Smith*, 18 Kan. 399, it was held that in such actions there may properly be joined a claim for possession. The question presented seems not to have been decided by this court in a case where it was directly involved. Under our statute, a partition suit has relation solely to a division of real estate, according to the respective interests of the claimants. The nature of the proceeding and the relief that may be afforded are shown by the following sections of the code:

“When the object of the action is to effect a partition of real property, the petition must describe the property, and the respective interests of the owners thereof, if known”: Gen. Stats. 1901, sec. 5101.

“The answers of the defendants must state, among other things, the amount and nature of their respective interests. They may also deny the interests of any of the plaintiffs or any of the defendants”: Gen. Stats. 1901, sec. 5104.

"After the interests of all the parties shall have been ascertained, the court shall make an order specifying the interests of the respective parties, and directing partition to be made accordingly": Gen. Stats. 1901, sec. 5105.

"The court shall have full power to make any order not inconsistent with the provisions of this article that may be necessary to make a just and equitable partition between the parties, and to secure their respective interests": Gen. Stats. 1901, sec. 5116.

Section 5084 of the General Statutes of 1901, found under the title of "Actions concerning real property," reads: "In an action by a tenant in common of real property against a cotenant, the plaintiff must . . . state in his petition that the defendant either denied the plaintiff's right, or did some act amounting to such denial."

³ It is a settled doctrine of the common law that one joint tenant or tenant in common cannot maintain a suit for partition unless he be in possession or seised of the lands when the suit is brought: *Adam v. Ames Iron Co.*, 24 Conn. 230; *Tiedeman on Real Property*, sec. 262. In states having a code like ours the rule of the common law has been adhered to: *Hutson v. Hutson*, 139 Mo. 229, 40 S. W. 886. In *Estes v. Nell*, 140 Mo. 639, 650, 41 S. W. 940, 941, it was said: "It is well established in this state that where one is in the possession of land claiming it adversely against all others, one out of possession cannot maintain a suit against him for partition without first establishing his right in an action of ejectment, but after having done so he may maintain his action for partition against the person or persons in possession": See, also, *London v. Overby*, 40 Ark. 155; *Hardy v. Mills*, 35 Wis. 141; *Weston v. Stoddard*, 137 N. Y. 119, 33 Am. St. Rep. 697, 33 N. E. 62, 20 L. R. A. 624, and note on page 626. In the case last cited, it was held that prior to 1880, under the statutes of New York, a tenant in common of real property must wait until he has gained possession in an action or proceeding at law before he can insist upon a division of the property between himself and his cotenants. The case was decided, however, in 1893, under a statute which authorized the litigation in an action of partition of all questions of title between cotenants and their privies who might be parties to the action. In California it was held, under a code of that state, that a tenant in common who had never been in occupancy of the land might maintain a suit in partition

against a cotenant whose possession was adverse or hostile. In the opinion the court said that their code declares that any right, title, or interest in the land may be put in ⁴ issue, tried and determined in the action: *Martin v. Walker*, 58 Cal. 590. See, also, *Peterson v. Fowler*, 73 Tex. 524, 11 S. W. 534.

In the case of *Delashmutt v. Parrent*, 39 Kan. 548, 557, 18 Pac. 712, 717, while the point raised here was not directly involved, the court said: "The title of the plaintiff being disputed, ejectment was the appropriate, if not the only, remedy which could be employed to determine the title of the adverse claimants to the property. The theory of partition is, that there is a common and undisputed ownership by which the share of each owner is to be set off, or, if partition cannot be made, the court may permit any one of the owners, electing to take the same at an appraised value, or may order a sale of the property and a division of the proceeds among the parties according to their respective interests. Some of the courts have gone to the extent of holding that the title of parties owning common property and claiming adversely must first be established by ejectment before partition proceedings can be maintained: *Sedgwick and Wait's Trial of Title to Land*, sec. 166. Under our code, however, the fact that the property is held adversely to the plaintiff will not defeat an action of partition when brought in connection with or as part of another action for the recovery of real property. Under our rules of pleading, the two causes of action may be united in one action, or they may, when so pleaded, and no objection is made, be treated as a single cause of action: *Scarborough v. Smith*, 18 Kan. 399."

We are clear that the petition in this case did not state a cause of action, and for that reason the judgment of the court below must be reversed. A plaintiff in a suit of this kind, to obviate a multiplicity of actions, ought to have his possessory rights determined in the same proceeding where partition is prayed for. Two actions are unnecessary where complete relief can be obtained in one.

⁵ On the other questions involved, we think, under the findings of fact, that the conclusions of law were correct. There was no valid delivery of the deeds executed by Walter Burrell which were found in his house at the time of his death.

The objection to the service upon the minors who were defendants below is highly technical, and, as no objection was made to it in the trial court, it cannot be considered here. It appears that the minors were personally served with sum-

mons. This is not denied. If the objection had been made in the court below, an amendment of the return of the sheriff could have been made.

The judgment of the district court will be reversed and the cause remanded for a new trial.

Cunningham, Greene and Pollock, JJ., concurring.

The Principal Case was followed in *Chandler v. Richardson*, 65 Kan. 152, 69 Pac. 168, in an action of partition by one out of possession, asserting an interest against one in possession claiming title to the entire property adversely to all others. "In such case," said Justice Pollock, "an action of partition cannot be maintained unless the right to recover an interest in the property has been first established in a prior action for the recovery of real property, or unless a cause of action for the recovery of real property be united with the action of partition. The reason for this rule is apparent. The right to trial by a jury cannot be denied in an action in ejectment or for the recovery of real property. In such case a second trial, when demanded, under the statute is a matter of right. The action of partition is an equitable action, properly triable by the court. In such a case a jury is not a matter of right. Special questions of fact may, in the discretion of the court, be submitted to the jury. Their findings thereon, however, are not binding upon the court, but are merely advisory. If it were permissible for a party out of possession, claiming an undivided interest in real property, to bring and maintain an action of partition against a party in possession, claiming to own the entire estate adversely as against the world, without either having first established his right to recover a portion of the property in a prior action or joining an action for the recovery of real property with his action for partition, the trial court could, without error, deny a jury trial in such partition case, and the defendant would be thus indirectly and in effect deprived of a jury trial in an action for the recovery of real property, in which a jury is demandable of right, and would also be denied a second trial in ejectment under the statute. For this reason, a simple action in partition, as in the case at bar, cannot be maintained by one out of possession against one in possession claiming the entire estate, unless his right to some portion of the property is first established in an action for the recovery of real property, or unless an action for the recovery of real property be joined with the action of partition."

Partition.—Actual or constructive possession is ordinarily essential to maintaining an action for partition: *Savage v. Savage*, 19 Or. 112, 20 Am. St. Rep. 795, 23 Pac. 890; monographic note to *Nichols v. Nichols*, 67 Am. Dec. 703. Constructive seisin is sufficient, unless there is proof of an ouster: *Barnard v. Pope*, 14 Mass. 434, 7 Am. Dec. 225. In Indiana, one may have partition without having possession, or may have it even against an adverse claimant: *Godfrey v. Godfrey*, 17 Ind. 6, 79 Am. Dec. 448. See, also, *Barker v. Jones*, 63 N. H. 497, 13 Am. St. Rep. 586.

HAZEN v. WEBB.

[65 Kan. 38, 68 Pac. 1096.]

A COURT OF EQUITY, Once Having Assumed jurisdiction, will draw into consideration the entire subject matter and bring before it the parties interested therein, that a complete, effectual, and final decree adjusting the rights of all parties may be entered and enforced. (p. 279.)

PARTITION—Parties.—In an Action to Partition a Portion of a joint estate and adjust the liens thereon, brought by a grantee of one of the co-owners, the defendants may, by a cross-demand for affirmative relief, have drawn into the controversy all the joint estate and all parties in interest therein, and have the entire matter adjusted in one litigation. (p. 279.)

CHANGE OF VENUE.—The Jurisdiction of a Court taking a cause by change of venue is precisely the same as would have obtained in the court from which the venue is changed. (p. 281.)

PARTITION—Sale of Part of Property.—In an action to partition lots encumbered by specific, overlapping liens, it is proper to order a sale of the property in satisfaction of the liens established, in accordance with the priority of the liens thereon, and a partition of the remainder, when in no other way can the interests of the lienors and joint owners be protected. (p. 282.)

H. W. Page and William R. Hazen, for the plaintiffs in error.

Keeler & Hite, for the defendants in error.

³⁵ **POLLOCK, J.** The matters involved in this litigation are so inextricably confused, and the interests of the parties so interminably intermingled, that it will ³⁹ subserve no useful purpose to attempt an exact or detailed statement of all. It will be sufficient to state such facts only as are necessary to disclose the nature of the propositions discussed and relied on by counsel.

John S. Branner and Jacob Klein were partners. Klein died, leaving as heirs defendants in error, Josie Webb and Millie Nichols. Branner, as administrator settled the individual estate of Klein, the partnership estate of Branner & Klein, and acted as guardian for the Klein heirs. The values of the properties involved are large, and much litigation has arisen between the heirs of Klein and Branner. Many cases arising between these parties have been determined by this court: See Webb v. Branner, 59 Kan. 190, 52 Pac. 429; Branner v. Nichols, 61 Kan. 356, 59 Pac. 633; Branner v. Webb, 61 Kan. 181, 59 Pac. 270, 61 Kan. 861, 60 Pac. 1131. Others aside from this are now pending.

Plaintiff in error, Hazen, having secured title from Branner and wife to Branner's undivided interest in much of the partnership real estate during the pendency of litigation in which the property was involved, brought this action in Shawnee county to partition one lot and a portion of two others, in the city of Topeka, belonging to the partnership estate. To this action Branner, the Klein heirs receivers of certain of the property, theretofore appointed one George Giles, the owner of a mortgage of seven thousand dollars on the property sought to be partitioned and on other portions of the partnership property, and others, were made defendants. Each of the heirs of Klein owned an undivided one-fourth of the property involved. Josie Webb had theretofore recovered a judgment against Branner in the sum of four thousand five hundred dollars for rents and profits accruing on certain of the partnership estate. Millie Nichols had recovered ⁴⁰ a like judgment in the sum of four thousand seven hundred and forty-two dollars and twenty cents. These judgments were liens upon Branner's portion of the joint property. Webb and Nichols also had a claim of twenty thousand dollars in litigation against Branner, growing out of the settlement of the estates and his guardian accounts. After plaintiff had procured his deed from Branner, he mortgaged the property therein described to the Bank of Topeka to secure the sum of four thousand three hundred dollars. Moses Snattinger held a mortgage on one portion of the joint property to secure payment of the sum of six thousand dollars. M. Oswald held a mortgage on another portion of the joint property to secure payment of the sum of three thousand dollars.

A change of venue was taken to Jackson county district court, where defendants Webb and Nichols jointly, by way of answer and amended answer and cross-demand, set forth the foregoing facts in detail; described the joint property; alleged possession of their interest, the liens upon the joint property, their right to partition of the same; also, that the deed from Branner to plaintiff was fraudulent and void; demanded partition and asked that all parties in interest in the joint property might be brought in and their interests in the joint estate fully adjusted, determined and protected by the decree entered. All parties in interest were brought in, and their rights to and claims on the joint property were fully set forth. During the pendency of this action the undetermined demand

of Webb and Nichols against Branner was reduced to judgment, and ascertained to be the sum of twelve thousand one hundred and ninety-six dollars and ninety-four cents, which fact was set forth in a supplemental answer filed in this case.

After issues fully joined, plaintiff, for the mortgagee Snattinger, Snattinger in his own behalf and mortgagee Giles, moved for a dismissal of the action, which ⁴¹ motion was overruled. After an ineffectual application for continuance, plaintiff and mortgagees, Snattinger, Giles, and the Bank of Topeka, dismissed their several causes of action. Thereupon, upon demand of the defendant heirs, the case was brought on for trial, and, as to all matters except the fraudulent character of the deed from Branner to plaintiff, was tried by the court. This question of fraud was by the court specially submitted to a jury. In answer to a special question, the jury found such deed fraudulent and void. The court made full findings of fact upon the evidence, conclusions of law therefrom, at length, and entered a decree fully adjusting and determining the interest of all parties in the property, and the extent, amount and priority of the liens thereon. It specifically directed the manner of sale of the different parcels of encumbered property and the distribution of the proceeds, to the end that the priority of the liens thereon might be preserved, protected, and paid, and ordered the partition of the remainder of the property after the satisfaction of the liens between the parties in interest, as provided by law. From this decree the plaintiff, Branner and the mortgagees prosecute this proceeding in error.

The questions raised for determination are mainly matters of practice. The evidence is not in the record and the facts found by the court are conclusive. The findings support the decree entered. From the facts stated, on account of the interlacing of interests and the overlapping of liens, that any effectual, enforceable and protective decree might be entered, it was almost an imperative necessity that all of the joint property and all the parties interested therein should be brought before one court in one litigation. For, in no other manner conceivable could an effectual decree ⁴² determining the several rights and protecting the different interests of all parties be obtained. The action of the trial court in so doing constitutes the chief ground of complaint made against the decree entered. The property in dispute being real property,

situate in Shawnee county, and the relief demanded being the partition of this property and the determination of the extent and priority of liens thereon, that the district court of Jackson county in the first instance had no jurisdiction, is apparent. What is the rule, however, this action having been commenced in Shawnee county to partition a portion of the joint property, and having been legally removed to Jackson county on change of venue?

On principle, it is well settled that the general policy of the law is to avoid a multiplicity of actions. It is also a principle of universal application that a court of equity once having assumed jurisdiction of a subject matter will reach out and draw into its consideration and determination the entire subject matter and bring before it the parties interested therein, that a full, complete, effectual, and final decree adjusting the rights and equities of all parties in interest may be entered and enforced. A partial or incomplete decree in equity will not be entered. No decree will be granted until all necessary parties are before the court, if jurisdiction can be obtained. This action having been originally commenced by plaintiff in Shawnee county to partition only a portion of the joint estate and adjust the liens thereon, had the case remained in that jurisdiction, that the heirs could, by cross-demand for affirmative relief, have drawn into the controversy all the joint estate and all parties in interest therein, and fully determined and adjusted the entire matter in ⁴⁸ one litigation, would seem sound in principle and well sustained by authority.

In the case of *Parker v. Harrison*, 63 Miss. 225, Mr. Justice Campbell, in delivering the opinion of the court, said: "The complainant was a cotenant of all the lands sought to be partitioned, and brought before the court the alienees of former cotenants, so that their interests would be protected. Surely, they cannot successfully complain of this. It is the right of one of several cotenants to convey his interest in the whole or a part of the joint estate, but this shall not prejudice the rights of a cotenant who has not aliened and desires to obtain partition. It is not allowable for a cotenant to split the joint estate into fragments, and necessitate as many separate suits for partition as there may be conveyances. He who has a joint interest in the several parcels may proceed as if no conveyance had been made by any of his cotenants, and bring all parties in interest before the court, which will do justice between the parties according to their several rights."

In the case of *Barnes v. Lynch*, 151 Mass. 510, 21 Am. St. Rep. 470, 24 N. E. 783, it was said: "A conveyance by one tenant in common of his interest in part only of the common estate will not authorize a cotenant to enforce partition of such part against the grantee, leaving the residue unpartitioned."

In *Grady v. Maloso*, 92 Wis. 666, 66 N. W. 808, it was held that one of several persons who together inherited from the same person two tracts of land may, without his complaint being open to the objection of improperly uniting several causes of action maintain an action for partition of the two lots against his coheirs and persons to whom they ⁴⁴ have conveyed an interest in one or the other or both of the lots.

In *Grant v. Murphy*, 116 Cal. 427, 58 Am. St. Rep. 188, 48 Pac. 481, it was held that, as a general rule, all the parties to an action for partition are actors, each having the right to set up in his pleadings the nature and extent of his interest, and to have the same ascertained and adjudicated by the interlocutory decree; that this rule applies where the property must be sold for partition as well as in other cases, and a decree which does not adjudicate the interests of the respective parties is ordinarily erroneous.

In *Goro v. Dickinson* 98 Ala. 363, 39 Am. St. Rep. 67, 11 South. 743, it was held: "The court having acquired jurisdiction of the main question—the real subject matter—it will ascertain the validity and extent of such conveyances, and so mold and adjust its decree as to meet all the equities of the parties growing out of their ownership of and relation to the property."

Mr. Knapp, in his work on Partition, page 25, says: "The court, before it will order a sale of lands in partition, requires that all those that have an interest in them shall be made parties to the action, to the end that the purchaser may get a perfect title." At page 89 the same author says: "It is a general rule that all persons who may in any way be interested in the lands sought to be partitioned shall be made parties to the action. . . . This rule also includes those who have a lien upon the land, or who may be interested in any mortgage, judgment or mechanic's lien, or, in fact, any lien that may be actually valid against the premises": See, also,

English v. English, 53 Kan. 173, 35 Pac. 1107; *Barnes v. Boardman*, 157 Mass. 479, 32 N. E. 670.

This being the rule governing the rights of the parties, ⁴⁵ had Shawnee county remained the forum, does the fact that the venue of the action was changed to Jackson county limit the jurisdiction of that court to that portion of the joint estate described in the petition and actually involved in the controversy at the time the venue was changed? Or was the jurisdiction of that court coextensive with that of the Shawnee court had the venue remained unchanged? From an examination of the authorities, it would seem to be the general rule that a court taking jurisdiction of a cause by change of venue takes precisely the same jurisdiction which would have obtained in the court from which the venue is changed. In the *Encyclopedia of Pleading and Practice*, volume 4, at page 487, it is said: "The jurisdiction acquired by a change properly made is in all respects the same as that of the court in which the cause originated." In the case of *McIlwrath v. Hollander*, 73 Mo. 105, 39 Am. Rep. 484, it was held: "A court to which a change of venue has been taken may render any judgment which might have been rendered by the court in which the case originated." In the opinion it was said: "The circuit court of Buchanan county, having regularly acquired jurisdiction of the suit by change of venue, had precisely the same power to render judgment therein which the circuit court of Livingston county had, and for all the purposes of this case the judgment may be regarded as a judgment of the circuit court of Livingston county."

As the Klein heirs had the undoubted right to have all the joint property partitioned in the one action brought in Shawnee county, notwithstanding the conveyance by Branner to plaintiff, and the interest of all parties therein determined, that the decree might be effectual and an end of litigation, and as the district ⁴⁶ court of Jackson county, by the change of venue taken, acquired jurisdiction to determine any question and render any judgment in the case that the district court of Shawnee county could have rendered had the venue remained unchanged, it follows that the decree entered is not objectionable upon this ground.

Again, it is contended by counsel for plaintiffs in error that the court had no power to order the sale of the real estate involved in this controversy, or any portion thereof, and the

distribution of the proceeds. We apprehend that this contention is based upon the assumption that, under the statutory provisions for partition of real estate, the only judgment the trial court is warranted in rendering is one determining the extent of the interest of the parties and appointing a commission to make partition in kind, if possible, or, if found and reported by the commissioners that partition in kind cannot be made, to order a sale on the appraisement made by the commissioners, in the event none of the parties in interest in the property elects to take the same at its appraised value. Whatever may be the general rule upon this subject where the property is unencumbered and no insuperable objection to this method of procedure is presented, we do not think the rule applicable to the facts in this case, or that justice could be done the parties by a strict adherence thereto. Section 616 of the code (Gen. Stats. 1901, sec. 5163) provides: "Creditors having a specific or general lien upon all or any portion of the property may be made parties." Section 629 (Gen. Stats. 1901, sec. 5116) provides: "The court shall have full power to make any order not inconsistent with the provisions of this article that may be necessary to make a just and equitable partition between the parties, and to secure their respective interests."

⁴⁷ As has been seen, the joint property in this case was composed of several town lots and fractions of lots, encumbered by the specific, overlapping liens of the mortgagees and the general liens of the heirs upon the interests of Branner and plaintiff. The statute grants the power to make the lienors parties. Under the power granted, they were made parties in this case. When made parties, the statute, and the general rules of equity as well, invested the court with full jurisdiction over them to make all orders necessary to protect their interests, and also to protect the interests of the joint owners of the property. The only manner in which this could be accomplished in this case was by a sale of the property in satisfaction of the liens established, in accordance with the priority of the liens thereon, and the partition under the statute of the remainder. Any other decree would have been insufficient to meet the equities of the case, would afford no protection to the parties, and be incapable of enforcement under the peculiar complications of the case. Former decisions of this court tend to support this view: *Sarbach v. Newell*, 28 Kan. 642; *Sarbach v. Newell*, 30 Kan. 102,

1 Pac. 30; Phipps v. Phipps, 47 Kan. 328, 27 Pac. 972. The supreme court of Iowa, in passing upon this proposition, in *Brown v. Cooper*, 98 Iowa, 444, 60 Am. St. Rep. 190, 67 N. W. 378, held: "The object of partition proceedings is to enable those who own property as joint tenants or coparceners, or tenants in common, to so put such end to the tenancy as to vest in each a sole estate in specific property or an allotment of the lands or tenements. It contemplates an absolute severance of the individual interests of each joint owner, and, after partition, each has the right to enjoy his estate without supervision, let or hindrance from the other. Unless this can be accomplished, then the joint estate ought to be sold, and the proceeds divided."

⁴⁸ Complaint is also made of the trial court in permitting the filing of amended and supplemental pleadings, in refusing to grant a continuance, and in proceeding with the trial after the dismissal by plaintiff and the mortgagees of their several causes of action. Upon consideration, we find these objections without sufficient merit to entitle them to separate consideration. After dismissal by these parties they participated in the trial, the equities of the mortgagees were fully protected, and ample provision was made for the satisfaction of their liens.

Upon the whole record, it would appear that justice has been done as between the parties by the decree entered. It is therefore affirmed

Smith, Cunningham and Greene, JJ., concurring.

A Court of Equity, having acquired jurisdiction of a cause for any purpose, will generally retain it and make a final adjudication between the parties: *Lodor v. McGovern*, 48 N. J. Eq. 275, 27 Am. St. Rep. 446, 22 Atl. 199. It will give full relief and do complete justice: *Whipple v. Farrar*, 3 Mich. 436, 64 Am. Dec. 99; *Vaught v. Meador*, 99 Va. 569, 86 Am. St. Rep. 908, 39 S. E. 225.

In a Partition Suit all persons interested are necessary parties: *Batterton v. Chiles*, 12 B. Mon. 348, 54 Am. Dec. 539; *Ferris v. Montgomery Land etc. Co.*, 94 Ala. 557, 33 Am. St. Rep. 146, 10 South. 607. As to the duty of the court to determine the interests of the parties, see *Grant v. Murphy*, 116 Cal. 427, 58 Am. St. Rep. 188, 48 Pac. 481. In a proper case, partition may be by sale and division of the proceeds: *Wilson v. Bogle*, 95 Tenn. 290, 49 Am. St. Rep. 929, 32 S. W. 386; *Pearce v. Rickard*, 18 R. I. 142, 49 Am. St. Rep. 755, 26 Atl. 38; *Brown v. Cooper*, 98 Iowa, 444, 60 Am. St. Rep. 190, 67 N. W. 378; *Corrothers v. Jolliffe*, 32 W. Va. 562, 25 Am. St. Rep. 836, 9 S. E. 889.

GARDEN CITY v. MERCHANTS' AND FARMERS' NATIONAL BANK.

[65 Kan. 345, 69 Pac. 325.]

RES JUDICATA.—When a Matter is Once Adjudicated, it is conclusively determined between the same parties and their privies as to all matters which were or might have been litigated; and this determination is binding as an estoppel in all other actions, whether commenced before or after the action in which the adjudication was made. (p. 285.)

RES JUDICATA.—The Determination of the Validity of Municipal Bonds in an action on interest coupons is conclusive in a subsequent action between the same parties to recover on other coupons attached to the same bonds. (p. 286.)

E. C. Wilcox, for the plaintiff in error.

Isaac P. Campbell, for the defendants in error.

³⁴⁵ **JOHNSTON, J.** This was an action by the Merchants' and Farmers' National Bank of Danville, New York, to recover from the city of Garden City on interest coupons which had been detached from refunding bonds previously issued by the city. The defense was that the bonds were invalid, because they were issued to take up an indebtedness incurred for the erection of a mill which was a private enterprise, and also because the officers executing them had no authority to do so. In reply to this defense, the bank, among other things, ³⁴⁶ alleged that, in another action between the same parties upon other interest coupons which had been attached to the same bonds, the same defenses had been set up by the city in the same court, and the same issues joined as in the present action; that judgment was rendered in that action in favor of the bank, sustaining the validity of the bonds; and that, as the matters in litigation had been adjudicated, the city was estopped from making the same defense and from further litigating the same matters and issues. A motion to strike out this part of the reply was overruled, and, as the testimony in the case conclusively established a former adjudication on the issues presented in the present action, the court held that the city was estopped further to prosecute its defense, and directed a verdict in favor of the bank.

The funding bonds in controversy were issued in pursuance of chapter 50 of the Laws of 1879, and contain full recitals

showing that all the prerequisites to the regular issuance of the bonds had been complied with, and that they were regularly and honestly issued by the officers of the city. They were purchased on the open market by the bank, without knowledge of any irregularities or defects in their issuance.

As an original proposition, the bonds appear to be valid and binding obligations in the hands of the bank which was an innocent purchaser (*State v. Board etc. of Wichita County*, 62 Kan. 494, 64 Pac. 45); but every objection now made to their validity was made and adjudicated in the first action, and, as the judgment then rendered was final and unreversed, the same matters are not open to another inquiry in another action between the same parties.

"When a matter is once adjudicated it is conclusively determined between the same parties and their ³⁴⁷ privies, as to all matters which were or might have been litigated, and this determination is binding as an estoppel in all other actions, whether commenced before or after the action in which the adjudication was made": *Chicago etc. R. R. Co. v. Commissioners of Anderson Co.*, 47 Kan. 767, 29 Pac. 96; *Hoisington v. Brakey*, 31 Kan. 560, 3 Pac. 353; *Boyd v. Huffaker*, 40 Kan. 634, 20 Pac. 459; *Shepard v. Stockham*, 45 Kan. 244, 25 Pac. 559; *Sanford v. Oberlin College*, 50 Kan. 342, 31 Pac. 1089; *McDowell v. Gibson*, 58 Kan. 607, 50 Pac. 870.

The main defenses in the original action were that the bonds were signed by the president of the city council, as acting mayor, without right or authority; that they were issued for a private purpose, and, therefore, did not constitute a valid indebtedness of the city; and that the bank knew, or should have known, of the defects and irregularities in the execution of the bonds. In that proceeding the court found that the bank was an innocent purchaser for a valid consideration, without notice of any defects; that there was a vacancy in the office of mayor of the city when the bonds were issued; that C. J. Powers, who signed the bonds, was then president of the city council and acting mayor of the city, and was a proper officer to execute the refunding bonds; and, further, that the bonds were regularly issued, and were valid obligations of the city. These matters were brought directly in issue by the pleadings, and precisely the same defenses were set up and sought to be established in the present action. There is the identity of parties, issues and purposes necessary to a bar un-

der the doctrine of *res judicata*, and, as the judgment in the former proceeding was pronounced by a court of competent jurisdiction, it is a bar not only as to any further dispute as to facts, but also as to any further consideration of the law bearing on the case.

³⁴⁸ It is contended that there is a lack of identity as to the cause of action, because the action in this case is brought on different coupons from those that were sued on in the former case. Both actions, however, were brought to recover interest on the same debt. The coupons had all been attached to the same bonds, and in each case the right of recovery depended on the validity of the bonds from which the coupons were detached.

In *Chicago etc. R. R. Co. v. Commissioners of Anderson Co.*, 47 Kan. 767, 29 Pac. 96, it was held that the rule of *res judicata* applies as well to the facts settled and adjudicated as to causes of action. In *Furneaux v. National Bank*, 39 Kan. 144, 7 Am. St. Rep. 541, 17 Pac. 854, it was held that where a party makes a defense to an action on a note that was given for the purchase of machinery, and other notes were given as a part of the same transaction and for the same consideration, a judgment based on a defense made on the first of the notes is conclusive as to all the other notes. In *Bissell v. Spring Valley Township*, 124 U. S. 225, 8 Sup. Ct. Rep. 495, there was an adjudication on coupons of municipal bonds, where the defense was that the municipality never executed the bonds and that the bonds were not its obligations. This adjudication was held to be conclusive in a subsequent action brought by the same party on different coupons of the same bonds: See, also, *Southern Pac. R. R. Co. v. United States*, 168 U. S. 1, 18 Sup. Ct. Rep. 18; *Whittaker v. Johnson County*, 12 Iowa, 595.

As the facts and the law brought in question here have been fully adjudicated between the parties, the city is precluded from attempting to show anything contrary to the determination first made. This view practically disposes of all that is meritorious in the ³⁴⁹ case. There is nothing substantial in the objections to rulings on the testimony, and nothing is found which affords ground for reversal.

The judgment is affirmed.

Cunningham, Greene and Ellis, JJ., concurring.

Res Judicata.—Questions that may be deemed *res judicata* are not confined to those raised and insisted on at the former adjudication, but embrace also those which were involved in the issue and might have been properly insisted upon: *Gross v. People*, 193 Ill. 260, 61 N. E. 1012, 86 Am. St. Rep. 322, and cases cited in the cross-reference note thereto. Compare *Pitts v. Oliver*, 13 S. Dak. 561, 79 Am. St. Rep. 907, 83 N. W. 591; *Freeman v. Barnum*, 131 Cal. 386, 82 Am. St. Rep. 355, 63 Pac. 691. A judgment sustaining the action of a lower court in overruling objections to an application for a judgment of sale for certain installments of a special assessment is *res judicata* as to subsequent installments: *Gross v. People*, 193 Ill. 260, 86 Am. St. Rep. 322, 61 N. E. 1012. See, also, *Furneaux v. First Nat. Bank*, 39 Kan. 144, 7 Am. St. Rep. 541, 17 Pac. 854; *Stallcup v. Tacoma*, 13 Wash. 141, 52 Am. St. Rep. 25, 43 Pac. 541.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY v. MERRILL.

[65 Kan. 436, 70 Pac. 358.]

A RAILWAY Company Which Delivers a Defective Car to a connecting carrier is not liable for injuries sustained by an employé of the latter by reason of such defect, after the receiving company has inspected the car and taken it in charge for transportation over its line. (p. 288.)

THE DUTY OF A RAILWAY Company to Inspect the Cars of Other Roads received by it is enjoined by law, and its dereliction of duty, in the event of an injury to its employé from such cars, is the proximate cause of the hurt, and the negligence of the company turning over the unsafe cars is the remote cause. (pp. 291, 292.)

MASTER AND SERVANT.—The Liability to a Servant ceases with the control of the master over his actions. (p. 293.)

NEGLIGENCE—Control of Offending Object.—When one is to be charged because of the ownership or construction of an object which causes damage by some defect, commonly the liability is held to end when the control of the object is changed. (p. 293.)

STARE DECISIS.—If an Erroneous Decision has been made, it ought to be corrected speedily, especially when it can be done before the litigation in which the error has been committed has terminated finally. (pp. 297, 298.)

Defendant in error, Merrill, recovered a judgment in the lower court against the Kansas City Suburban Belt Railroad Company and the Missouri, Kansas and Texas Railway Company for personal injuries sustained in passing from a flat-car to a box-car in the yards of the Chicago Great Western Railway Company. He was a switchman employed by the latter company. The flat-car belonged to the Missouri, Kansas, and

Texas Railway Company. The end-gates of the car were held in an upright position by wooden cleats, nailed to the inside of the sideboards on the outside of the end-gates. There were no iron hooks or eye-bolts, which generally are used to hold end-gates in position. The injuries to Merrill were sustained by one of the end-gates giving way, precipitating him to the ground between the cars. When the car arrived in Kansas City, it was sent from the yards of Missouri, Kansas and Texas Railway Company to the yards of the Kansas City Suburban Belt Railroad Company, there inspected by the latter company, and pushed to a place where cars were usually received by the Chicago Great Western Railway Company. The car was there inspected by this company, and then taken to its yards, where the accident occurred.

T. N. Sedgwick, Silas Porter, Miller, Buchan & Morris, and Lathrop, Morrow, Fox & Moore, for the plaintiff in error.

Angevine & Cubbinson for the defendant in error.

⁴³⁸ SMITH, J. The question for consideration is whether a railway company which delivers a defective car to a connecting carrier is liable for injuries sustained by an employé of the latter by reason of such defect, after the receiving company has inspected the car and taken it in charge for transportation over its line. In a former decision of this case, it was held to be within the contemplation of the first carrier that the car would be delivered to another for transportation, and it was also known that connecting carriers employ switchmen to handle such cars, and that their services are necessary in the work of making up trains. It was said:

"With this knowledge, it was the duty of both the plaintiffs in error to provide a car which would be reasonably safe for the service to be performed and for employés of connecting lines to handle, to the end that freight might be expeditiously carried to its destination. . . . Negligence on the part of the Chicago Great Western Railway Company will not excuse the plaintiffs in error either for their failure to inspect, or, having inspected the car, permitting it to be ⁴³⁹ delivered to a connecting line in a condition which might be dangerous to switchmen and other employés engaged in the practical part of the business of railway transportation": *Railway Co. v. Merrill*, 61 Kan. 671, 675, 60 Pac. 820.

We are now fully convinced that the doctrine announced in the former decision on the subject in hand runs counter to an unbroken current of authorities, and fails to stand the test of reason. A critical examination of the cases cited in the former opinion to sustain the view then taken will show that they are distinguishable from the case at bar. We will review some of them.

In *Pennsylvania R. R. Co. v. Snyder*, 55 Ohio St. 342, 60 Am. St. Rep. 700, 45 N. E. 559, there was a traffic arrangement between the different railway companies forming a fast freight line by which they were to share in the earnings of the transportation in proportion to the distance the car should be hauled over their respective roads. Under the arrangement, the Pennsylvania company, before delivering its cars to the Lake Shore company, agreed to have them properly inspected and put in safe condition for hauling. The car, when delivered to the Lake Shore company to be taken over its road, was defective and unsafe, which proper inspection would have discovered, and prevented the injury caused thereby to an employé of the Lake Shore company. The case differs from the present one. It was argued in the briefs in that case that, by reason of the traffic contracts between them, the two railroads were partners; and it is stated in the opinion that under the arrangement the Pennsylvania company, before delivering its cars to the Lake Shore road, was to have them properly inspected and put in safe condition for hauling. While there is much said in the opinion favorable to the defendant in error on the question before us, yet the peculiar contractual relations of the two roads as to inspection and payment of the cost of repairs do not exist in this case.

In the case just commented on, *Moon v. Northern Pac. R. Co.*, 46 Minn. 106, 24 Am. St. Rep. 194, 48 N. W. 679, is cited and approved. That decision was given prominence as a precedent in the former opinion in this case. In the *Moon* case the Northern Pacific and Manitoba railroad companies were connecting carriers and interchanged cars at certain common points under a traffic agreement. According to a rule adopted by the companies, cars received and delivered were required to be inspected by the car inspectors of both on the transfer track, and, if any repairs were needed, they were to be made by the Northern Pacific company before they were

transferred and received by the Manitoba company. Accordingly the car was so inspected by the car inspectors of both companies. It was examined by them together and they agreed that it was in good order. Afterward, while the car was being operated by the Manitoba company, the plaintiff's intestate was injured by a defective brake. It was claimed that the brake-staff was defective, and also that the car was not properly or carefully inspected by the inspectors of the respective companies.

It is to be observed that in the Moon case the inspection by the two companies was substantially one act. The Northern Pacific company, through its inspector, at the time the inspection was made, knew that no other or further inspection would be made for the protection of the employes of the Manitoba company. Hence, he is held in law to have anticipated that, if his inspection was careless or negligent, the employes of the Manitoba company would be subjected ⁴⁴¹ to whatever dangers should arise therefrom. The court said: "In this case the inspection by the two companies was substantially one transaction, in pursuance of a mutual arrangement under which it was made jointly by the two car inspectors."

The case of *Heaven v. Pender*, L. R. 11 Q. B. Div. 359 (503), was also cited in the former opinion, and is referred to in *Moon v. Northern Pac. R. Co.*, 46 Minn. 106, 24 Am. St. Rep. 194, 48 N. W. 679. The facts on which that decision rested were as follows: The defendant, a dock owner, supplied and put up a staging outside a ship in his dock under a contract with the ship owner. The plaintiff was a workman in the employ of a ship painter who had contracted with the ship owner to paint the outside of the ship, and in order to do the painting the plaintiff went on and used the staging, when one of the ropes by which it was slung, being unfit for use when supplied by the defendant, broke, and by reason thereof the plaintiff fell into the dock and was injured. In that case the staging was supplied for immediate use, and it was not within the contemplation of the parties that the plaintiff's employer should make an inspection of the appliances to ascertain their fitness prior to their use. It was said by Brett, M. R.: "It must have been known to the defendant's servants, if they had considered the matter at all, that the stage would be put to immediate use—that it would not be used by the ship owner,

but that it would be used by such a person as the plaintiff, a working ship painter."

In *Beven on Negligence*, second edition, volume 1, page 62, the author says: "It is submitted that the principle underlying the decision in *Heaven v. Pender*, L. R. 11 Q. B. Div. 503, is that the dock owner, having undertaken to supply the staging, thereupon ⁴⁴² undertook the obligation to supply a fit staging, which obligation the plaintiff was justified in assuming he would discharge. Had there been a duty on the ship owner or on the ship painter to examine the staging, the chain of connection between the plaintiff and the dock owner would have been broken. The decision must, therefore, be taken to imply that there was no duty on the part of anyone, subsequent to the dock owner, to test the staging supplied; but that, when the dock owner undertook to supply staging, there was an objection that the staging supplied should be reasonably fit for the purpose for which it was to be used, so that those coming to use it might trust to the performance of the dock owner's duty without any independent examination of their own."

In *Savannah Ry. Co. v. Booth*, 98 Ga. 20, 25 S. E. 928, the deceased was an employé of a mill located on a railway company's switch. The latter placed cars on the switch to be loaded by the mill hands, and, by reason of a defect in the car, the employé was killed, and his representative recovered judgment therefor against the railway company, which was sustained. The railway company in that case selected and retained control of the car and placed it in position, knowing the purpose for which and by whom it would be used, thus extending to the injured servant an invitation to use it. Had the master been a mere hirer, or the company exercised no right as to the selection of the cars to be used, the duty of inspection would have been upon the master, and, in case of injury to his servant in consequence of his furnishing an unsafe appliance, the loss would have fallen upon him.

A recovery has been denied in cases like the one at bar on two grounds: That there is a positive duty resting on the receiving railway company to inspect the car turned over to it for transportation by ⁴⁴³ another company, to the end that its employés may not be injured by defects existing before its receipt; that the omission or negligent discharge of such duty breaks the causal connection between the negligence of the company tendering

the defective car and the plaintiff's injury. In such cases the failure to inspect or the negligent manner of doing it is the proximate cause of the injury to the employé, and the negligence of the company turning over the unsafe car is the remote cause. The failure to discharge the obligation to inspect interposes an independent agency which severs the causal connection between the company first guilty of negligence and the hurt. It was so held in *Fowles v. Briggs*, 116 Mich. 425, 72 Am. St. Rep. 537, 74 N. W. 1046, a case very similar to this. See, also, *Leilis v. Michigan Cent. Ry. Co.*, 124 Mich. 37, 83 N. W. 828.

The duty of a railway company to inspect cars of other roads received by it is enjoined by law: *Missouri Pac. Ry. Co. v. Barber*, 44 Kan. 612, 24 Pac. 969; *Atchison etc. R. R. Co. v. Penfold*, 57 Kan. 148, 45 Pac. 574; *Texas etc. R. R. Co. v. Archibald*, 170 U. S. 665, 18 Sup. Ct. Rep. 777.

Wharton, in his work on Negligence, section 439, says: "There must be causal connection between the negligence and the hurt, and such causal connection is interrupted by the interposition, between the negligence and the hurt, of any independent human agency. Thus, a contractor is employed by a city to build a bridge in a workmanlike manner, and, after he has finished his work and it has been accepted by the city, a traveler is hurt when passing over it by a defect caused by the contractor's negligence. Now, the contractor may be liable on his contract to the city for ⁴⁴⁴ his negligence, but he is not liable to the traveler in an action on the case for damages. The reason sometimes given to sustain such a conclusion is that otherwise there would be no end to suits. But a better ground is that there is no causal connection between the traveler's hurt and the contractor's negligence. The traveler reposed no confidence on the contractor, nor did the contractor accept any confidence from the traveler. The traveler, no doubt, reposed confidence on the city that it would have its bridges and highways in good order; but between the contractor and the traveler intervened the city an independent responsible agent breaking the causal connection."

The principle above stated is well illustrated in *Carter v. Towne*, 103 Mass. 507. There the defendant negligently sold gunpowder to a child, but the child gave all of the powder to its parents, who afterward allowed the child to take some of it, by the explosion of which he was injured. The defendant was

held not liable because the effect of his negligence had been cured by the intervening breach of the child's parents in taking charge of the powder, and their consequent negligence in allowing the child to have it again could not restore the connection between the defendant's original negligence and the final injury.

A second and, we think, better founded reason for denying the right to recover in cases like the present is that the liability to a servant ceases with the control of the master over his actions. In *Glynn v. Central R. R. Co.*, 175 Mass. 510, 78 Am. St. Rep. 507, 56 N. E. 698, the plaintiff was in the employ of the New York, New Haven and Hartford Railroad Company in Connecticut, and was injured while coupling a car belonging to a New Jersey railway company which had a defective coupling apparatus. He sued the latter ⁴⁴⁵ company. The court, in holding the defendant not liable, said:

"There was no dispute that, after the car had come into the hands of the New York, New Haven and Hartford Railroad, and before it had reached the place of accident, it had passed a point at which the cars were inspected. After that point if not before, we are of opinion that the defendant's responsibility for the defect in the car was at an end. . . . But when a person is to be charged because of the construction or ownership of an object which causes damage by some defect, commonly the liability is held to end when the control of the object is changed.

"Thus, the case of *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47, 4 Am. St. Rep. 279, 15 N. E. 84, just cited, shows that the mere ownership of a house so constructed that its roof would throw snow into the street, and therefore threatening danger as it is without more, whenever snow shall fall, is not enough to impose liability when the control of it has been given up to a lessee, who, if he does his duty, will keep it safe. In the case at bar the car did not threaten harm to anyone, unless it was used in a particular way. Whether it should be used in a dangerous way or not depended, not upon the defendant, but upon another road. Even assuming that the car had come straight from the defendant at Harlem river, the defendant did no unlawful act in handing it over. Whatever may be said as to the responsibility for a car dispatched over a connecting road before there has been a reasonable chance to inspect it, after the connecting road has had the chance to inspect

the car and has full control over it, the owner's responsibility for a defect which is not secret ceases: See *Sawyer v. Minneapolis etc. Ry. Co.*, 38 Minn. 103, 8 Am. St. Rep. 648, 35 N. W. 671; *Wright v. Delaware etc. Canal Co.*, 40 Hun, 343; *Macklin v. Boston etc. R. R. Co.*, 135 Mass. 201, 206, 46 Am. Rep. 456."

In this case there was no contractual relation existing between the switchmen in the employ of the ⁴⁴⁶ Chicago Great Western Railway Company and the plaintiffs in error. They did not employ them, and they had no power to discharge them. They could protect themselves against damages resulting to their own servants by reason of defects in the car by giving them notice of its condition, in which event their servants would have the option of assuming the risk or of quitting the service of their employers. There was no relation of confidence between Merrill and the defendants in error. The latter owed a duty to their own servants to see that the cars put in their charge were in a reasonably safe condition and in proper repair, but to extend this duty to every servant of every other railroad in the United States under whose charge defective cars might come would be to formulate a new rule of liability for negligence not sustained by reason or authority.

In *Sawyer v. Minneapolis etc. Ry. Co.*, 38 Minn. 103, 105, 8 Am. St. Rep. 648, 35 N. W. 672, a case in many respects like the present one the court said: "At the time of the accident the car was under the management and control of the company operating it, and not of the defendant. It did not come to the hands of the plaintiff through the agency or by the authority of the defendant, and there is no privity between them. It owed him no duty growing out of contract, and was not bound to furnish him safe instrumentalities. As to the defendant, the plaintiff was a mere stranger": Citing authorities. "The liability of the defendant in respect to the condition of its cars did not extend beyond those to whom it owed some duty by reason of its relation to them as master, employer, or carrier. Any other rule would be found impracticable of application in ordinary business operations."

A railway company might have occasion to send a ⁴⁴⁷ train of defective cars from San Francisco to Boston for repairs, to be hauled over several lines of road. Its own servants, knowing their bad condition, would use a high degree of care to avoid injury from them. but. under the theory of counsel for defend-

ant in error, unless the company forwarding them gave express notice of their condition to every railway employé of the several roads transporting the cars, it would be liable for damages to them in the event that they were hurt by reason of such defects.

In *Winterbottom v. Wright*, 10 Mees. & W. 109, 114, the defendant had contracted with the postmaster general to provide a coach for carrying the mail, and agreed to keep it in repair and fit for use. Other persons had a contract with the postmaster general to supply horses and coachmen for conveying the coach. The vehicle broke down and injured the driver, by reason of the negligence of the defendant in failing to keep it in proper repair and fit for use. Lord Abinger said: "There is no privity of contract between these parties; and if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue."

So, a gasfitter was held liable for damages for negligently hanging a chandelier in a public house, knowing that it would likely fall on plaintiff and others, unless properly hung. It fell and injured the plaintiff. The court held that he had no cause of action because the declaration did not disclose any duty by the defendant toward the plaintiff for the breach ⁴⁴⁸ of which an action could be maintained: *Collis v. Seldon*, L. R. 3 C. P. 495.

In *Heizer v. Kingsland etc. Mfg. Co.* 110 Mo. 605, 614, 617, 33 Am. St. Rep. 482, 19 S. W. 633, a servant of the purchaser of a steam boiler was injured by the explosion of it. He sought to charge the manufacturer of the boiler, and alleged that the latter, when he sold it warranted it to be free from defects and of first-class material; that the cylinder was made of poor material, was defective in construction, and too weak to stand the ordinary strain, all of which defects were known to the defendant's agents at the time of the sale, and by reason thereof the explosion occurred. The court, in denying a right to recover, said: "Wharton thinks the better reason for the rule is that there is no causal connection between the negligence and the hurt; but be this as it may, the rule itself is well established in England and in the United States and we think the case in

hand comes within it. It is true the defendant must have known when it made and sold the machine to Ellis, that other persons would be engaged in operating it; but this is no reason why defendant should be held liable to such other persons for injuries arising from the negligent use of poor material or for defective workmanship. Such knowledge must have existed in the cases which have been cited as asserting the rule, and would have been as good an argument against the rule in those cases as in the case in hand. . . . The plaintiff's case tends to show no more than negligence, and an action based on that ground must be confined to the immediate parties to the contract by which the machine was sold. To hold otherwise is to throw upon the manufacturers of machinery, not necessarily dangerous a liability which, in our opinion, the law will not justify."

In the case quoted from, a large number of authorities, 449 both English and American, are collected, which sustain the principle announced. See, to the same effect, *Necker v. Harvey*, 49 Mich. 517 14 N. W. 503; *Losee v. Clute*, 51 N. Y. 494, 10 Am. Rep. 638; *Bragdon v. Perkins-Campbell Co.*, 87 Fed. 109, 30 C. C. A. 567.

One of the principal reasons given in the former decision in this case for holding plaintiffs in error liable was that they knew that this defective car, after it left their hands, must be switched about and put into trains of connecting roads by switchmen employed by the latter, and, with such knowledge, they were negligent in permitting it to go into the charge of such railway employes in a defective condition. In the many cases cited and quoted from above, it was equally well known by the manufacturer of a defective machine, like an elevator, for example, that employes of the purchaser would be called on to use it, yet, there being no privity between the maker of the machine and the vendee's servants who were injured by it, there could be no recovery by the latter against the manufacturer or builder: *Heizer v. Kingsland etc. Mfg. Co.*, 110 Mo. 605, 33 Am. St. Rep. 482, 19 S. W. 633.

If responsibility for defects in this car is to be fixed on the two railways, or either of them, then the application of such a rule of liability must of necessity be extended to cover the case of a brakeman injured by a negligently constructed car-wheel, and permit a recovery by him of damages against a foundry company which cast and furnished the wheel and sold it to the railway company; for it is within the contemplation of

the manufacturer of car-wheels that they will come into the charge and control of the servants of the railway companies using the cars. If such wheels are negligently constructed, the contemplated purpose of ⁴⁵⁰ their future use being manifest, the liability of the maker would follow that use everywhere, whenever they happened to cause injury to a railroad employé operating them. The liability of the maker could not be defeated by the fact that the defective appliances might have changed ownership and control many times after their first adaptation to railway purposes. As we have seen, the liability of negligent parties so far removed from the injury as the manufacturer in the supposed case finds no support in the authorities.

The defective car was not inherently dangerous. It was the manner of its use which caused the injury. The two railway companies that handled the car before its delivery to the Chicago Great Western Railway Company cannot be held to that strict account which the law imposes on one who negligently delivers poisonous drugs to another, imminently dangerous to human life, which fall into the hands of third persons to their injury.

In *Roddy v. Missouri Pac. Ry. Co.*, 104 Mo. 234, 247, 24 Am. St. Rep. 333, 15 S. W. 1114, it was said: "It cannot reasonably be contended that a railroad car, though supplied with defective brakes, is an imminently dangerous instrument. Unless put in motion it is perfectly harmless, and when in motion it is not essentially dangerous."

In *Mastin v. Levagood*, 47 Kan. 36, 42, 27 Am. St. Rep. 277, 27 Pac. 124, it was said: "There is a marked distinction between an act of negligence imminently dangerous and one that is not so, the guilty party being liable in the former case to the party injured, whether there was any relation of contract between them or not, but not so in the latter case": See, also, *Glynn v. Central R. R. Co.*, 175 Mass. 510, 78 Am. St. Rep. 507, 56 N. E. 698.

⁴⁵¹ Counsel for defendant in error have invoked the rule *stare decisis*, and insist that the former decision must govern on the second appeal. This would come to us with more force if we were not considering the same case with the same parties before the court. If an erroneous decision has been made, it ought to be corrected speedily, especially when it can be done before the litigation in which the error has been committed has

terminated finally. We are fully satisfied that the rule of the former case is shattered by the pressing weight of opposing authority, and that reason is against it. In *Ellison v. Georgia R. R. Co.*, 87 Ga. 691, 13 S. E. 809, the learned Chief Justice Bleckley used the following forcible language: "Some courts live by correcting the errors of others and adhering to their own. . . . Minor errors, even if quite obvious, or important errors, if their existence be fairly doubtful, may be adhered to and repeated indefinitely; but the only treatment for a great and glaring error affecting the current administration of justice in all courts of original jurisdiction is to correct it. When an error of this magnitude and which moves in so wide an orbit competes with truth in the struggle for existence, the maxim for a supreme court, supreme in the majesty of duty as well as in the majesty of power, is not *stare decisis*, but *fiat justitia ruat cælum*."

The judgment of the court below will be reversed, with directions to enter judgment on the finding of the jury in favor of the defendants below.

All the justices concurring.

DOSTER, C. J., concurring specially. I believe we were in error in the former determination of this case, and, therefore, concur in the decision now made. However, I do not believe that our present judgment can be rested on the theory of the breaking of causal ⁴⁵² connection between the negligent acts of the railway company delivering the defective car and the one receiving it, caused by the latter's failure to inspect, or the making by it of an ineffective inspection. A failure to inspect, or a careless inspection, either one, was a simple failure to do a duty—an omission, not an affirmative act of wrongdoing—and I think the breaking of causal connection between a series of negligent acts is accomplished only by the doing of something by somebody else which operates as a new and independent producing cause, diverting the first negligent act from its natural end, and giving it a direction and force it would not otherwise have. It is not philosophical to speak of causal connection between act and consequence being broken by a mere failure, though a negligent one, of some person, not the original actor, to do something. Causal connection is broken only by the intervention of active agencies, not the occurrence of passive conditions and qualities.

A Railroad Using the Cars of a connecting line is liable to the same extent as if they were its own, if such cars, when received and used, are dangerous to its employes: *Reynolds v. Boston etc. R. R. Co.*, 64 Vt. 66, 33 Am. St. Rep. 908, 24 Atl. 134; *Eaton v. New York Cent. R. R. Co.*, 163 N. Y. 391, 79 Am. St. Rep. 600, 57 N. E. 609. Either company may be held liable to an employé of the receiving company injured by the cars: *Pennsylvania R. R. Co. v. Snyder*, 55 Ohio St. 342, 60 Am. St. Rep. 700, 45 N. E. 559; *Moon v. Northern Pac. R. R. Co.*, 46 Minn. 106, 24 Am. St. Rep. 194, 48 N. W. 679.

EWING v. MALLISON.

[65 Kan. 484, 70 Pac. 369.]

JURISDICTION.—Between Courts of Coequal Authority, the one first acquiring jurisdiction is allowed to pursue it to the end, to the exclusion of all others, and it will not permit its jurisdiction to be impaired or subverted by a resort to some other tribunal. (p. 302.)

LETTERS OF ADMINISTRATION—Collateral Attack.—The action of a probate court in appointing an administrator, if jurisdiction is obtained, is not subject to collateral attack. (p. 304.)

THE GRANTING OF LETTERS of Administration is in the exercise of judicial authority, and the letters, if regular in form, are prima facie evidence of the regularity of the prior proceedings. (p. 305.)

LETTERS OF ADMINISTRATION.—The Essential Jurisdictional Facts in granting letters of administration are the death, an estate to administer, and the residence or inhabitancy of the deceased at the time of his death. (p. 305.)

IF JURISDICTION Depends on the Finding of a Particular Fact, the exercise of jurisdiction implies the finding of such fact. (p. 306.)

LETTERS OF ADMINISTRATION—Collateral Attack.—The Actual Fact of Residence of the deceased in the county of the court at the time of death, being essential to uphold the jurisdiction of a probate court, is not concluded by the decision of the court that such fact exists, but may be inquired into in a proper collateral proceeding to show a want of jurisdiction in the court assuming to administer the estate. (pp. 306, 307.)

JUDGMENTS—Collateral Attack.—If Jurisdiction Depends upon some collateral fact which can be decided without going into the case on its merits, then the jurisdiction may be questioned collaterally, even though the jurisdictional fact is averred of record, and was actually found to exist by the court rendering the judgment. (p. 307.)

Lambert & Huggins, for the plaintiff in error.

C. B. Graves, Daniel Mallison, and Hutchings & Keplinger, for the defendants in error.

⁴⁸⁵ POLLOCK, J. John A. Whitcraft died at the residence of his nephew, Horace H. Standish, in Wyandotte county, on the sixth day of January, 1898. At the date of his death he was the owner of two certificates of deposit of one thousand dollars each, issued by the First National Bank of Emporia; also, real estate and other personal property in Lyon county. For many years prior to his death Whitcraft had been a resident of Lyon county. On the nineteenth day of January, 1898, Horace H. Standish filed his petition in the probate court of Lyon county, praying his appointment as administrator of the estate of Whitcraft. On the same day John W. Logan and others filed their petition praying for the appointment of W. F. Ewing as administrator of such estate. These petitions each alleged the death of Whitcraft, late of Lyon county, Kansas, deceased; that he died leaving no last will and testament, so far as the petitioners knew or believed, and that he died seised of mony in bank, mortgages and real estate in Lyon county, Kansas. On the twenty-first day of January there was a hearing on these applications, and that of Standish for his appointment was denied, and that of Logan and others for the appointment of Ewing was granted. Ewing was appointed, letters of administration were issued to him, and he qualified and gave bond as such administrator.

Thereafter, on the thirteenth day of February, 1898, Standish made application to the probate court of Wyandotte county for probate of an alleged oral will ⁴⁸⁶ of Whitcraft, and for the appointment of defendant in error Mallison, as administrator, with will annexed. To this proceeding Ewing, as administrator, appeared in the probate court of Wyandotte county, filed his plea in abatement, alleging his prior appointment and qualification as administrator by the probate court of Lyon county, and want of jurisdiction in the probate court of Wyandotte county to make the appointment prayed. Upon a hearing, this plea was overruled, and it was found that Whitcraft was at the date of his death a resident of Wyandotte county. Thereafter an order was made admitting the nuncupative will to probate, and appointing defendant in error Mallison administrator with will annexed. No appeal was taken from the proceedings of either probate court.

This action was brought by Mallison, as administrator, with will annexed, to recover from the receiver of the First National Bank of Emporia; then insolvent and in the hands of Morton

Albaugh, as receiver, by order of the comptroller of the currency, on the certificates of deposit. Ewing, as administrator, was made party defendant, and answered, setting up his appointment by the probate court of Lyon county, his qualification under such appointment, and his right to the funds of the estate. Plaintiff replied, pleading an adjudication by the probate court of Wyandotte county and an estoppel of Ewing to claim under this appointment. There was judgment for plaintiff. Defendant Ewing brings error.

The merits of this controversy depend on the actions of the probate courts of Lyon and Wyandotte counties, and the effect of the appearance of the administrator appointed by the probate court of Lyon county in the probate court of Wyandotte county, and there contesting the jurisdiction of that court over the estate he ⁴⁸⁷ was appointed to represent. It is admitted that the jurisdiction of the probate court of Lyon county was first invoked, and that court first assumed jurisdiction over the estate; that plaintiff in error was appointed administrator of the estate, and letters of administration were issued to him; and that he qualified, as provided by law, before the jurisdiction of the probate court of Wyandotte county was invoked. That Standish, first to invoke the jurisdiction of Lyon county court, after defeat in that court, was the first to invoke the jurisdiction of the probate court of Wyandotte county, is admitted.

This controversy arises over the exercise of jurisdiction by the separate tribunals. The petition of Standish, verified and filed in the probate court of Lyon county, seeking his own appointment as representative of the estate, among other things, alleged the following: "The petition of the undersigned, Horace H. Standish, respectfully represents that John H. Whitcraft, late of the county of Lyon, aforesaid, departed this life at the residence of this petitioner, at Kansas City, Kansas, in Wyandotte county, on or about the sixteenth day of January, 1898, leaving no last will or testament, as far as your petitioner knows or believes."

In legal contemplation, this allegation means that the deceased was last a resident of Lyon county (Beckett v. Selover, 7 Cal. 215, 68 Am. Dec. 237), and left no will, and was made for the purpose of inducing the probate court of Lyon county to assume jurisdiction over the estate of the deceased. Although such allegation would not confer jurisdiction on the probate court of Lyon county to administer the estate of the deceased

if the requisite jurisdictional facts did not exist, for jurisdiction cannot be conferred by consent of parties, yet, it may well be doubted whether, after ⁴⁸⁸ the probate court of Lyon county acted judicially on the admission and declaration contained in this allegation of residence of the deceased, an admission of a jurisdictional fact solemnly made on the oath of the petitioner, Standish should not be debarred from denying the truth of this allegation for the purpose of either invoking the jurisdiction of the Wyandotte court or denying the authority of plaintiff in error as representative of the estate. A party should not be permitted thus to belie himself. In support of this position, see *Railway Co. v. Ramsey*, 22 Wall. 322; *Turner v. Billagram*, 2 Cal. 520; *Miltimore v. Miltimore*, 40 Pa. St. 151; *Potter v. Adams*, 24 Mo. 159; *Lovelady v. Davis*, 33 Miss. 577; *Ela v. McConihe*, 35 N. H. 279; *Hines v. Mullins*, 25 Ga. 696; *Brown v. Haines*, 12 Ohio, 1; *Mandeville v. Mandeville*, 35 Ga. 243; *Harbin v. Bell*, 54 Ala. 389. However, we do not rest our decision upon this ground.

It is a principle of universal application, essential to the orderly administration of justice, in order to avoid conflict between tribunals of coequal authority, that the court first acquiring jurisdiction shall be allowed to pursue it to the end, to the exclusion of others; and that it will not permit its jurisdiction to be impaired or subverted by a resort to some other tribunal. This general principle was announced by this court in the criminal case of *State v. Chinault*, 55 Kan. 326, 40 Pac. 662, and writers on criminal law and criminal cases arising in other jurisdictions are there cited in its support. The doctrine is not confined to criminal cases. It is alike applicable in civil practice: *Sharon v. Terry* (C. C.), 36 Fed. 337; *Taylor v. Taintor*, 16 Wall. 366; *Gaylord v. Ft. Worth etc. R. R. Co.*, 6 Biss. 286, Fed. Cas. No. 5284; *Union Mut. L. Ins. Co. v. Chicago University* (C. C.), 6 Fed. 433, 10 Biss. 191; *Mason v. Piggott*, 11 Ill. 85; *Bank of Bellows Falls v. Rutland etc. R. Co.*, 28 Vt. 470; *Stearns v. Stearns*, 16 Mass. 167; *Home Insurance Co. v. Howell*, 24 N. J. Eq. 238; *Hines v. Rawson*, 40 Ga. 356, 2 Am. Rep. 581; *Wilkinson v. Wait*, 44 Vt. 508, 8 Am. Rep. 391; *Merrill v. Lake*, 16 Ohio, 373, 47 Am. Dec. 377.

In *Stearns v. Stearns*, 16 Mass. 167, it was said: "When different courts have concurrent jurisdiction, the one before whom proceedings may be first had, and whose jurisdiction first attaches, must necessarily have authority paramount to the

other courts; or, rather, the action first commenced shall not be abated by an action commenced between the same parties, in relation to the same subject, in the same or any other court."

In *Home Ins. Co. v. Howell*, 24 N. J. Eq. 238, it was held: "This court having the authority to hear and determine the subject matter in controversy, and having first obtained possession of the controversy, is fully at liberty to retain it until it shall have disposed of it. The general rule is that as between courts of concurrent and co-ordinate jurisdiction, the court that first obtains possession of the controversy must be allowed to dispose of it, without interference from the co-ordinate court."

In *Brooks v. Delaplaine*, 1 Md. Ch. 351, it was said: "When two courts have concurrent jurisdiction over the same subject matter, the court in which the suit is first commenced is entitled to retain it. This rule would seem to be vital to the harmonious movement of courts whose powers may be exerted within the same spheres, and over the same subject and persons. . . . Any other rule will unavoidably lead to perpetual ⁴⁹⁰ collision, and be productive of the most calamitous results."

The statute (Gen. Stats. 1901, sec. 2806) provides: "Upon the decease of any inhabitant of this state, letters testamentary or letters of administration on his estate shall be granted by the probate court of the county in which the deceased was an inhabitant or resident at the time of his death."

The words "inhabitant" and "resident" are usually synonymous: *Bouvier's Law Dictionary*, subject, "Residence"; *Lee v. City of Boston*, 2 Gray (Mass.), 490. Hence, but one court was possessed of jurisdiction to administer the estate of deceased—the probate court of the county of his residence at the date of death. But if it were possible to assume that either the probate court of Lyon county or the probate court of Wyandotte county might have rightfully acquired jurisdiction over this estate for the purpose of appointing an administrator or proving a will, the action taken by the Lyon county probate court being first in point of time, if in its nature judicial, and that court in fact had jurisdiction, it will retain the same to the end, to the exclusion of jurisdiction in the probate court of Wyandotte county, unless the appearance of the administrator appointed by the probate court of Lyon county in the probate court of Wyandotte county to contest the jurisdiction of that court may be held to have deprived the probate court of Lyon county of jurisdiction once acquired, or to estop the administrator appointed

by the Lyon county probate court from asserting nonjurisdiction in the Wyandotte probate court.

That the action of a probate court in appointing an administrator of an estate is in its nature judicial, and, where jurisdiction obtains, not subject to collateral attack, would seem to be well settled by this court. ⁴⁹¹ In *Taylor v. Hasick*, 13 Kan. 518, it was held: "Where a probate court has jurisdiction to appoint some person administrator, and makes an appointment by issuing letters of administration to a person not a relative or creditor of deceased, and without citing any of the relatives or creditors to appear and either take or renounce the administration, held, that although the appointment may have been erroneous, yet the letters of administration cannot be attacked collaterally, and especially not by a person who is neither a relative nor a creditor of the deceased."

In the opinion, it was said: "Letters of administration can be attacked collaterally only when the probate court for some reason has no jurisdiction to make the appointment, and never when the court has merely committed an error by appointing one person (who is eligible), when the court should have appointed some other person." (Page 527.)

In *Brubaker v. Jones*, 23 Kan. 411, it was held: "Where an inhabitant of a county dies intestate, leaving an estate to be settled, the probate court of such county has power to appoint an administrator for such estate, and it is immaterial how the probate court ascertains these facts. When these facts exist, and the appointment is made, the appointment will be held valid, when attacked collaterally, although the probate court may have made some mistakes in making the appointment. And when letters of administration are issued, such letters will be held to be prima facie evidence for all facts necessary for the validity of such letters."

In *Missouri etc. Ry. Co. v. McWherter*, 59 Kan. 345, 53 Pac. 135, it was held: "Letters of administration granted to a minor are not void, nor will the removal of the administratrix from the state operate ipso facto as a revocation of ⁴⁹² the letters. Neither the fact of her minority or of her removal will constitute a defense in an action prosecuted by her as administratrix."

In the opinion it was said: "We deem it unnecessary to make extended comments on any of these claims, or to consider whether they would have availed in a direct attack in the probate

court on the letters of administration. The letters were in the plaintiff's hands at the time the action was tried, and no proceedings had ever been instituted to cancel or revoke them. The plaintiff was then more than eighteen years of age. She was administratrix in fact, and her authority to act was not open to collateral attack by the defendant: *Davis v. Miller*, 106 Ala. 154, 17 South. 323; *Succession of Lyne*, 12 La. Ann. 155; *State v. Rucker*, 59 Mo. 17; *State v. Smith*, 71 Mo. 45."

It has been many times held by this court that where a probate court, without jurisdiction, assumes to act, an order appointing an administrator and granting letters of administration is void: *Perry v. St. Joseph etc. R. R. Co.*, 29 Kan. 420; *Estate of Mallory v. Burlington etc. R. R. Co.*, 53 Kan. 557, 36 Pac. 1059; *Missouri Pac. Ry. Co. v. Bennett*, 58 Kan. 499, 49 Pac. 606.

Upon authority, therefore, two propositions are clear: 1. The granting of letters of administration by a probate court is the exercise of judicial authority, and the letters granted, if regular in form, are prima facie evidence of the regularity of the prior proceedings; 2. Such letters are void if the court making the appointment had no jurisdiction to grant them.

The controversy in the court below did not arise on an appeal from an order revoking the letters of administration granted by either probate court. The letters of both contending parties stand unrevoked. As the case, however, arose on the conflicting claims ⁴⁹⁸ of two persons pretending to represent the estate, each holding letters of administration, and as, under the law, it is impossible for more than one probate court of the state rightfully to claim jurisdiction over the estate of a deceased resident, or be permitted to administer such estate, it was the duty of the trial court to determine which of the two contesting parties rightfully claimed the assets of the estate in litigation.

The essential jurisdictional facts required by the statute are: 1. The death; 2. An estate to administer; 3. The residence or inhabitancy of the deceased at the time of his death. It is conceded that the death occurred and that an estate is left to be administered; hence, unlike prior cases in this court in which administration proceedings have been declared void, the jurisdictional facts warranting administration in some court stand admitted. The sole question in dispute over which the conflicting claims to jurisdiction arose is, Of what county was the

deceased an inhabitant or resident at the time of his death? This identical question of fact of necessity must have been presented to, and determined by, the probate court of Lyon county, for where jurisdiction depends on the finding of a particular fact alleged or essential to support jurisdiction, the exercise of jurisdiction implies the finding of such fact: *Erwin v. Lowry*, 7 How. 172; *Wyatt v. Steele*, 26 Ala. 639.

Again, the determination of this fact by that court was first in point of time; its proceedings are in due form of law; a copy of the letters issued is found in the record; they are regular, and to this court and all other courts are prima facie evidence of the regularity of all prior proceedings, including the jurisdiction of the court to issue the same. If in the case at bar ⁴⁹⁴ as in the case of *People's Sav. Bank v. Wilcox*, 15 R. I. 253, 2 Am. St. Rep. 894, 3 Atl. 211, cited by counsel for defendant in error, it stood admitted in the record that Whitcraft was not, in fact, a resident of Lyon county at the date of his death, or if the record contained a finding of such fact, from the evidence, a want of jurisdiction in the probate court of Lyon county would appear, and we would be justified in holding its proceedings void. But no such admission or finding appears in the record. True, it was found by the probate court of Wyandotte county that the deceased at the time of his death was a resident of Wyandotte county, and, as a consequence, that the probate court of Lyon county was without jurisdiction; and because of such determination the trial court refused to receive any evidence as to the actual residence of the deceased at the date of his death, but held the proceedings in the probate court of Wyandotte county res judicata and conclusive. If, however, the proceedings in the probate court of Lyon county were not conclusive upon the question of jurisdiction in that court, no more were the proceedings in the probate court of Wyandotte county, unless the proceedings in that court were affected by the appearance therein of plaintiff in error.

The place of residence, like the question of death, or the existence of an estate to be administered, is a collateral, jurisdictional question of fact, and the actual fact of residence by the deceased in the county of the court at the time of death being essential to uphold the jurisdiction of a probate court, it is not concluded by the decision of the court that such fact does exist, but it may be inquired into in a proper collateral proceeding for the purpose of showing want of jurisdiction in the court

making the determination. ⁴⁹⁵ This is the general rule as to judgments in this state: *Mastin v. Gray*, 19 Kan. 458, 27 Am. Rep. 149; *Pray v. Jenkins*, 47 Kan. 599, 28 Pac. 716. The rule appears to be: "Where the jurisdiction depends upon some collateral fact which can be decided without going into the case on its merits, then the jurisdiction may be questioned collaterally and disproved, even though the jurisdictional fact be averred of record, and was actually found in evidence by the court rendering the judgment. But, on the other hand, where the question of jurisdiction is involved in the question which is the gist of the suit, so that it cannot be decided without going into the merits of the case, then the judgment is collaterally conclusive, because the question of jurisdiction cannot be retried without partly, at least, retrying the case on its merits, which is not permissible in a collateral proceeding unless other parts of the record show affirmatively that the finding cannot be true": 17 Am. & Eng. Ency. of Law, 2d ed., 1084, 1085; *People's Sav. Bank v. Wilcox*, 15 R. I. 258, 2 Am. St. Rep. 894, 3 Atl. 211; *Breckett v. Selover*, 7 Cal. 215, 68 Am. Dec. 237.

We are, therefore, of the opinion upon this branch of the case, that the district court erred in refusing to permit an inquiry into the actual residence of the deceased at the time of his death, and in holding the proceedings had in the probate court of Wyandotte county *res judicata*.

The remaining question is, Is plaintiff in error estopped from asserting jurisdiction in the court appointing him and from denying the jurisdiction of the Wyandotte probate court? becomes easy of solution. If the Lyon county probate court had jurisdiction, the Wyandotte court did not have, and any proceeding therein or order made was void, and any participation therein was binding on no one. On the other hand, if the probate court of Wyandotte county had jurisdiction ⁴⁹⁶ the proceedings therein were valid and conclusive because *res judicata*. Jurisdiction rests in the probate court of the county of the residence of the deceased at the time of his death. This essential, collateral, jurisdictional fact is concluded by the finding of neither court, but is the question left open for separate determination, for on the determination of this fact depends the right of either probate court to take any step or make any valid order in relation to the estate of deceased, whether it be the appointment of an administrator or the proof of a will.

It follows that the judgment will be reversed, for further proceedings in conformity with this opinion.

All the justices concurring.

Cunningham, J., not sitting, having been of counsel.

Collateral Attack upon the right of an acting administrator is considered in the monographic note to *Dobler v. Strobel*, 81 Am. St. Rep. 535-562. See pages 548-552 of this note as to whether letters of administration can be impeached collaterally on the ground of the nonresidence of the deceased in the county at the time of his death.

KELSO v. NORTON.

[65 Kan. 778, 70 Pac. 896.]

MORTGAGEE in Possession.—A mortgagee who purchases and enters into possession under a void foreclosure, the mortgagor acquiescing therein, is "a mortgagee in possession." (p. 311.)

EJECTMENT—Defenses.—A defendant in ejectment, even under a general denial, may interpose any defense, legal or equitable, tending to rebut the right of the plaintiff to possession, or to establish the right of the defendant to possession. (p. 311.)

EJECTMENT Against a Mortgagee in possession cannot be maintained, the mortgage debt remaining unpaid, whether or not the right of foreclosure is barred by the statute of limitations. (p. 315.)

Gleed, Ware & Gleed and Bishop Crumrine, for the plaintiff in error.

W. A. Randolph, for the defendant in error.

⁷⁸² **POLLOCK, J.** Without so deciding, let it be conceded for the purposes of this case, as found and determined by the trial court, that the original summons was not sealed with the seal of the court, and was therefore absolutely null and void, and may be so declared in this purely collateral proceeding. Also, let it be conceded, as a consequence thereof, that no jurisdiction was obtained over the person of the defendants in the foreclosure action, and that all subsequent proceedings, including the decree, sale, and sheriff's deed, were likewise void. What, then, are the rights of the parties? Can this action be maintained and can the judgment entered be upheld?

It was found by the trial court that, after the sale of the premises and the execution and delivery of the sheriff's deed, the purchaser at the sale, Kelso, believing himself to be the owner, took and retained possession of the mortgaged property. Is this finding sufficient in law to constitute Kelso "a mortgagee in possession"? At common law, a mortgagee was entitled to possession and to recover possession from the mortgagor upon condition broken. In this state, by force of statute, a mortgage retains but few, if any, of its common-law attributes. It is a mere security contract, incident to the debt. The mortgagor, both before and after default, is entitled to the possession of the premises. The only legal right of the mortgagee ⁷⁶³ is to foreclose the equity of redemption, and obtain a decree of sale in satisfaction of his debt. While such are the legal rights of the mortgagor and mortgagee in this state, it does not follow that these legal rights may be changed or waived by agreement, express or implied. If the mortgagor consents to the mortgagee's taking possession of the premises for the better security of his debt, and the mortgagee does take possession, it is clear that the possession thus taken will constitute "a mortgagee in possession."

In the case at bar, the foreclosure proceedings being, as we have heretofore conceded, abortive and void, the mortgagors were under no legal obligation to yield possession to the mortgagee, but might have stood upon their legal rights and refused to surrender possession until a valid foreclosure decree and sale were obtained, and a deed and writ of assistance based thereon had issued to place the purchaser in possession. Upon this legal right, however, they did not insist, but acquiesced in the proceedings had and the possession taken thereunder by the purchaser. Hence, they and those claiming under them, must be held to have waived their legal right to possession of the mortgaged premises and to have assented to the possession taken by the mortgagee as purchaser at the sale. This is the precise point ruled on in *Rogers v. Benton*, 39 Minn. 39, 12 Am. St. Rep. 613, 38 N. W. 765. It was there held: "Though an attempted foreclosure be abortive as such, it may take effect as a transfer of the rights of the mortgagee to the purchaser at the sale, and to those who claim under him by conveyance of the interest in the premises apparently acquired by such purchaser at the foreclosure sale. If the purchaser at such sale, or his assign, go into possession of the mortgaged premises with the

⁷⁸⁴ assent of the mortgagor, under the rights supposed to have been acquired under the foreclosure sale, he will be deemed a mortgagee in possession."

In the opinion, it was said: "It follows necessarily from this that a mortgagee, even after condition broken, has no right or remedy except to foreclose his mortgage; that he cannot, merely under his mortgage, either recover or maintain possession of the mortgaged premises. The only logical rule is that, to constitute 'a mortgagee in possession,' the mortgagee must be in possession by reason of the agreement or assent of the mortgagor or his assigns that he have the possession under the mortgage and because of it. The right to take possession under his mortgage being taken away, nothing remains but to foreclose, or else make some arrangement for his better security with the owner of the fee. Having no right to take possession under his mortgage, the mortgagee can get none, except by the agreement or assent of the one who owns that right. This, of course, need not necessarily be express. It may be implied from circumstances. Where the mortgagor expressly abandons possession, his assent that the mortgagee might go into possession under his mortgage might well be implied, especially when he allows him to remain in possession for a considerable length of time without objection. But, after all, the assent, express or implied, of the mortgagor, that the mortgagee may take possession under or because of his mortgage is of the essence of 'a mortgagee in possession.'

"This assent is conclusively proved in the present case. Benton, by his permanent removal from the state, abandoned all personal occupancy or possession. Conant demanded the possession from Mrs. Benton, under his mortgage, or by virtue of rights supposed to have been acquired under its foreclosure. She surrendered possession in pursuance of that demand, knowing, as she herself testifies, that Conant was coming in under the mortgage, and that her husband knew it too; and after this entry the Conants, and ⁷⁸⁵ those claiming under them, were allowed to remain in possession over ten years, without objection or assertion of any right in themselves by the mortgagors, or anyone claiming under them. The fact that Conant claimed the right to the possession under his foreclosure, and threatened legal proceedings to obtain it, and that Mrs. Benton may at that time have supposed that he had that right, does not alter the legal aspect of the case, or render Mrs. Benton's act any less a

voluntary surrender of the possession to Conant as mortgagee. Mrs. Conant and those claiming under her had therefore the rights of 'mortgagees in possession.'"

In *Cook v. Cooper*, 18 Or. 142, 17 Am. St. Rep. 709, 22 Pac. 945, it was held: "If, for any cause in the foreclosure suit, the proceeding is ineffectual to foreclose the mortgage, and the mortgagee purchases at a sale under such void proceedings, and enters into the possession under such sale, his relation to the mortgaged premises is that of a mortgagee in possession."

To the same effect is *Miner v. Beckman*, 50 N. Y. 337, and many other cases of that and other states, where, by force of statutory provisions, the mortgage does not operate as a conveyance, or grant the right to possession of the mortgaged premises, but is only a security for the payment of the debt, may be cited in support of the position here taken. It therefore must be held that Kelso, as mortgagee and purchaser at the invalid foreclosure sale, was entitled to receive whatever protection the law throws around a mortgagee in possession.

What are such rights? Will an action in the nature of ejectment by the heirs of the mortgagor lie to dispossess him of the property until his mortgage debt is paid? Or, will the heirs of the mortgagor seeking to reclaim the property be required to resort ⁷⁸⁶ to an action to redeem the property from the mortgage debt, in which action the amount of the debt and all the equities of the parties may be fully investigated, determined, and decreed? It is contended by counsel for plaintiff in error that ejectment will not lie, but that plaintiff, as heir at law, must resort to an action to redeem. Is this contention sound?

Upon this proposition there would seem to be a lack of uniformity in the authorities. While in many cases, under facts somewhat similar to those found in the case at bar, it seems that this court has permitted recovery in an action of ejectment of mortgaged premises against the mortgagee in possession, yet, an examination of these cases will show that the point here presented was neither urged or determined: *Richards v. Thompson*, 43 Kan. 209, 23 Pac. 106; *Le Comte v. Pennock*, 61 Kan. 330, 59 Pac. 641; *Seeley v. Johnson*, 61 Kan. 337, 78 Am. St. Rep. 314, 59 Pac. 631; *Kager v. Vickery*, 61 Kan. 342, 59 Pac. 628, 78 Am. St. Rep. 318. Hence, the decisions therein are not conclusive of the point presented.

It has always been the rule of this court that a defendant in ejectment, even under a general denial may interpose any defense which he may have, either in its nature legal or equitable, tending to rebut the right of plaintiff to the possession of the premises, or tending to establish the right of defendant to possession: *Hall v. Dodge*, 18 Kan. 277; *Wicks v. Smith*, 18 Kan. 508; *Clayton v. School Dist.*, 20 Kan. 256; *Armstrong v. Brownfield*, 32 Kan. 116, 4 Pac. 185; *Chandler v. Neil*, 46 Kan. 67, 26 Pac. 470. This rule, however, does not obtain in the federal courts and in those states where the distinction between actions at law and suits in equity is preserved: *Fenn v. Holme*, 21 How. 481; *Hooper v. Scheimer*, 23 How. 787 235; *Smith v. McCann*, 24 How. 398; *Foster v. Mora*, 98 U. S. 425; *Michigan Land Co. v. Thoney*, 89 Mich. 226, 50 N. W. 845; *Paldi v. Paldi*, 95 Mich. 410, 54 N. W. 903; *Moran v. Moran*, 106 Mich. 8, 63 N. W. 989, 58 Am. St. Rep. 462. Hence, in those jurisdictions, the equitable right to withhold possession peaceably obtained until payment of the mortgage debt cannot be interposed as a defense in the ejectment action, such defense being not a legal but an equitable defense: *Humphrey v. Hurd*, 29 Mich. 44; *Newton v. McKay*, 30 Mich. 380. In this state all distinctions between actions at law and suits in equity are abolished by section 10 of the code: Gen. Stats. 1901, sec. 4438. Hence, such equitable defense is, under our practice, admitted.

It being shown by the findings made from the evidence that defendant Kelso is "a mortgagee in possession," can the plaintiff and her defendant brother recover possession of the premises in ejectment without payment of the mortgage debt? It is conceded that the mortgage debt has not been paid. It is admitted that at common law, where the mortgage operates as a conveyance of the title to the property, defeasible upon condition of payment of the mortgage debt, a mortgagee obtaining peaceable possession under his title thus conveyed by the mortgage cannot be ejected, and only a suit by the mortgagor, his heirs, or those holding under him, subject to the mortgage, will lie. Such is undoubtedly the law. But it is insisted by counsel for defendant in error that such is not the rule in those states where a mortgage does not operate as a conveyance of the property, but is a mere incident to the debt secured. This is the legal effect of a mortgage in this and most states of the 788 Union. The question arising for our determination, therefore, is, What is the true rule in those jurisdictions where the dis-

inction between actions at law and suits in equity is abolished, and by statute the mortgage conveys no title, but is a mere incident to the debt? A decision coming close to a determination of this question was made in this court in *Cross v. Knox*, 32 Kan. 725, 736, 5 Pac. 32, in which it was said: "The relation of the defendant to the tract of about twenty-two acres of land to which the plaintiff holds the equity of redemption is that of a mortgagee in possession, and he cannot be dispossessed by an action at law, and the only means for lawfully obtaining the possession the plaintiff has is by a redemption of the land from the lien of the mortgage. She had the right to bring suit in equity to redeem, and this suit was properly brought for that purpose: 3 Pomeroy's Equity Jurisprudence, secs. 1189, 1190."

Mr. Jones, in his work on Mortgages, fourth edition, section 674, says: "A mortgagor cannot maintain ejectment against the mortgagee in possession so long as there is any question whether the mortgage debt has been paid in full, or there remains any question of account to be settled between the parties. He must resort to a bill to redeem. . . . Even in states where a mortgagee has no right to take possession until foreclosure is absolute, if the mortgagor voluntarily puts the mortgagee in possession, his possession is rightful, and ejectment cannot be brought against him unless some action is previously taken which will terminate his right and render his continuance in occupancy wrongful."

Again, at section 702, the same author says: "It has already been noticed that in several states the mortgagor's right, before foreclosure, to maintain ejectment against the mortgagor, or to recover possession in any way, has been taken away by statute. 789 But even under such statutes it is generally held that a mortgagee, who has gone into peaceable possession of the premises after a default, cannot be ejected by the mortgagor while the mortgage remains unsatisfied."

In the case of *Cook v. Cooper*, 18 Or. 142, 17 Am. St. Rep. 709, 22 Pac. 945, it was held: "Under section 326 of Hill's Code, a mortgagee is precluded from recovering possession of the mortgaged premises after forfeiture by action; but if he can obtain possession of such premises in any lawful or peaceable mode, that is, without force, he may retain possession of such premises, as against the mortgagor or any person claiming under him subsequent to the mortgage, until his mortgage debt is paid."

In the case of *Spect v. Spect*, 88 Cal. 437, 22 Am. St. Rep. 314, 26 Pac. 203, it was held: "A mortgagor who has placed his mortgagee in possession of the mortgaged premises cannot maintain ejectment against him while the debt for which the mortgage was given remains unsatisfied, even though an action by the mortgagee for the recovery of the debt is barred by the statute of limitations."

In the opinion it was said: "Whenever a mortgagor seeks a remedy against his mortgagee, which appears to the court to be inequitable, whether it be to cancel the mortgage as a cloud upon his title, or to enjoin a sale under the power given by him in the security, or to recover from the mortgagee the possession of the mortgaged premises, the court will deny him the relief he seeks, except upon the condition that he shall do that which is consonant with equity. In accordance with these principles, it is a settled rule that a mortgagor cannot maintain ejectment against his mortgagee until the debt is paid: *Phyfe v. Riley*, 15 Wend. 248, 30 Am. Dec. 55; *Hubbell v. Moulson*, 53 N. Y. 225, 13 Am. Rep. 519; *Fee v. Swingly*, 6 Mont. 596, 13 Pac. 375; *Roberts v. Sutherlin*, 4 Or. 220; *Cooke v. Cooper*, 18 Or. 142, 17 Am. St. Rep. 709, 22 Pac. 945; *Frink v. Le Roy*, 49 Cal. 314; *Tallman v. Ely*, 6 Wis. 244; *Brinkman v. Jones*, 44 Wis. 512; *Sahler v. Signer*, 44 Barb. 614; *Madison Ave. Baptist Church v. Oliver St. Baptist Church*, 73 N. Y. 82; *Wright v. Wright*, 7 N. J. L. 175, 11 Am. Dec. 546; *Wells v. Van Dyke*, 109 Pa. St. 335; *Duke v. Reed*, 64 Tex. 705; *Jones on Mortgages*, sec. 715. The debt is not satisfied or paid by mere lapse of time. The statute of limitations is a bar to the remedy only, and does not extinguish, or even impair, the obligation of the debtor. It is available in judicial proceedings only as a defense, and can never be asserted as a cause of action in his behalf or for conferring upon him a right of action. It is to be used as a shield, and not as a sword."

In the case of *Bryan v. Brasius* (Ariz.), 31 Pac. 519, Chief Justice Gooding, in rendering the opinion, said: "But it is claimed by appellant that the debt secured by the mortgage was barred by the statute of limitations at the commencement of this action, and therefore need not be paid. I do not think a court of equity would ever allow the statute to have that effect. It would be so inequitable and shocking to all sense of right that a court exercising equitable powers, as this court

does, and recognizing equitable defenses in an action of ejectment, would never disturb the possession of a mortgagee in peaceable and quiet enjoyment under legal proceedings, valid or invalid, until the mortgage debt was paid and all other requirements of equity fully met."

The above cases arose in states in which the mortgage was of similar legal effect as in our own. Of like import, see Newell on Ejectment, 11; 3 Pomeroy's Equity Jurisprudence, sec. 1189; Hildreth v. James, 109 Cal. 299, 41 Pac. 1038; Van Duyne v. Thayer, 14 Wend. (N. Y.) 234; Phyfe v. Riley, 15 Wend. 248, 30 Am. Dec. 55; Miner v. Beekman, 50 N. Y. 337; Fee v. Swingly, 6 Mont. 596, 13 Pac. 375; Johnson v. Sandhoff, 30 Minn. 197, ⁷⁹¹ 14 N. W. 889; Stark v. Brown, 12 Wis. 572, 78 Am. Dec. 762; Wright v. Wright, 7 N. J. L. 175, 11 Am. Dec. 546; Duke v. Reed, 64 Tex. 705.

In no jurisdiction where an equitable defense may be interposed to an action in the nature of ejectment for the recovery of real property do we find a different holding. Whether the mortgage there operates as at common law to convey a defeasible title or as a mere security contract incident to the debt does not change the rule. In neither case will the mortgagor, or one claiming under him by conveyance subsequent to the mortgage, or by operation of law, be permitted to maintain ejectment against one shown to be a mortgagee in possession of the premises, whether or not at the time the action is brought to recover possession the statute of limitations would bar an action by the mortgagee to foreclose his mortgage. Not only is this the law in other jurisdictions having similar statutory provisions with relation to the legal effect of mortgages and the defenses which may be interposed in actions of ejectment, but it so accords with that which is just, right and equitable between the parties in this and all other cases where some technical defect in legal proceedings is relied on to obtain a nullification of such proceedings, and so accords with the acts and acquiescence of the parties therein for many years, that the rule commends itself to our judgment as sound and wholesome. We therefore hold, upon the findings made, plaintiff in error to be "a mortgagee in possession," entitled to retain such possession until the mortgage debt is paid or adjusted. This action of ejectment cannot be maintained against him.

Whether, in the light of the findings made, the heirs, if so advised, may maintain their action to redeem the property from the mortgage debt, is not before ⁷⁹² us for decision, and we do not decide it. Such action, of necessity, would involve a determination of the question whether the sheriff's deed under which plaintiff in error took possession is an absolute nullity, and subject to be so declared in a purely collateral action, and other questions which we have found it unnecessary to consider or determine in this case.

It follows that the judgment must be reversed, with directions to enter judgment for defendant Kelso on the findings. It is so ordered.

All the justices concurring.

In Ejectment, a defendant may interpose an equitable defense: *Clyburn v. McLaughlin*, 106 Mo. 521, 27 Am. St. Rep. 369, 17 S. W. 692; *Johnson v. Drew*, 34 Fla. 130, 43 Am. St. Rep. 172, 16 South. 780. Compare *Kirkpatrick v. Clark*, 132 Ill. 342, 22 Am. St. Rep. 531, 24 N. E. 71; *Shaw v. Hill*, 83 Mich. 322, 21 Am. St. Rep. 607, 47 N. W. 247. It has been held that ejectment will not lie against a mortgagee in possession so long as the mortgage subsists: *Hubbell v. Moulson*, 53 N. Y. 225, 13 Am. Rep. 519. Compare *Bowen v. Brogan*, 119 Mich. 218, 75 Am. St. Rep. 387, 77 N. W. 942; and see the note to *Cotton v. Carlisle*, 7 Am. St. Rep. 31-34. And in *Speck v. Speck*, 88 Cal. 437, 22 Am. St. Rep. 314, 26 Pac. 203, it is held that a mortgagee in possession is entitled to retain possession until his debt is paid, and cannot be deprived thereof by an action in ejectment, although the statute of limitations has barred his right to maintain an action to enforce the debt. As to who is a mortgagee in possession, see *Rogers v. Benton*, 39 Minn. 39, 12 Am. St. Rep. 618, 38 N. W. 765.

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

MAGAHA v. HAGERSTOWN.

[95 Md. 62, 51 Atl. 832.]

PRACTICE—Negligence, Contributory, Mode of Presenting. Where the defendant claims that the plaintiff was guilty of contributory negligence, the court should be asked to rule or instruct specifically upon that subject. The question is not presented by a general instruction to the effect that the plaintiff has offered no evidence sufficient to entitle him to recover. (p. 320.)

PUBLIC STREETS.—It is not Negligence per se for a Pedestrian to Cross from one side of the street to the other in the night-time at any point, unless he has notice of some defect or could discover one by the use of due care. (pp. 320, 321.)

NEGLIGENCE, Contributory, When a Question for the Jury. If it is claimed that the plaintiff was guilty of contributory negligence in crossing a street in the night-time without the aid of lanterns, such negligence cannot be affirmed by the court, but the question must be submitted to the jury. (p. 322.)

MUNICIPAL CORPORATIONS—Public Streets.—A municipal corporation must keep the streets in a reasonably safe condition when it can do so. What is a reasonably safe condition depends upon circumstances, and no city or town can be required to keep them absolutely safe under all circumstances. (p. 322.)

MUNICIPAL CORPORATIONS—Public Streets—Liability for Ice or Snow Upon.—A municipal corporation, having power to prevent, remove, or abate nuisances or obstructions in or upon its streets, alleys, and drains, is answerable to a person injured by falling upon such ice while crossing the street at night if, though notified, it permits ice to remain for a space of four or five feet in width and sixty feet in length in a driveway on a public street for a month or more. (p. 323.)

MUNICIPAL CORPORATIONS—Ice on the Public Streets—Distinction Between Rough and Smooth.—A recovery may be had against a municipal corporation by one injured by falling upon ice in a public street, when such ice is smooth, as well as when it is in ridges or mounds. (p. 324.)

MUNICIPAL CORPORATIONS—Liability for Ice on the Public Streets.—When a Question for the Jury.—In an action to recover of a municipal corporation for injuries suffered by the plaintiff in slipping or falling on the ice on a public street, it is for the jury to determine whether the ice was formed from water emptied out of a saloon, as claimed by the plaintiff, or from a cause over which the municipality had not control, whether it continued for such time as to be constructive notice to the authorities, or they had actual notice of the condition of the street, and a sufficient time had elapsed to enable them to receive it or protect the public from its dangers, if that could reasonably be done, and other facts reflecting on the question whether the municipality had exercised reasonable care and diligence to keep the highway safe. (p. 326.)

MUNICIPAL CORPORATIONS—Liability of, for Ice on the Public Streets.—An instruction in favor of the plaintiff in an action to recover of a municipal corporation for injuries received by him from slipping on the ice on a public street is properly rejected if it does not leave the jury to determine how the ice was formed—whether from water allowed to be emptied into the street, or merely as the result of cold weather following rain or snow. (p. 326.)

MUNICIPAL CORPORATIONS—Ice or Snow on the Public Streets.—When not Answerable for.—A municipal corporation is not under obligation to keep its streets at all times in such condition that foot-passengers may be able to cross with a reasonable degree of safety, if there may be times when this is not possible. (p. 327.)

Action to recover of the defendant for injuries suffered by the plaintiff in crossing one of its public streets. The plaintiff's first prayer referred to in the opinion of the court was as follows: "If the jury find that ice had accumulated in large quantities in the public footway, gutter and street on the south side of West Washington street between High and Foundry streets, in the city of Hagerstown, covering portions of said street and gutter in such a manner as greatly to obstruct, inconvenience and endanger the public in walking across said West Washington street and along the said sidewalk and if the jury further find that the said obstruction could have been removed, or the danger and inconvenience therefrom remedied by the use of proper care and diligence on the part of the defendant, or its proper agents appointed for that purpose; and if the jury further find from the evidence that the defendant and its proper agents, aforesaid, had notice, or might by care and diligence have obtained notice of such obstruction by ice, as aforesaid, a sufficient time to have removed the same before the occurrence of the injury complained of, then it was the duty of the said defendant or its agents, to have removed the said obstruction in a reasonable time after notice thereof, or after they might have obtained notice thereof, by the use of ordinary care and diligence; and if the jury further find that

the plaintiff while exercising ordinary care and diligence on his part received the injury complained of by falling on said obstruction by ice and that such injury occurred after the lapse of a sufficient time for the notice of such obstruction to the defendant, or its said agents, or from the period when the defendant or its agents might have obtained notice thereof, by the exercise of ordinary care and diligence, then the plaintiff is entitled to recover such damages by reason of his injury as the jury may think he has sustained under the circumstances." All the plaintiff's prayers for instructions were rejected, and the court directed a verdict to be returned for the defendant.

Alexander R. Hagner, for the appellant.

J. Augustine Mason, for the appellee.

BY BOYD, J. The appellant sued the appellee for damages sustained by him on account of its alleged negligence in permitting the accumulation of ice on Washington street, in the city of Hagerstown, upon which he slipped and fell, causing a fracture of his thigh bone and other injuries. At the conclusion of the testimony, the court rejected five prayers, offered by the plaintiff and granted one, at the instance of the defendant, that "the jury are instructed that the plaintiff has offered no evidence legally sufficient to entitle him to recover, and the verdict of the jury must be for the defendant." A judgment was entered for the defendant on the verdict so rendered, and this appeal was taken from the rulings of the court, in rejecting the plaintiff's prayers and granting that of the defendant.

About 5 o'clock in the morning of the 4th of January, 1901, the plaintiff was going along the north side of Washington street to his place of business when a friend on the opposite side of the street called to him and he started in a diagonal direction across the street to see him. When he got within five or six feet of the curb he slipped on the ice and fell, his hip striking the curb. The evidence on the part of the plaintiff was to the effect that there was a terra cotta pipe running under the pavement from a saloon which emptied into a gutter, which is from two to two and a half feet wide, and about three inches deep in the center. The plaintiff fell at a point about sixty feet from where the pipe emptied. John M. Stahl, who lived next to the saloon, said the ice extended from the railroad, below where the plaintiff fell, to the pipe, was six

inches thick in some places and extended into the street four or five feet; that ^{as} it was there during the month of December and early part of January. He also said he told the mayor and chief of police about it. Other witnesses testified to the same effect as to the condition of the street, and their evidence tended to show that the ice was formed from water coming from the saloon, and that the street remained in that condition from the latter part of November, or early in December, until the ice melted in the spring. There was a descending grade from where the pipe emptied to the place where the plaintiff fell. That portion of the street was macadamized and there was no cross-walk from High street to the Public Square, a distance of three squares, and the one at High street was four hundred feet from where the accident happened. The ice was smooth where the plaintiff fell, but was rough in some places, forming ridges, and was somewhat oval shaped.

The first question to be considered is whether the case should have been submitted to the jury. In determining that we are, of course, to accept the evidence offered by the plaintiff, and cannot be governed by the fact that the defendant offered some in contradiction of parts of it. The appellee contends that the plaintiff cannot recover, first, because he was guilty of contributory negligence, and, second because the defendant is not liable under the circumstances independent of the alleged negligence of the plaintiff. It may well be questioned whether the first contention is properly before us, as no prayer was offered directly presenting it. The prayer granted by the court did not call upon it to determine whether the plaintiff had been guilty of contributory negligence. When that is desired a prayer directing the court's attention to the alleged negligence of the plaintiff, as a ground for refusing him relief, should be offered. "By such an instruction" as the one before us, "the point decided is simply the legal insufficiency of the evidence to be considered by the jury": *Western Maryland R. R. Co. v. Carter*, 59 Md. 311. But as we are of the opinion that the case must be reversed, and as the question has been fully argued, we will consider it.

1. We find nothing in the record that establishes such negligence ^{as} on the part of the plaintiff as to justify the court in determining, as a matter of law, that he so contributed to the accident as to preclude his recovery. It is not negligence *per se* for a pedestrian to cross from one side of the street to the

other, and it has been held by this court "that persons have the right to cross the streets at any point along the thoroughfare": *Baltimore Traction Co. v. Helm*, 84 Md. 526, 36 Atl. 121, and others there cited. If a municipality provides suitable and convenient crossings, pedestrians cannot expect the whole of the thoroughfare to be kept as clean and smooth as the sidewalks, but unless he has notice of some defect, or by the use of due care could discover it, a person who crosses a street at a place other than a fixed crossing cannot be said to be thereby necessarily guilty of negligence. And when, as in this case, the nearest crossing is four hundred feet away, it would be exacting a great deal of a pedestrian to require him to go to it, instead of crossing where he is to speak to a friend who is on the opposite side. "A person desiring to cross the street, either in the night-time or in the daytime, is not confined to a crossing. He has a right to assume that all parts of the street intended for travel are reasonably safe": *Brusso v. Buffalo*, 90 N. Y. 679. See, also, *Baker v. Grand Rapids*, 111 Mich. 447, 69 N. W. 740; *Lincoln v. Detroit*, 101 Mich. 245, 59 N. W. 617; *Raymond v. Lowell*, 6 Cush. 524, 53 Am. Dec. 57; *Junction City v. Blades*, 59 Kan. 774, 52 Pac. 44. Of course, there may be circumstances which call upon one thus using a street to exercise greater care than would be required of him on the sidewalks or places especially intended for pedestrians. But there is nothing in this record to show that the plaintiff was so indifferent to his own safety, or so lacking in the use of proper care, as to authorize the court to say that he was negligent. He testified he did not know the ice was there; that he walked as he always did, strong and firm; that he was always a careful walker, and was as careful that morning as he ever was in his life. He also said there was no ice on the side from which he came, and if he had known there was on the other side he would not have gone over. It is true it was dark, but he had no reason to suppose he was going into a dangerous place, if his testimony is to be believed, and that was for the jury. It was suggested by the counsel for the appellee that prudence required him to ask his friend, who had a lighted lantern, to elevate it or come forward so as to light the way. If he had known the ice was there he might have done so, but he says he did not know it, and hence had no reason to fear that he would subject himself to such danger by crossing the street at that point. Ordinarily, it is

for the jury to determine whether a plaintiff has been guilty of contributory negligence, and it is only when there are undisputed facts or circumstances establishing such negligence that the court is authorized to decide that question. On this branch of the case therefore we think it was for the jury to say whether the plaintiff was negligent, and if so whether such negligence directly contributed to the injury complained of. In that connection it could have considered his opportunities to know the condition of the street, which his witnesses testified had existed for some weeks, and any other facts reflecting upon the question.

2. There can be no doubt that it is the duty of a municipality to keep the streets in a reasonably safe condition, when it is in its power to do so. But what is a reasonably safe condition must depend upon circumstances, and no city or town can be required to keep them absolutely safe under all circumstances. It would, for example, be very unreasonable to require the authorities of a city, such as Hagerstown, to keep its streets between the sidewalks at all times free from snow and ice. The winters in that part of the state are often sufficiently severe to make it impracticable, if not impossible, to avoid having more or less ice on the streets for considerable periods of time. It sometimes happens that snow is so packed on the streets by the ordinary use of them, or is followed by such weather as to put it beyond the power of the authorities to remove it or prevent ice accumulating, by the use of such reasonable means as can be demanded of them. In cleaning the sidewalks the snow generally is, and usually must be, thrown into the street and in a city like Hagerstown it would ⁷¹ be demanding too much to require it to be hauled away or entirely removed from the streets. Then again, snow and rain may fall at the same time, or close together, and be followed by cold weather so as to produce such conditions as must continue until relieved by a change of temperature. Under such and similar circumstances it would not do to hold a municipality responsible for injuries sustained by one falling, by reason of slipping on ice, especially if he was not on the sidewalk. But this record presents facts, as shown by the plaintiff's witnesses, which distinguish the case from those arising under such conditions as we have just spoken of. The mayor and council of Hagerstown had the power to pass ordinances necessary for the good government of the city; "to prevent, re-

move and abate all nuisances or obstructions in or upon the streets, highways, lanes or alleys, drains or watercourses": Code of Public Local Laws, art. 22, sec. 171. We have already stated some of the facts attempted to be proven by the plaintiff. From them it will be seen that the condition of this street when the accident happened was owing entirely to the fact that the proprietor of a saloon was permitted to empty water into the street in large quantities. This had been going on for several years. One witness said it would commence to freeze as soon as cold weather set in and disappeared in March, and when the pipe would freeze up the water was thrown out from the saloon in buckets at night. The ice formed from four to six inches in thickness, extended into the street in some places four or five feet, filled up the gutter and ran in on the pavement and covered a distance of sixty or more feet in length, varying in width. When the accident happened it had been there more than a month. A man and a lady testified they had fallen on the ice and a number of horses fell on it. One witness said he had notified the chief of police and the mayor of the city and warned the mayor that there would be an accident there.

Under such circumstances, if established to the satisfaction of a jury, can the court say there can be no recovery for injuries sustained by one, using due care, who fell on the ice in ⁷² crossing the street? The municipal authorities not only had the power, but it was their duty, to abate such a nuisance as the plaintiff's testimony tends to show that was, if aware of its existence, of which there was evidence. As was said in the familiar case of Mayor etc. of Baltimore v. Marriott, 9 Md. 160, 66 Am. Dec. 326: "It is a well-settled principle that when a statute confers a power upon a corporation to be exercised for the public good, the exercise of the power is not merely discretionary but imperative, and the words 'power and authority,' in such case, may be construed duty and obligation." That was an action for negligence in not preventing or removing an accumulation of ice on the footway of a street in Baltimore, and while we do not mean to say that municipal authorities are required to exercise the same degree of care to guard against accidents from such a cause on the driveways, as on sidewalks, yet when the evidence discloses such facts and circumstances as those we have related, there is a "duty and obligation" on them to use reasonable efforts to protect the

public from injury when in the lawful use of the streets, whether it be a part of the sidewalk or in the driveway. We have cited above a number of authorities, including Helm's case, decided by this court, which hold that pedestrians have the right to cross streets at points other than established crossings, and they having that right are justified in assuming that they will not be subjected to the dangers of such a nuisance as the plaintiff's testimony tends to show this place to have been. In order that we may not be misunderstood, we desire to emphasize the fact, at the risk of repetition, that we do not mean to say that the appellee would be liable if this ice was simply the result of snow or rain, or both, falling and then freezing. If it had been, and if the ice thereby formed was in large quantities in the streets, it would be exacting too much to require the municipal authorities to remove it. Under such conditions persons crossing the streets would or could know the danger and would be required to use more care than is expected of them in walking on the sidewalk, and the conclusion we have reached is based on the particular facts of ⁷³ this case which show that the ice was formed in the manner we have stated and to such an extent as to become a nuisance, which it was the duty of the appellee to abate. The distinction is to some extent pointed out in *Flynn v. Canton Co.*, 40 Md. 312, 17 Am. Rep. 603.

3. Counsel for the appellee cited cases which hold that a municipality is not liable if the party injured falls on smooth ice, while it may be if the ice has been allowed to remain in ridges or mounds. That is upon the theory that the latter actually form an obstruction to the highway, and that the former cannot reasonably be avoided. Although they were decided by courts whose decisions are entitled to great respect, some of them ranking among the highest in this country, we cannot adopt such a distinction, if it is to be applied to circumstances such as those before us. Primarily, the ground for holding a municipality liable for injuries sustained by ice on a highway is that it has been negligent in not preventing or not removing it, and if it has used reasonable care and diligence in those respects it is not liable. But if it has been so negligent and if the ice is dangerous because it is smooth and slippery, why should it not be held liable as well as if the ice be in ridges or mounds? Smooth, even ice is likely to cause more people to fall than when it is rough and uneven. The

latter is more easily observed and very little snow on the former may entirely conceal it from the observation of a careful pedestrian, and it oftentimes results in dangerous falls.

In *Mayor etc. of Baltimore v. Marriott*, 9 Md. 160, 66 Am. Dec. 326, the statement of facts shows that the plaintiff fell "on a large sheet of slippery ice," which was formed by the freezing of water running from hydrants and the judgment for injuries thereby sustained was affirmed. It is true that distinction does not appear to have been made or considered, but the fact that it was smooth ice was before the court. In *Cloughessey v. City of Waterbury*, 51 Conn. 405, 50 Am. Rep. 38, the difference between ice in ridges and that which is smooth and level was considered, as affecting the liability of municipalities, and that court declined to recognize it. It was there ⁷⁴ said that the authorities which adopted the doctrine were based on the decision in *Stanton v. Springfield*, 12 Allen, 566, and the Connecticut court undertook to show that in Massachusetts it had been virtually repudiated by the case of *Cromarty v. Boston*, 127 Mass. 329, 34 Am. Rep. 381, where a city was held liable for injuries sustained by reason of glass and iron in a sidewalk becoming smooth and slippery, and other cases in Massachusetts are cited to show that the doctrine has been somewhat modified by the supreme court of that state. But however that may be, an examination of the cases decided by that court on this subject will show that they are largely based on the construction of statutes imposing duties on municipalities, and they as a rule refer to ice formed from snow or rain and not to that formed as this was. In most of the states where the distinction is recognized, the climate is much more severe than it is here, but in this state if an injury is sustained by reason of the slippery condition of the streets, caused by a recent sleet or snow, which is so extensive as to make it impracticable to remove it by the use of reasonable means, there could ordinarily be no recovery. Municipal authorities are not required to prevent snow and ice from getting on the streets in cold weather, or to do other impossible things. Nor can it be expected that those in control of a city like Hagerstown should remove all snow and ice from the streets, between sidewalks. But according to the theory of the appellant, there was no recent snow and the ice complained of was not the result of snow or rain falling, but it was caused by the freezing of water which was emptied into the street, through

the pipe leading into the saloon or from buckets, or both, from day to day and for a long period of time, and with the knowledge of the appellee. Indeed, there was some evidence that it was by its express permission.

There are many cases to the effect that a municipality may be liable for the accumulation of ice resulting from its own negligence: *Chicago v. Smith*, 48 Ill. 107; *Hall v. Lowell*, 10 Cush. 260; *Bishop v. Goshen*, 120 N. Y. 337, 24 N. E. 720; *Decker v. Scranton*, 151 Pa. St. 241, 31 Am. St. Rep. 757, 25 Atl. 36; *Gaylord v. New Britain*, 58 Conn. 398, 20 Atl. 365; *McGowan v. Boston*, 170 Mass. 384, 49 N. E. 633, and other cases cited in 15 Am. & Ency. of Law, 2d ed., 449. And in such a case it has been held that the fact that the ice was smooth is no defense, even in a state where the distinction between smooth and rough ice is fully recognized: *Decker v. Scranton*, 151 Pa. St. 241, 31 Am. St. Rep. 757, 25 Atl. 36. It was for the jury to determine whether this ice was formed from water emptied out of the saloon, or from causes over which the appellee had no control, whether it had continued for such time as to be constructive notice to the authorities or they had actual notice of the condition of the street, and a sufficient length of time had elapsed to enable them to remove it, or protect the public from its dangers, if that could reasonably have been done, and other facts reflecting upon the question whether the appellee had exercised reasonable care and diligence to keep the highway safe. In the note to *Hausmann v. Madison*, 21 L. R. A. 277, many cases to that effect are cited. There was error in granting the defendant's prayer.

4. The plaintiff's first prayer was properly rejected. It does not leave to the jury to determine how the ice was formed—whether from water thus allowed to be emptied into the street, or merely as the result of cold weather following snow or rain. Two witnesses on the part of the defendant testified that no water had "run out" of the saloon in December and January. If that be true, and it was not permitted to be thrown out, but the ice was formed by reason of some recent snow or rain which froze, it would be holding the appellee too strict a liability to say it should have removed ice thus formed on the street. Then this prayer submits to the jury to find whether ice had accumulated on "the footway, gutter and street," so as to obstruct and endanger the public in walking across the street, "and along the said sidewalk." This ac-

cident did not occur on the sidewalk, and the jury might have been misled by that prayer. It might have been of the opinion that the defendant was negligent in not cleaning the sidewalk, but it was not so negligent in not keeping the street clean (outside the curbs), and yet have understood that it ~~to~~ could find for the plaintiff if the defendant was negligent in reference to the sidewalk.

The second prayer also omits all reference to the cause of the ice. The third asks the court to say it was the duty of the defendant to keep its streets, from sidewalk to sidewalk, in such condition that foot passengers may be able to cross with a reasonable degree of safety, using proper care and caution themselves, "at any and all times." There may be times when that is impossible. For example, there was some testimony that there was a sleet the night before this accident, and it would be impossible for the authorities to keep the streets safe, if they were covered with sleet. What we have said of the first is applicable to the fourth. These four prayers were properly rejected. The fifth is on the measure of damages and seems to state the rule correctly, as adopted in a number of cases in this state.

Judgment reversed, the appellee to pay the costs, and a new trial awarded.

A City is under an Absolute Duty to keep its streets in a reasonably safe condition, though it is not an insurer against injury to travelers: Beall v. Seattle, 28 Wash. 593, 69 Pac. 12, 92 Am. St. Rep. 592, and cases cited in the cross-reference note thereto. A person desiring to cross a street is not confined to the crossing, but may assume that all parts of the street intended for travel are reasonably safe: Olathe v. Mizee, 48 Kan. 435, 30 Am. St. Rep. 308, 29 Pac. 754; Moebus v. Hermann, 108 N. Y. 349, 2 Am. St. Rep. 440, 15 N. E. 415. As to the liability for allowing ice to accumulate on streets or sidewalks, see Chamberlain v. Oshkosh, 84 Wis. 289, 36 Am. St. Rep. 928, 54 N. W. 618; Decker v. Scranton, 151 Pa. St. 241, 31 Am. St. Rep. 757, 25 Atl. 36; Hausmann v. Madison, 85 Wis. 187, 39 Am. St. Rep. 834, 55 N. W. 187; St. Louis v. Connecticut etc. Ins. Co., 107 Mo. 92, 28 Am. St. Rep. 402, 17 S. W. 637.

STATE v. HAWKINS.

[95 Md. 133, 51 Atl. 850.]

LOTTERIES—Gift Enterprises, When Amount to.—If, on the sale or purchase of goods, a trading stamp is given, entitling the purchaser to something which is uncertain, indeterminate, and then unknown to him, the transaction involves the elements of chance, and a statute prohibiting the giving of such stamp is not unconstitutional. (pp. 331, 333.)

CONSTITUTIONAL LAW.—A Statute Prohibiting the Redeeming of a Trading Stamp at a place other than that where, or by a person other than him by whom, the sale was made, is unconstitutional, because the place where and the person by whom the redemption is to be made does not introduce an element of chance into the transaction. (pp. 332, 333.)

Isidor Rayner, attorney general, for the appellant.

W. Benton Crisp and Alexander H. Robertson, for the appellee.

¹⁴¹ **BOYD, J.** The criminal court of Baltimore City sustained a demurrer and quashed an indictment against the appellee for an alleged violation of the act of 1898, chapter 207, known as sections 263A, 263B and 263C of article 27 of the Code of Public General Laws. From that judgment the state appealed and the question before us is whether that is a valid law—the court below having determined that it was not.

There are three counts in the indictment and a demurrer to each one was sustained. The first charges that the traverser “unlawfully did use, hold for use and sell to one Walter J. ¹⁴² Gregory, a certain stamp, commonly called a trading stamp, and a certain ticket and check,” which was a scheme and device for the sale, etc., of certain goods, wares and merchandise, holding out as an inducement for such sale, etc., the giving and issuing of such stamp, ticket and check which was to be and might have been presented to and redeemed by some person and association of persons other than the traverser, the holder “getting and receiving in exchange therefor a certain gift, prize, gratuity and divers other things uncertain, undetermined and unknown to him, the said Walter J. Gregory, the said purchaser of said goods, wares and merchandise at the time of the purchase thereof.”

That count is for the violation of section 263A, and follows very closely the language of that section. The second and

third are based on section 263B—intending to embrace the two methods of redemption of the stamps therein prohibited, namely, “at any other place than that where said sale, barter or trade was made, or in any other manner than by something certain and known to the purchaser at the time of said sale, barter or purchase.” At the argument and in the briefs of counsel a good deal was said about the methods adopted by those dealing in trading stamps, but in our consideration of the case we are confined to the allegations in the indictment, so far as the facts are concerned, and as the three counts substantially follow the language of the statute and embrace all of the acts therein prohibited, we are to determine whether they, or any of them, charge the traverser with doing what the legislature had the power to prohibit. The case of *Long v. State*, 74 Md. 565, 28 Am. St. Rep. 268, 22 Atl. 4, established as the law of this state that a statute prohibiting all gifts to purchasers of goods, wares or merchandise, as inducements to make the purchasers, was invalid, and could not be enforced, in so far as it related to gift enterprises not involving chance. The court said: “Such a regulation of trade is in our opinion, not only unwise, but unlawful, and unlawful because it is necessary neither for the health, safety nor welfare of the people and which in its operation would be oppressive and burdensome.” But the language of the statute¹⁴³ then under consideration differs materially from the one now before us and the concluding paragraph of that opinion shows that this court recognized the distinction contended for by the attorney general in this case. It says: “It follows that the act of 1886, chapter 480, by reason of its general terms, including as it does all gift enterprises, those involving the element of chance, as well as those that do not, is invalid so far as it relates to gift enterprises not involving chance.” The court had previously stated that “in so far as the object of an act is to protect the morals and advance the welfare of the people by prohibiting every scheme and device bearing any semblance to lottery or gambling, it undoubtedly would be a valid exercise of power, and the citation of authorities is not necessary to sustain a proposition so well settled.” The act of 1886 prohibited “holding out as an inducement for any such barter, sale or trade, or the offer of the same, any scheme or device by way of gift enterprises of any kind or character whatsoever,” and the court said that that broad language not

only included "a lottery in which a valuable consideration is given for the chance to win a prize, but also a gratuitous distribution not involving the element of chance." The statute was only held to be invalid so far as it related to the latter.

But section 263A of the act of 1898 is not thus broad and comprehensive in its terms. It only condemns the giving or issuing of a stamp (we can omit the other things mentioned) to be presented to some person or association of persons other than the vendor of the goods sold, which entitles the holder to get or receive in exchange therefor "any gift, prize or gratuity, or anything uncertain, undetermined or unknown to the purchaser of said goods, wares or merchandise at the time of the purchase thereof." If the vendor holds out as an inducement to purchase his goods, wares and merchandise the giving of a stamp which will thus entitle the purchaser to something which is uncertain, undetermined and unknown to him at the time of the purchase, the transaction is certainly one bearing some "semblance to lottery or gambling"—"involving the element of chance." Although the facts relied on to hold the appellee ¹⁴⁴ guilty are not before us, excepting in so far as they are to be found in the indictment, we cannot decline to consider such things as are of common knowledge to all persons acquainted with business dealings, and we must assume that neither a merchant nor trading stamp company would intentionally engage in a business by which loss must necessarily be sustained. If the merchant only received the actual value of the goods sold, he could not very long continue the practice of having a third party furnish some other article at his expense, and unless the third party in some way gets value for the articles delivered by him, his business career would ordinarily be shortlived. And it would seem to be equally clear that if purchasers from the merchant always paid full value for the goods purchased and for the article obtained from a trading stamp company, there would be but little inducement for them to make purchases in that way. But when they are led to believe that they have the chance of getting something in addition to their purchases, and especially when they do not know what it is to be, then it is unfortunately true that there are very many persons who would be thereby induced to make purchases who would not otherwise do so. The "uncertain, undetermined or unknown" is what attracts a large class of people in every community and it is dealing with the "uncer-

tain, undetermined or unknown" that has ruined many and the tendency to thus deal (appealing to the gambling instinct) is one of the evils of the present day. Lotteries, which were at one time expressly authorized by law, are now generally prohibited throughout this country—there are provisions against them in the constitutions of many states, including our own. Numerous statutes have been passed to prevent transactions which, while not technical lotteries, are so akin to them that they have some of the same evil results, and when a statute is before a court for construction which apparently seeks to correct such evils, it should not be too ready to declare it invalid but on the contrary should sustain it, unless it clearly violates some rights guaranteed to those affected by it. If the inducement for the sale was a stamp which would enable ¹⁴⁵ the holder to get something which was uncertain, undetermined and unknown to him at the time of the purchase, it would seem to be clear that the transaction involved the element of chance referred to in *Long v. State*, and therefore not only cannot be justified by that decision, but is, by implication at least, condemned by it.

Nor do we find in the other cases relied on by the appellee any authority for declaring a statute such as this invalid, on constitutional grounds. The one before the court in *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343, was of the same character as our act of 1886 above referred to. In *State v. Dalton*, 22 R. I. 77, 84 Am. St. Rep. 818, 46 Atl. 234, the supreme court of Rhode Island was construing a statute which did not have such a provision in it as the one now being considered (section 263A). Although the court held the act before it to be unconstitutional and void, in disposing of the case it said: "As to the argument before referred to, that the scheme is in the nature of a lottery because the precise nature and value of the premium are unknown to the purchaser, it is enough to reply that nothing appears in the act or in the record before us to show this"; and again it was there said: "If the act had prohibited the giving away of any stamp or device in connection with the sale of an article, which would entitle the holder to receive, either directly from the vendor, or indirectly through another person, *some indefinite and undescribed article, the nature and value of which were unknown to the purchaser, there would then be introduced into the prohibited transaction enough of the element of uncertainty and chance*

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to condemn it as being in the nature of a lottery." It would be difficult to find an authority more applicable to the language used in our statute than that just quoted, especially the part italicized by us.

In *Commonwealth v. Emerson*, 165 Mass. 146, 42 N. E. 559, the court said in reference to the statute before it that it was not intended to prevent the sale of two things at once: "But the aim of this statute is to prevent offers of bargains which appeal to the gambling instinct, and induce people to buy what they do not want by the promise of a gift or prize, the precise nature ¹⁴⁶ of which is not known at the moment of making the purchase. There was nothing of the sort in the present case." And in *Commonwealth v. Sisson*, 178 Mass. 578, 60 N. E. 385 (decided by the supreme court of Massachusetts in May, 1091), the court said it is presumed that when the act then under consideration was passed, the legislature had before it the decision in *Commonwealth v. Emerson*, and, after referring to what we have quoted from that case, said: "When, then, it is enacted by the latter statute that the provisions of the one last mentioned should apply to the giving of a stamp, or coupon, entitling the purchaser to other property from other persons, the same limitations to the generality of the words used must be understood." Nor is there anything in the case of *Yellowstone Kit v. State*, 88 Ala. 196, 16 Am. St. Rep. 38, 7 South. 338, opposed to the conclusion we have reached, as the statute there does not have such a provision as the one we are considering.

The case of *Lansburgh v. District of Columbia*, 11 App. D. C. 512, went further than we are required to do to uphold the validity of this statute, and sustained one which was not so clearly directed against transactions involving the element of chance as our act of 1898.

The second count relies on the allegations that the stamp was to be redeemed by the traverser "at a certain place other than that where said sale, barter and trade was made." The mere fact that it was to be so redeemed does not introduce into the transaction such an element of chance as would distinguish it from *Long v. State*, 74 Md. 565, 28 Am. St. Rep. 268, 22 Atl. 4. We therefore are of the opinion that the demurrer to that count was properly sustained.

What we have said of the first is applicable to the third count. It charges that the stamp was to be redeemed by the traverser

"in other manner than by something certain and known to the said purchaser, the said Walter J. Gregory, at the time of said sale, barter and purchase." Whether or not the stamp is to be redeemed by the party selling the goods, wares or merchandise, or by a third party, is not of itself material. At the trial of a case under this statute it may be a circumstance proper to be proven as reflecting upon the uncertainty ¹⁴⁷ of the article to be received by the holder of the stamp, but the mere fact that it is to be redeemed by a third person would not necessarily change the nature of the transaction. If the stamp entitles the holder to something which is uncertain and unknown at the time of the purchase, it matters not whether the vendor of the goods, wares or merchandise, or some other person, redeem it. It is then so far of the nature of a lottery, or gambling transaction, as to bring it within the power of the legislature to prohibit it.

We have not thought it necessary to enter into a discussion of the police power of the state, as that has been so frequently considered by this and other courts and in one of the recent cases before us, involving that question, it is fully and ably discussed by the chief judge: *State v. Broadbelt*, 89 Md. 565, 73 Am. St. Rep. 201, 43 Atl. 771. Without further prolonging this opinion by referring to other questions so ably presented by the counsel, we think the first and third counts of this indictment are sufficient, and that the statute is valid, excepting in so far as it undertakes to make it a criminal offense merely to have the stamp or other article mentioned redeemed "at any other place than where such sale, barter or trade was made." The demurrer to the first and third counts should have been overruled, and that to the second sustained. For error in sustaining the demurrer to the first and third counts the judgment will be reversed.

Judgment reversed, the appellee to pay the costs, and new trial ordered.

Lotteries.—A method of doing business by which the vendor of articles gives the purchaser a stamp or other device that entitles him to obtain from some other person some article of merchandise in addition to that actually sold, is not a lottery, and cannot be forbidden by statute: *State v. Dalton*, 22 R. I. 77, 84 Am. St. Rep. 818, 46 Atl. 234. See, also, *Long v. State*, 74 Md. 565, 28 Am. St. Rep. 268, 22 Atl. 4; *People v. Gillson*, 109 N. Y. 339, 4 Am. St. Rep. 465, 17 N. E. 348; *Yellow-stone Kit v. State*, 88 Ala. 196, 16 Am. St. Rep. 38, 7 South. 338.

FISHER v. FISHER.

[95 Md. 815, 52 Atl. 898.]

DIVORCE—Party also in Fault cannot Procure.—One who has been guilty of adultery, and has been denied a divorce on that ground cannot obtain a divorce in another suit charging adultery. (pp. 335, 336.)

DIVORCE—Denial of, for a Cause Known to the Court, but not Plead or Proved by the Parties.—In an action for divorce on the ground of adultery, it is not improper for the court to inquire whether the parties are not the same as were before it in a prior suit, when both were denied relief on the ground that both had been guilty of adultery, and on the admission they are such parties, then to deny relief in the second suit. (p. 338.)

Oliver C. Warfield, for the appellant.

No appearance for the appellee.

³¹⁵ PAGE, J. The appellant in this case is seeking a divorce a vinculo matrimonii from her husband, the appellee. She charges in her bill that he has been guilty of adultery, since the first day of January, 1901, with divers women, whose names are unknown to her. The docket entries are not set out in the record, and it does not appear whether he was summoned or appeared voluntarily without the service of subpoena. The bill was filed on the ninth day of November; the answer of the appellee was filed three days later. On the 14th of November issue was joined and on the same day leave was granted to the appellant to take testimony. On the fifth day of December the testimony was taken, and returned to the court, and on the same day, by agreement of parties, the cause was "submitted for decree and the forty-third general equity rule" waived; and without argument was referred by the court to the auditor and master. The appellee in his answer admits all the averments of the bill except those contained in the third and fourth paragraphs to the effect that the appellant "has always been" a chaste wife, and that since the ³¹⁶ first day of January, 1901, the appellee has been guilty of adultery, etc.; as to these, "he neither admits nor denies," but "calls for strict proof thereof." All the testimony taken was on behalf of the appellant. None was offered by the appellee. The cross-examination of appellant's witness was brief, and its effect was merely to emphasize what had already been elicited. It is apparent, we think, from the facts we have just recited that the learned

judge below was fully justified in closely scrutinizing this proceeding when it came before him for his action for the purpose of being assured there were not important facts, other than those that appeared in the return of the examiner, that should have been brought to his knowledge. Accordingly, having knowledge of a certain other case between the parties of the same name, in which the bill and a cross-bill for divorce had been dismissed "upon the grounds that the parties were in *pari delicto*," the judge "sent for the solicitors in the present case, and in open court the said solicitors admitted to the court that the Louisa Fisher and William L. Fisher, who are parties to this cause, are the same persons who were parties to the antecedent case of *Fisher v. Fisher*." He then dismissed the bill, and from the decree the appellant has taken this appeal.

With his decree, the judge filed an opinion, a part of which is now here reproduced, viz.: "It is an elementary principle of divorce law that the party seeking the aid of a court of equity for relief from matrimonial bonds must be without fault to be entitled to the interposition of the court; yet in this case the plaintiff, by the findings of this court and the court of appeals, has been guilty of the same offense as that charged against the husband, and is not, therefore, entitled to the relief sought, if the fact is properly before the court.

"The former proceedings between the parties and the judgment of the court therein are not mentioned in the pleadings nor referred to in the evidence, yet they are matters not merely of the personal knowledge of the court, and a part of the ³¹⁷ records of this court, but also of the court of appeals of this state, and the identity of parties in the two proceedings is admitted by their respective solicitors. . . .

"The present proceeding, however, is one for divorce, and cases of this character are not conducted in all respects or bound by the same rule as other causes. In theory at least the state is always a party to every divorce proceeding, and since not represented by a solicitor, the duty of watching the proceedings in the interest of the state devolves upon the court; and while in a case of a different character, one in which the state has no interest, the court may not be entitled to take notice of its own proceedings and records, in a divorce proceeding it becomes incumbent upon him to do so. If in the discharge of its duty the court is called upon to act in a case for divorce where it appears by its own records and the adjudication of the

court of last resort in the state, that the complainant is not entitled to the relief of a court of equity, the chancellor who would grant the divorce would be lacking in the duty imposed upon him, and fall short of the obligation due the state."

The former proceedings thus referred to will be found reported in *Fisher v. Fisher*, 93 Md. 299, 48 Atl. 833, and by reference to the case in the printed volume it will appear that the appellee in this case filed a bill against the appellant charging adultery and praying for a divorce a vinculo matrimonii. The appellant denied the charge, but presented counter charges of the same kind in a cross-bill, in which she also asked for a divorce a vinculo. It was held in the court below and in this court that the testimony showed that both of the parties had been guilty of adultery, and for that reason neither was entitled to a divorce, so that, if the record of the antecedent proceedings had been laid before the judge in the regular manner, this case would have been one in which the wife, a proven adulteress herself, comes again into court and prays for a divorce from her husband upon the ground that he had committed the same offense of which she had also been guilty. She would not, under such circumstances, most certainly be coming into court with clean ³¹⁸ hands, and for a court of equity then to grant her relief "would be offering a bounty to guilt": *Fisher v. Fisher*, 93 Md. 299, 48 Atl. 833.

It is insisted, however, by the appellant that these facts were not properly before the court and that the judge erred in considering any other facts than those which had been established by the evidence which had been regularly offered before the examiner. In view of this contention, it becomes proper to enter upon the power and the duty of the court under the circumstances existing at the time the case was submitted to him for his decree. In *J. G. v. H. G.*, 33 Md. 406, 3 Am. Rep. 183, it was held that, under the authority conferred by the code, article 16, section 35, the court sits as a divorce court and "must be governed by the rules and principles established in the ecclesiastical courts in England, so far as they are consistent with the provisions of the code"; and therefore the decisions of those courts in similar cases "may properly be referred to as precedents," "as safe and authoritative guides for the courts of this state in disposing of cases of this kind. It has always been held, in England as well as in this country, that the public has a peculiar interest in the marriages of its citizens, since

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upon the proper preservation of the marriage ties depends the decency and purity of society. Therefore, though unmarried persons may contract the status of marriage when they mutually please, those who have assumed it cannot cast it off by mutual consent, as parties to an ordinary contract may annul its obligations": 2 Bishop on Marriage and Divorce, 6th ed., c. 16, sec. 230; Hall v. Hall, 3 Swab. & T. 347.

And it is for this reason that a cause for divorce cannot be established by admission of parties alone, as public policy requires that such confession, to be sufficient to support a decree, must be corroborated by other evidence: Betts v. Betts, 1 Johns. Ch. 199; Harris v. Harris, 2 Hagg. Ecc. 376; Summerbell v. Summerbell, 37 N. J. Eq. 603; Robinson v. Robinson, 1 Swab. & T. 362; 9 Am. & Eng. Ency. of Law, 2d ed., tit. "Divorce," p. 845.

This general principle, maintained by the courts of England and most of the courts of this country, has been recognized ³¹⁹ and enforced in this state by legislative enactment. It is provided by section 40, article 16 of the code, that "the admission of a respondent, of the facts charged in a bill for a divorce, who consents to the application, shall not be taken of itself as conclusive proof of the facts charged as the ground of the application." This statute is a legislative recognition of the principle that the state has a peculiar interest in the maintenance of the marriage ties. In ordinary cases the parties may agree as to what facts shall be submitted to the court, and may by agreement waive any rights they may have, but do not desire to exercise. But in divorce cases the policy of the state demands that the marriage bond shall not be broken except for sufficient and legal causes, specially designated in the statute. This policy is founded upon the necessity that exists for the protection of the rights and interests of children and other individuals, who, though not parties to the cause, might be deeply affected by its results, and also for the preservation of the public morality which demands that the marriage tie shall not be severed except for such sufficient and legal causes as the statute specifically designates. For the more efficient maintenance of these principles, in England and in some of the states of the Union, a divorce suit is regarded as a triangular proceeding, and the statutes or the practice of the tribunal allow the state to be represented by the appearance of its proper officer: Butler v.

Butler, 14 Prob. Div. 160. See statutes of several states cited in 7 Ency. of Pl. & Pr. 67.

In this state there is no statute authorizing the appearance of the public attorney, but none the less the duty of protecting the public interests is in the care of the tribunal before which the proceedings are pending, and it will be astute in enforcing the policy and principles of the law, lest by the suppression or perversion of important facts it be made the medium of obtaining a decree to which neither of the parties is justly and legally entitled. More particular, also, will be the scrutiny of the court if there are circumstances which "alarm the jealousy of the court" and reasonably excite suspicion lest there may be a suppression of facts that ought to have been brought to its knowledge: *Williams v. Williams*, 4 Eng. Ecc. 415. And further, if there be reason for the suspicion that important testimony has not been produced, the judge may of his own motion elicit such evidence, in any manner that the rules of his tribunal allow: *Thompson v. Thompson*, 70 Mich. 62, 37 N. W. 710; *Owen v. Owen*, 48 Mo. App. 208-210; *Peck v. Peck*, 44 Hun, 292, in which the court said that "to prevent judgments of divorce to be taken where a valid defense exists, courts on their own motion interfere to prevent such result when the facts are brought to their knowledge."

Here the court below had knowledge from the printed reports of the decisions of this court that a case between parties having the same names as those then before him had been disposed of in which it was decided that both husband and wife had violated their marital vows, and for that reason neither was entitled to a divorce from the other. No reference having been made to these proceedings in the pending case, and no reason having been assigned for the omission to do so, it was entirely proper for the judge to elicit, on his own motion, proof as to the identity of the parties, and it having been admitted that "the Louisa Fisher and William L. Fisher parties to this cause are the same persons who were the parties to the antecedent cause," the bill was properly dismissed.

Decree affirmed.

We have ventured to make the second point in the syllabus somewhat broader than anything which was directly said in the opinion of the court, because the facts of the case and the action taken and affirmed are such as necessarily support all that we have inserted in this point of the syllabus. Does it necessarily follow that, be-

cause both parties have been guilty of adultery, that each may thereafter commit other acts of the same character without giving the other any right to relief? As long as both continue in fault, doubtless neither is entitled to any relief, for neither can come into court with clean hands. But may we not suppose that after both have been denied relief, one or both may reform, and resolve not to again offend? If so, is the one who keeps the good resolution entitled to no redress against the other who breaks or never makes it? It will be observed in the principal case that no inquiry was made in the trial court, except to ascertain that the parties were the same as had been before the court in the original suit. Though the record does not show this fact, it is probable that the act of adultery charged in the present case was committed subsequently to the former trial and judgment, and yet neither the trial nor the appellate court made any inquiry upon this subject, but held the former judgment to be a sufficient answer to the present suit, and hence affirmed, whether consciously or not, that if the two spouses had once been guilty, neither could be entitled to relief because of any act done by the other, regardless of the date of the complainant's former offense or her course of conduct since the former trial. No inquiry was made whether the parties since such trial had resumed matrimonial relations. Yet, if they were resumed, we assume that each condoned the prior known offense of the other, and became entitled to subsequent matrimonial rectitude, and also to redress when it was departed from without his or her fault or connivance.

Divorce.—If both husband and wife have a right to a divorce by reason of the adultery of the other, neither has: See the monographic note to Decker v. Decker, 86 Am. St. Rep. 236, on recrimination as a defense in divorce proceedings.

GETTYSBURG NATIONAL BANK v. BROWN.

[95 Md. 367, 52 Atl. 975.]

CORPORATIONS—Subscription to Capital Stock—Liability for.—Not Until the Whole Capital Stock is Taken is a subscriber liable to assessments or calls, unless there is a provision to that effect in the recorded certificate or general law under which the company is incorporated, or unless the subscriber, knowing that the whole has not been subscribed, attends meetings of the corporators and votes for expenditures of money or other acts which can be properly done only when the subscribers intend to proceed with the stock partially taken up. (p. 345.)

CORPORATIONS—Subscriptions to Capital Stock—Estoppel. The mere fact that a subscriber pays part of his subscription, knowing that the whole capital stock has not been subscribed, and that the corporation is incurring debts, does not estop him from setting up the defense that the capital stock has not all been subscribed for. (p. 346.)

CORPORATIONS—Subscriptions to Increased Capital Stock may be Enforced, although the whole of the contemplated increase has not been subscribed for. (p. 346.)

CORPORATIONS—Capital Stock—When Deemed Original and When Increased.—If, after the original certificate of incorporation has been executed, and a certain number of shares of stock have been subscribed for, all the subscribers resolve to change the number of shares and the par value of each share, such change, when effected, does not operate to increase the capital stock, but obliterates the old stock, and in lieu thereof establishes another differing in amount, number of shares, and par value, and any subsequent subscription must be for the stock as thus changed. (pp. 347, 348.)

CORPORATIONS—Capital Stock—Subscription for, When Controlled by an Amended Charter.—If a subscription for capital stock is made on a basis as to amount and number and value of shares different from that fixed by the charter of the corporation, it must be regarded as a subscription to become effective whenever the corporation shall be authorized to issue stock of the kind subscribed for, and it is not material that the amendment of the charter is not made until some time after the subscription. (p. 348.)

Suit by a creditor of an insolvent corporation to recover on his subscription made by the defendant to the shares of its capital stock. The trial court rejected plaintiff's prayers for instructions numbers 1, 2, 4, 5, and 6, which were as follows:

"Plaintiff's First Prayer: That, by the uncontradicted evidence in this case, the United Milk Producers' Association of Baltimore City was a corporation of such a nature that it could not be fairly presumed by any stockholder that it would not begin business until all the authorized increase in capital stock had been subscribed for, and that therefore the defense attempted to be interposed by the defendant bearing upon the alleged nonsubscription for the full amount of said authorized increase in capital stock is no defense to the plaintiff's suit in this case.

"Plaintiff's Second Prayer: The plaintiff prays the court to instruct the jury that if they find that the United Milk Producers' Association of Baltimore City is indebted to the plaintiff on the note in evidence in this case and that at the time the said indebtedness was incurred the defendant was a stockholder in said corporation to the extent of four hundred shares of the par value of one dollar per share, and that the said defendant has only paid on account of said subscription the sum of one hundred and forty-two dollars and fifty cents (\$142.50), then the verdict of the jury must be for the plaintiff in the sum of two hundred and fifty-seven dollars and fifty cents."

"Plaintiff's Fourth Prayer: If the jury find that the United Milk Producers' Association of Baltimore City was incorporated under the general laws of the state of Maryland, and the capital stock of said association as fixed in its amended certificate of incorporation was not fully subscribed for, but also find that the said company was indebted to the plaintiff as stated in the declaration, and that such indebtedness occurred by the discounting by the plaintiff of the note given in evidence in this case, and also find that at the time the defendant was a stockholder in the said company to the extent of four hundred shares of the par value of one dollar per share, and that the defendant has only paid on account of his subscription to said capital stock the sum of one hundred and forty-two dollars and fifty cents, and further find that whilst he was such stockholder the defendant, with knowledge of the fact that the capital stock of the company had not been fully taken and subscribed for, and that the company was engaging in business, purchasing property and incurring liabilities, continued for eight months to ship milk to the said company by virtue of his right as a stockholder, and to make monthly payments on account of his said subscription to its capital stock, then such action on his part is a waiver of any defense growing out of the fact that the capital stock of the company had not been fully subscribed for, and the verdict of the jury must be for the plaintiff to the extent of defendant's subscription still remaining unpaid.

"Plaintiff's Fifth Prayer: That the defendant, by signing the stock subscription contract in evidence in this case, has waived all defense growing out of the nonfull subscription of the increased capital stock of the United Milk Producers' Association of Baltimore City.

"Plaintiff's Sixth Prayer: That if the jury find, from consideration of the charters, stock subscription contract, the general purposes of the United Milk Producers' Association, as testified by the witness Crowther and the defendant, that the said corporation was of such a character that no stockholder could presume that it was not to commence business until the whole amount of its increased capital stock was subscribed for, then the nonfull subscription of the capital stock of said corporation is no defense to this suit."

The plaintiff's third prayer for instructions, which was as follows, was given:

"Plaintiff's Third Prayer: The court, at the request of the plaintiff, instructs the jury that if they find:

"1. That the United Milk Producers' Association of Baltimore City was originally incorporated under the laws of the state of Maryland on or about the sixth day of December, 1899, with an authorized capital stock of one thousand dollars, divided into two hundred shares of the par value of five dollars per share, and that the said company, shortly after its incorporation, during January, 1900, before the full amount of its original stock was subscribed, organized by the election of officers, opened an office in Baltimore City, regularly transacted business and incurred indebtedness.

"2. That on or about the 2d of March, 1900, said corporation, by an amendment of its charter, duly adopted and recorded, authorized an increase of its capital stock to the amount of two hundred and fifty thousand dollars, and reduced the par value thereof to one dollar per share.

"3. That the defendant, before the discount by the plaintiff of the note offered in evidence, hereinafter mentioned, subscribed for four hundred shares of the increased capital stock of the said United Milk Producers' Association of the par value of one dollar per share, and that the defendant, though still a stockholder therein, has only paid on account of said subscription the sum of one hundred and forty-two dollars and fifty cents.

"4. That on or about the twenty-second day of August, 1900, the plaintiff, in due course of business, discounted the note for two thousand nine hundred dollars drawn by the said United Milk Producers' Association, and that the said note was not paid at its maturity by the said association, and that the association is now insolvent, and nothing has been paid on account of said note to the plaintiff.

"Then their verdict must be for the plaintiff for the amount of defendant's subscription remaining unpaid.

The court granted defendant's second prayer for instructions, as follows:

"Defendant's Second Prayer: That if the jury shall find from all the evidence that the capital stock of the United Milk Producers' Association of Baltimore City was fixed and limited to two hundred and fifty thousand dollars, as testified to in evidence; and shall further find that the defendant subscribed for four hundred shares of said capital stock at the times mentioned

in evidence; and shall further find from all the evidence that said capital stock of said corporation was never subscribed for in full, and that not more than one hundred and eighty-seven thousand dollars of said capital stock was ever subscribed for, then the verdict of the jury must be for the defendant, although the jury may further find from all the evidence that at the times the said defendant subscribed for said capital stock he knew the whole of said capital stock had not been subscribed for, and although the jury may further find that the said defendant, after his said subscriptions to said capital stock, shipped his milk to said United Milk Producers' Association of Baltimore City, and was credited by said association every month during said shipment of milk to it with five per cent of the total amount of milk shipped as part payment of said capital stock subscribed for by him, and that defendant knew said credits were being made as aforesaid, on his subscriptions to said capital stock, if the jury so find, unless the jury shall further find from all the evidence that the defendant, as subscriber to the capital stock of the said United Milk Producers' Association of Baltimore City, intended that it should proceed with its business with the stock of said United Milk Producers' Association only partially subscribed.

The defendant's first and third prayers for instructions were rejected. They were:

"Defendant's First Prayer: That if the jury shall find, from all the evidence, that the capital stock of the United Milk Producers' Association of Baltimore City was fixed and limited to two hundred and fifty thousand dollars, as testified to in evidence; and shall further find that the defendant subscribed for four hundred shares of said capital stock at the times mentioned in evidence; and shall further find from all the evidence that the said capital stock of said corporation was never subscribed in full, and that not more than one hundred and eighty-seven thousand dollars of said capital stock was ever subscribed for, then the verdict of the jury must be for the defendant, unless the jury shall further find, from all the evidence, that the defendant knew that the whole of said capital stock had not been subscribed for, and that after such knowledge the defendant participated in the affairs of the said United Milk Producers' Association of Baltimore City in a way which could only be properly done upon the assumption that the subscribers to said capital stock intended that the said United Milk Producers' Association of Baltimore City should proceed with its business if

the jury so find, with the stock of said United Milk Producers' Association only partially subscribed.

"Defendant's Third Prayer: That the plaintiff has offered no evidence legally sufficient of an indebtedness from the Milk Producers' Association to the plaintiff, and the verdict of the jury must be for the defendant.

W. Calvin Chestnut, Charles T. Reifsnider, Jr., Gans & Haman, E. Oliver Grimes, Jr., and Stuart S. Janney, for the appellant.

James A. C. Bond, Guy W. Steele, Benjamin F. Crouse, Francis Neal Parke, and John M. Roberts, for the appellee.

³⁸³ PAGE, J. This suit was brought by a creditor of the United Milk Producers' Association, an insolvent corporation, against the appellee, one of the stockholders, to enforce the liability imposed by the sixty-fourth section of article 23 of the Code of Public General Laws. This association was incorporated, as appears from the certificate, on the fifth day of December, 1899. The purposes of its creation were for dealing in milk and cream and the manufacture of the same into butter, cheese, ice-cream, condensed milk, and other by-products, for buying, ³⁸⁴ selling, and exchanging eggs, poultry and other farm products, and the more effectually to carry into execution these objects, for buying, selling, leasing and mortgaging property of all kinds, real and personal, and for improving the same by erecting warehouses and cold-storage plants, and for manufacturing and selling ice, and doing all things that may be lawfully done in connection with said main business. Its capital stock was one thousand dollars, divided into two hundred shares of the par value of five dollars each. After eleven shares of the stock had been subscribed and paid for, a meeting of the stockholders, eleven in number, each holding one share, was held, on the 16th of December, 1899, and it was at that time resolved "that the par value of the shares . . . be and the same is hereby, reduced from five dollars per share to one dollar per share, and that the capital stock . . . be, and the same is hereby, increased from one thousand dollars to two hundred and fifty thousand dollars, divided into two hundred and fifty thousand shares of the par value of one dollar each." This resolution, attested by the president, was incorporated in a certificate, which is referred to by the stockholders as "a certificate of the amendment of its charter by providing for a change of the par value and number of shares of its stock." It was filed for rec-

ord on the 2d of March, 1900. The company was organized, "first in December," the precise time does not appear. The president testified it "started to do business on the 15th of January"—"not before the capital stock was authorized, but before there was any action on the part of the courts in granting the charter to increase our capital stock." It was after the passage of the resolution authorizing a change in the par value and number of shares, and before the certificate was filed for record, that the appellee made his subscription for three hundred shares of his stock; the remainder of his holdings, one hundred shares, was taken subsequently. The first subscription was made some time in January, before the company had commenced to do business, at a meeting of the stockholders, who then stated that the capital stock was two hundred and fifty thousand dollars. He attended no other meeting; but received monthly statements showing his credits of five per centum per month on his subscription, ^{ass} on account of the milk shipped by him. His second subscription for one hundred shares was made about four months after the first. He testified it was not made "at any meeting," but "just at the place where they were doing business" and that he then subscribed because "we were to give them so much they said of the amount of milk we were shipping and I thought it was not honest unless I paid them five per cent of the four hundred gallons."

The law applicable to the liability under our statute of stockholders of insolvent corporations on account of unpaid subscriptions to the stock of the company has been stated by this court in a number of cases. In *Hager v. Cleveland*, 36 Md. 490, it was said: "As a general rule, where the capital stock and number of shares are fixed in the recorded certificate, no valid assessments or calls can be made on subscribers, until the whole capital stock is taken, unless there be a provision to that effect in the recorded certificate or general law, under which the company is incorporated." "It is a condition, however, which the subscriber may waive," either expressly or impliedly. "If knowing that the whole capital stock has not been subscribed, they attended the meetings of the company, co-operate in the votes for the expenditure of money, for the purchase of property, for the making of contracts, and other acts which only could be properly done upon the assumption that the subscribers intended to proceed with the stock partially taken up, they would be estopped from setting up such a defense": *Hughes v. Antietam Mfg. Co.*, 34 Md. 332.

But as was said in *Garling v. Baechtel*, 41 Md. 325, the "mere fact that he paid part of his subscription knowing that the whole capital stock had not been paid in, and that the company was incurring debts for property and materials, are not such acts of participation as to estop him from setting up as a defense in this action the partial subscription of the capital stock."

These rules apply to subscriptions made before and after the company is chartered: *Morrison v. Dorsey*, 38 Md. 383 472. They are founded upon the theory that the subscription is made upon the implied understanding that the entire amount of stock fixed by the charter is necessary for the successful prosecution of the business for which the company was incorporated. It is not to be supposed that a reasonably prudent person will invest in a corporation which is not to be supplied with sufficient capital with which to prosecute its affairs; and therefore it is that a presumption arises that the amount fixed in the charter shall be raised before the corporation creates any liabilities.

There is nothing, however, to be found in the laws of this state that operates to prevent a corporation from organizing and electing officers before the whole amount fixed by the charter has been subscribed and paid in; and if after organization new subscriptions are taken, the liability of the stockholders under section 64 of article 23 is not thereby defeated. It is not the acquiescence of the stockholder in the organization of the company that per se will estop him from setting up as a defense to the claim of a creditor of the corporation the fact of the partial subscription of its stock; but such acts of participation on his part in the conduct of its business as will indicate that he has consented to and acquiesced in, the company's proceeding in its business before the whole amount of its capital stock has been subscribed.

These principles are well settled in this state and elsewhere, but because of the reasons on which they rest they can apply only to such stock as is necessary for the full organization of the company. Between such stock as may be authorized and required by the charter, that is "original" or "formative" stock and "increased stock" there are substantial differences: *Baltimore City Pass. Ry. Co. v. Hambleton*, 77 Md. 346, 26 Atl. 279.

In case of the issue of increased stock, there are no implied understandings that the whole of the authorized issue shall be subscribed for: 1 *Cook on Stock and Stockholders*, 3d ed., sec. 288, and authorities cited.

The subscribers' contract for such stock is that he will pay the price agreed upon for the stock, and if it is not delivered in accordance with such contract, he is liable at any time to ³⁸⁷ be called upon to pay whatever balance he may owe: *Bank v. Eaton*, 141 U. S. 227, 11 Sup. Ct. Rep. 984; *Delano v. Butler*, 118 U. S. 643, 7 Sup. Ct. Rep. 39.

In the last-mentioned case, as well as in *Aspinwall v. Butler*, 133 U. S. 610, 10 Sup. Ct. Rep. 417, after the company had been fully organized, a resolution was passed to increase the stock in a regular manner, by the board of directors, who had authority for that purpose. A part of the stock finally remained unsubscribed for. In the last-mentioned case *Aspinwall* was sued to recover from him his subscription. He contended that inasmuch as the whole amount authorized was not subscribed for he could withdraw his subscription. The court held that there was no express condition that the individual subscription should be void if the whole amount was not subscribed, and "no implied condition in law to that effect."

At the time when the appellee in this case subscribed, the eleven stockholders had determined by resolution passed at a regular meeting, substantially, that instead of undertaking to do business with a capital stock of one thousand dollars, at five dollars per share, they would surrender the provisions of their charter that authorized that number and amount of shares, and in lieu thereof by the means of an amendment or change in the original charter, organize another corporation which should have a capital stock of two hundred and fifty thousand shares at one dollar per share. This change when effected did not therefore operate to increase the number of shares the company then had, but it obliterated the old stock, and in lieu thereof substituted another, differing in amount, number and par value. The company at the time of and before the adoption of this resolution had done no business and did not propose to do so. The subscription made by the appellee was to the stock of a company that he was assured would have a capital of two hundred and fifty thousand dollars divided into as many shares, each of the par value of one dollar. If the concern in which he was to become a stockholder did not have such a capital, then he was made the victim of a fraud. The resolution had been passed, the assurances had been given him, and if the latter were honestly made, and the resolution was to be carried out, the appellee had a right to believe that ³⁸⁸ the old company with its limited stock had been changed or would be changed, whereby an ad-

equale capital for the business it proposed to engage in would be assured. If the charter had not been amended or changed, the company would have had no power to issue stock at one dollar per share, and, after the adoption of the new charter, the stock at five dollars per share was out of existence. What, then, was contemplated by the parties? It is clear that it was understood there should be such a radical amendment in the charter that its very limited issue of stock at five dollars per share should be annulled, and its authority to issue stock should be totally changed as to the aggregate amount and the par value of its shares. The amount of the stock fixed by the new charter was that which it was supposed by all parties would be requisite for the accomplishment of the objects for which the corporation was created; and it must therefore be presumed that it would be all subscribed for, inasmuch as the purposes of the corporation would fail unless it was.

The fact that the change in the charter was not made until some time after the subscription of the appellee does not affect the legal aspects of the case. Had there been no alteration in the charter, the subscription would have been of no effect, for the reason that there would have been no power to issue a share of stock of the par value of one dollar. At most, the subscription can be regarded as an agreement on the part of the appellee to take three hundred shares at one dollar per share, whenever the corporation should be authorized to issue stock of that kind to the extent of two hundred and fifty thousand shares. The power to issue such stock amounted to a condition precedent to the validity of the subscription. All the rights of the company with respect to the enforcement of the contract and of a creditor of the company, who cannot recover in an action like this unless the party sued was a stockholder at the time his claim against the corporation was created, depended absolutely upon the amendment of the charter. If this be correct, the appellee did not and could not become a stockholder until the change in the charter had been effected, and the ³⁸⁹ question then would be whether the stock authorized by the change was formative stock. We have already said we think it was.

The court below, upon the view of the matter we have stated, rejected, without error, the appellant's second, third, fourth and fifth prayers. The first and sixth prayers were also properly rejected. The court could not say as matter of law that this corporation was of such a character that no stockholder could presume or that it could not be fairly presumed by any stock-

holder, that it would not commence business until the whole amount of increased stock was subscribed for.

There was no error in granting the defendant's second prayer. Even if the concluding clause of the prayer were conceded to be erroneous, it would not be such error as would entitle the appellant to make complaint in this court. The effect of it was merely to add another burden to the defense. It could not have injured the appellant's case.

Finding no error, the judgment will be affirmed.

LIABILITY TO CORPORATIONS OF SUBSCRIBERS TO THEIR CAPITAL STOCK.*

- I. Scope of Note.
- II. Subscription to Stock—Distinguished from.
 - a. Purchase of Stock.
 - b. Agreement to Subscribe for Stock.
- III. Remedies to Enforce Liability.
 - a. In General.
 - b. Action to Enforce Personal Liability.
 1. Where There is an Express Promise to Pay.
 - A. General Rule.
 - B. What Amounts to Express Promise.
 2. Where There is no Express Promise to Pay.
 - A. View that No Personal Action Maintainable.
 - B. Contrary View.
 - C. California Mining Corporations.
 - c. Forfeiture or Sale of Shares.
 1. Whether Exclusive Remedy.
 2. Right to Sue for Deficiency Remaining After.
 - A. Under Statute.
 - (1) Requiring Election Between Sale and Action.
 - (2) Permitting Suit for Deficiency.
 - (a) After Forfeiture.
 - (b) After Sale.
 - (c) Liability is Statutory.
 - (d) Provisions as to Forfeiture and Sale Must be Strictly Complied with.

*REFERENCES TO MONOGRAPHIC NOTES.

- Liability of stockholders to creditors of corporations for corporate debts: 8 Am. St. Rep. 806-873.
The right of corporations to assess their stockholders: 76 Am. St. Rep. 126-136.
Enforcement in other states of the personal liability of stockholders: 37 Am. St. Rep. 168-175.
Estoppel of a subscriber to question the validity of corporate organization: 33 Am. St. Rep. 124-136.
Liability of persons holding stock as collateral: 68 Am. St. Rep. 542-547.
Liability of stockholders for debts of corporation: 49 Am. Dec. 308-310.
Actions and suits against stockholder for debts of corporation: 43 Am. Dec. 694-702.
Power of courts to compel payment of subscriptions and levy and payment of assessments at instance of creditors or insolvent corporations: 100 Am. Dec. 552-557.
Subscriptions to corporate stock: 81 Am. Dec. 392-402.
Nature of stockholder's liability for debt of corporation: 99 Am. Dec. 432-435.

- B. In Absence of Statute.
 - (1) After Forfeiture of Shares.
 - (2) After Sale of Shares.
 - 3. Not an Inherent Power of Corporations.
 - 4. Provisions Relating to, Must be Strictly Complied with.
 - 5. Necessity of Notice of Call Before.
 - d. Attachment of and Execution on Shares.
- IV. Several Liability.
- V. Implied Conditions Precedent.
 - a. Organization of Corporation.
 - b. Subscription of All Capital Stock.
 - 1. General Rule.
 - 2. Where Contract Shows Contrary Intent.
 - A. In Provisions of Subscription Agreement.
 - (1) General Rule.
 - (2) Effect of Express Unconditional Promise to Pay.
 - B. In Statutes.
 - (1) Provision for Assessments Before All Stock Subscribed.
 - (2) Provision for Corporation Doing Business Before All Stock Subscribed.
 - (3) Provision for Organization of Corporation Before All Stock Subscribed.
 - 3. Where Capital Stock is not Fixed.
 - A. In General.
 - B. Effect of Provision for Calls when Certain Number of Shares are Subscribed.
 - C. Effect of Provision for Doing Business When Certain Number of Shares are Subscribed.
 - D. General Rule—Amount of Capital Stock Must be Fixed and Subscribed.
 - E. Contrary View.
 - 4. What Subscriptions may be Counted.
 - A. In General.
 - B. Must be Binding on Subscribers.
 - C. Conditional Subscriptions.
 - D. Must be Bona Fide.
 - 5. Increased Stock.
 - 6. Preliminary Expenses.
 - 7. Where Subscription is for Particular Purpose.
 - 8. Waiver of, or Estoppel to Insist on Condition.
 - A. In General.
 - B. Where Condition Imposed by Statute.
 - C. What Amounts to Waiver, etc.
 - (1) In General.
 - (2) Payment of Calls.
 - (3) Acting as Stockholders, etc.
 - (4) Acting as Officer, Director, etc.
 - (5) Distinction Between Waiver and Estoppel.
- a. Calls and Assessments.
 - 1. Necessity for.
 - A. Where Maturity of Subscription or Installments Fixed by Contract or Statute.

- B. Where Maturity not Fixed.
- 2. Validity of—In General.
- 3. Notice of.
 - A. Where Required by Statute, etc.
 - B. Where not Required by Statute.
- d. Tender of Certificates of Stock.

VI. Who Liable.

- a. Subscriber not Liable for Calls Made Before Subscription.
- b. Where Party Appearing on Books as Owner is Trustee, etc.
- c. On Transfer of Shares.
 - 1. General Rule—Person Appearing on Books as Owner at Time of Call.
 - 2. Bona Fides of Transfer.
 - 3. Necessity of Express Promise by Transferee to Pay Subscription.
 - 4. Statutory Provisions.
 - 5. Liability of Bona Fide Transferee.

VII. Defenses.

- a. Statute of Limitations.
 - 1. General Rule—Runs from Time Each Installment is Payable.
 - 2. Doctrine That Call Must be Made Within Statutory Period.
- b. Inability of Corporation to Deliver Stock.
- c. Miscellaneous Defenses.

VIII. Conflict of Laws.

I. Scope of Note.

It will be noted that in the principal case (Gettysburgh Nat. Bank v. Brown, 95 Md. 367, ante p. 339, 62 Atl. 975) the proceeding was a suit by the creditor of an insolvent corporation to enforce against a subscriber to the capital stock of the corporation the statutory liability for the amount remaining unpaid upon his subscription. The fact that the plaintiff was a creditor of the corporation rather than the corporation itself did not, however, present any peculiar question or in any way influence the decision of the questions there involved. The liability of subscribers to corporate stock upon their unpaid subscriptions, so far as the rights of creditors are involved, has, moreover already received exhaustive discussion in this series in the extended note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 806-873, on the liability of stockholders to creditors of corporations for corporate debts. To reconsider it would be largely a work of supererogation, and the discussion in this note will therefore be confined to the liability of subscribers to the corporation itself. To a great extent the principles are the same as those applicable when the corporate creditors are plaintiffs.

In order that the note shall not be unreasonably extended it will be impossible to treat of all the questions which affect the liability of subscribers to corporate stock. Matters concerning the formation and validity of the contract of subscription—its formal requisites, the consideration necessary to support it, the capacity of the par-

ties to enter into it—will not be considered. Similarly, matters such as the release or withdrawal of subscribers, discharge of the liability by payment, the effect of fraudulent representations which induced the subscription, the procedure and essentials of valid calls and assessments, etc., must necessarily be excluded. Nor will it be here attempted to treat the liability of a subscriber to particular kinds of subscription agreements, conditional subscriptions, those affected by collateral parol agreements, municipal subscriptions, etc. We shall, however, consider the nature and results of the liability arising out of the ordinary contract of subscription to the capital stock of a corporation.

II. Subscriptions to Stock—Distinguished From.

a. **Purchase of Stock.**—A contract of subscription to the capital stock of a corporation is to be distinguished from a purchase by an individual from a corporation of shares in the capital stock of the latter. A corporation may, under certain circumstances, dispose of its unissued stock by sale, and a person may become the owner of shares by purchase or by subscription. Whether the contract is one or the other is ordinarily a question of construction, and the fact that the word "purchase" or "subscription" is used in the contract is by no means conclusive of its nature: *Lincoln Shoe Mfg. Co. v. Sheldon*, 44 Neb. 279, 62 N. W. 480. "The difference," it is said in *Kohlmetz v. Calkins*, 16 App. Div. 518, 44 N. Y. Supp. 1031, "in the relation arising out of the contract of membership resulting from the original subscription to the stock and that of purchase is that in one case there is a bond of union between the shareholders, and in the other, when the purchase price is to be paid in the future, the contract is executory between the parties to it." Practically, the distinction is important as determining the necessity of the issuance or tender of a stock certificate before suit (as to this see post V, d). See for the cases in which the distinction is recognized, *Wemple v. St. Louis etc. Ry. Co.*, 120 Ill. 196, 11 N. E. 906; *Walter A. Wood Harvester Co. v. Jefferson*, 71 Minn. 367, 74 N. W. 149; *Lincoln Shoe Mfg. Co. v. Sheldon*, 44 Neb. 279, 62 N. W. 480; *Kohlmetz v. Calkins*, 16 App. Div. 518, 44 N. Y. Supp. 1031; *Astoria etc. B. R. Co. v. Hill*, 20 Or. 177, 25 Pac. 379.

b. **Agreement to Subscribe for Stock.**—Without attempting to here consider the formal requisites of a contract of subscription or to discuss the much mooted question as to when an actual subscription to the articles of incorporation or the subscription books after incorporation is necessary, it may be well to note the distinction made in a number of the cases between a present subscription and a mere agreement to subscribe to the stock of a corporation thereafter to be created. In the one case it is said there is a present subscription and the rights and liabilities of a subscriber immediately attach. In the other, there is said to be a mere agreement to thereafter take shares—to become a subscriber when the books

are opened—a future act is contemplated and until that act is performed, whatever may be the liability of the party on his contract to subscribe in the future, his liability is not that of a subscriber. “His promise is like any other promise or agreement to purchase any specific article of property. . . . On an agreement for the sale and purchase of stocks, and a refusal by the purchaser to take the stocks, the measure of damages ordinarily might be the difference between the par value of the stocks and their market value, or between them and money”: *Thrasher v. Pike County R. R. Co.*, 25 Ill. 393. See for other cases recognizing the distinction, *Quick v. Lemon*, 105 Ill. 578; *Mt. Sterling Coal Road Co. v. Little*, 77 Ky. (14 Bush) 429; *Irwin Creek etc. Turnpike Co. v. Rennecker*, 79 Ky. 552; *Yonkers Gazette Co. v. Taylor*, 51 N. Y. Supp. 969, 30 App. Div. 334; *Woods Motor Vehicle Co. v. Brady*, 78 N. Y. Supp. 203, 39 Misc. Rep. 79. Compare, also, *Rand v. White Mountains R. R.*, 40 N. H. 79; *Lake Ontario etc. Ry. Co. v. Curtiss*, 80 N. Y. 219; *Strasburg Ry. Co. v. Echternacht*, 21 Pa. St. 220, 60 Am. Dec. 49; and monographic note to *Parker v. Thomas*, 81 Am. Dec. 392.

The distinction taken in these cases has been criticised by the text-writers, Cook (Cook on Corporations, 4th ed. sec. 75) declaring that it is “unsound on principle,” while Mr. Thompson treats it as altogether indefensible (1 Thompson on Corporations, secs. 1164, 1165), the true view according to these authorities being that what these cases treat as an agreement to subscribe rather than a present subscription is in fact a valid contract of subscription on being accepted by the corporation, and that no further act of subscription is necessary to render the party a stockholder. To the same effect see *Nickum v. Burckhardt*, 30 Or. 464, 47 Pac. 788, 48 Pac. 474. Compare, however, 2 Clark and Marshall on Corporations, sec. 442; Morawetz on Corporations, 2d ed., sec. 49.

In *Rhey v. Ebensburg etc. Plank Road Co.*, 27 Pa. St. 261, the defendant signed an agreement that in the event of a certain route for the plank road being adopted one “J. C. Neill will subscribe five hundred dollars additional stock, for which I hold myself personally responsible.” Signed, A. J. Rhey. The court very properly held that this was not a contract of subscription at all, but a mere agreement that another should subscribe, and that the damages recoverable for its breach was not the amount of the contemplated subscription, but the difference between the par and the market value of the stock.

III. Remedies to Enforce Liability.

a. In General.—The nature of the liability of a subscriber to the capital stock of a corporation can, perhaps, be best considered by a discussion of the remedies open to the corporation on a breach of that contract. One of the questions concerning which the authorities in the various states are not entirely harmonious is whether or not the contract of subscription involves any personal liability on the part of the subscriber, and it arises most frequently in connec-

tion with the right of the corporation to maintain assumpsit for the amount subscribed or the unpaid balance.

b. Action to Enforce Personal Liability.

1. Where There is an Express Promise to Pay.

A. General Rule.—When there is contained in the contract of subscription an express promise to pay the personal liability of the subscriber is admitted in all the states. The provision need not necessarily be in the agreement signed by the subscriber, but may be found in the general law under which the subscription is made, and which is impliedly incorporated in the contract of subscription. A contract to pay for the shares subscribed is supported by a sufficient consideration and is binding on the subscriber. "A corporation may, in an action at law, recover the amount due for its shares, or for assessments legally made upon them, when, by its charter or other statute provision, a personal obligation is imposed upon the holder to pay for them, and when the holder has made an express agreement to pay for them": *Kennebec etc. R. Co. v. Kendall*, 31 Me. 470.

The proposition would seem a self-evident one, but its importance results from the holding in certain states—a holding to be hereafter considered—that in the absence of an express promise to pay, if the charter of a corporation provides for the forfeiture or sale of stock in the event of nonpayment of assessments, such remedy will be regarded as exclusive, and no implied promise to pay, supporting an action of assumpsit, will be inferred from the mere contract of subscription. Where, however, the promise to pay for the shares is express, whether it be contained in the agreement of subscription or results from a provision in the law, in contemplation of which the subscription is made, a provision that the stock may be forfeited or sold for nonpayment of calls will not exclude the remedy of an action at law upon the promise to pay. Where there is an express promise to pay, the right of the company to forfeit or sell the shares for delinquent calls is cumulative merely and does not bar an action of assumpsit to enforce the personal liability of the subscriber: *Barber v. Jacksonville etc. Plank Road Co.*, 6 Fla. 262; *Kirksey v. Florida etc. Plank Road Co.*, 7 Fla. 23, 68 Am. Dec. 426; *Cross v. Pinckneyville Mill Co.*, 17 Ill. 54; *Bangor Bridge Co. v. McMahon*, 10 Me. 478; *South Bay Meadow Dam Co. v. Gray*, 30 Me. 547; *Kennebec etc. R. Co. v. Kendall*, 31 Me. 470; *Kennebec etc. R. Co. v. Jarvis*, 34 Me. 360; *Buckfield etc. R. Co. v. Irish*, 39 Me. 44; *Penobscot etc. R. Co. v. Dunn*, 39 Me. 587; *York etc. R. Co. v. Pratt*, 40 Me. 447; *Worcester Turnpike Co. v. Willard*, 5 Mass. 80, 4 Am. Dec. 39; *Gilmore v. Pope*, 5 Mass. 491; *Andover etc. Turnpike Co. v. Gould*, 6 Mass. 40, 4 Am. Dec. 80; *New Bedford Turnpike Co. v. Adams*, 8 Mass. 138, 5 Am. Dec. 81; *Taunton etc. Turnpike Corp. v. Whiting*, 10 Mass. 327, 6 Am. Dec. 124; *Salem Mill Corp. v. Ropes*, 6 Pick. (Mass.) 23; *Worcester City Hotel v.*

Dickinson, 72 Mass. (6 Gray) 586; Penobscot etc. R. Co. v. Bartlett, 78 Mass. (12 Gray) 244, 71 Am. Dec. 753; Boston etc. R. Co. v. Wellington, 113 Mass. 79; Anglo-American etc. Co. v. Dyer, 181 Mass. 593, 64 N. E. 416; Smith v. Natchez Steamboat Co., 1 How. (Miss.) 479; Franklin Glass Co. v. Alexander, 2 N. H. 380, 9 Am. Dec. 92; Littleton Mfg. Co. v. Parker, 14 N. H. 543; New Hampshire Cent. R. R. Co. v. Johnson, 80 N. H. 390, 64 Am. Dec. 800; Contoocook Val. R. R. Co. v. Barker, 32 N. H. 363; Piscataqua Ferry Co. v. Jones, 39 N. H. 491; Rockingham Bldg. Co. v. Burlingame, 67 N. H. 301, 31 Atl. 23; Ft. Edward etc. Co. v. Payne, 17 Barb. 567; Troy etc. R. R. Co. v. Kerr, 17 Barb. 581; Goshen Turnpike Co. v. Hurtin, 9 Johns. 217, 6 Am. Dec. 273; Dutchess Cotton Mfg. Co. v. Davis, 14 Johns. 238, 7 Am. Dec. 459; Connecticut etc. R. R. Co. v. Bailey, 24 Vt. 465, 58 Am. Dec. 181.

B. What Amounts to Express Promise.—The difficulty here is to determine whether a particular form of subscription can be said to contain an "express promise" to pay for the stock subscribed. When the right is given the corporation to "demand" the full amount of the shares subscribed, this, it is strongly intimated in *Barbee v. Jacksonville etc. Plank Road Co.*, 6 Fla. 262, imposes a personal liability on the subscriber and gives the corporation the common-law remedy by action to enforce that liability. So, also, where the charter provides that the directors "may require payment": *Hartford etc. R. Co. v. Kennedy*, 12 Conn. 499. In Maine an agreement to "take" a certain number of shares is held not to impose a liability to pay for them, while an agreement to "take and fill" a certain number of shares does impose such liability: *Bangor Bridge Co. v. McMahon*, 10 Me. 478; *Buckfield Branch R. Co. v. Irish*, 39 Me. 44; *Penobscot etc. R. Co. v. Dunn*, 39 Me. 587; *York etc. R. Co. v. Pratt*, 40 Me. 447; and this is applied in *Penobscot etc. R. Co. v. Bartlett*, 78 Mass. (12 Gray) 244, 71 Am. Dec. 753, although Bigelow, J., expressed the doubt of the court on the correctness of this interpretation were it an original question. In *Kennebec etc. R. R. Co. v. Kendall*, 31 Me. 470, the contract of subscription contained no express promise to pay for the shares, but the charter authorized the corporation to "make and collect such assessments on the shares of such capital stock as may be deemed expedient, in such manner as shall be prescribed in the by-laws." Nevertheless, it was held that the corporation could not by by-laws impose a personal liability on the shareholder for a balance due after a sale of the shares on which assessments were delinquent: See, also, *Jay Bridge Corp. v. Woodman*, 31 Me. 573; *Belfast etc. R. R. Co. v. Moore*, 60 Me. 561. (If, on the other hand, there is a promise to pay in the subscription agreement, a by-law which simply authorizes a sale of the shares does not thereby exclude the remedy by action to enforce the subscriber's personal liability: *Kennebec etc. R. R. Co. v. Jarvis*, 34 Me. 360.) These instances sufficiently show the difficulty of determining whether a particular subscription can be said to contain an

"express" promise, and for other cases in which the question has been considered the reader is referred to those cited in the preceding paragraph.

2. Where There is no Express Promise to Pay.

A. View That no Personal Action Maintainable.—As already suggested, where there is no express promise to pay in the contract of subscription the courts of the various states are not in harmony as to whether any personal liability arises from the mere agreement of subscription. According to the doctrine held in certain of the New England states, a subscription to the stock of a corporation raises no implied promise to pay for them, at least where a remedy of forfeiture or sale is provided by the charter in the event that the subscriber becomes delinquent in the payment of assessments. In the view of these courts such a remedy is exclusive, and unless there is an express promise to pay, no action lies against the subscriber to recover the unpaid amount of his subscription. "It is," says Parsons, C. J., in *Andover etc. Turnpike Co. v. Gould*, 6 Mass. 40, 4 Am. Dec. 80, "a rule founded in sound reason that when a statute gives a new power and at the same time provides the means of executing it, those who claim the power can execute it in no other way. When we find a power in the plaintiffs to make the assessments, they can enforce the payment in the method directed by the statute, and not otherwise; and that method is by the sale of the delinquent's shares.

The basis of this doctrine is, therefore, that by naming one remedy the legislature must have intended to confine the corporation to that remedy, and that those who subscribe to the stock of such a corporation cannot be supposed to have intended to assume a personal liability in the absence of an express promise. The limitations upon the application of the doctrine which flow from its origin have not, as is pointed out in *Hartford etc. Ry. Co. v. Kennedy*, 12 Conn. 499, 525, always been observed; and the cases in those States in which the doctrine is upheld are generally understood and cited as sustaining the general proposition that no personal liability results from a contract of subscription which contains no "express" promise to pay for the shares subscribed for. In the absence of such a promise, assumpsit cannot be maintained. Such is the doctrine of the courts of Delaware, Maine, Massachusetts and New Hampshire: See *Odd Fellows Hall Co. v. Glazier*, 5 Har. (Del.) 172; *Bangor Bridge Co. v. McMahon*, 10 Me. 478; *Bangor House v. Hinckley*, 12 Me. 385; *Kennebec etc. Ry. Co. v. Kendall*, 31 Me. 470; *Penobscot etc. R. Co. v. Dunn*, 39 Me. 587; *Andover etc. Turnpike Co. v. Gould*, 6 Mass. 40, 4 Am. Dec. 80; *Andover etc. Turnpike Corp. v. Hay*, 7 Mass. 102; *New Bedford etc. Turnpike Corp. v. Adams*, 8 Mass. 138, 5 Am. Dec. 81; *Franklin Glass Co. v. White*, 14 Mass. 86; *Cutler Middlesex Factory Co.* 31 Mass. (14 Pick.) 483; *Atlantic Cotton Mills v. Abbott*, 63 Mass. (9 Cush.) 423; *Mechanics' Foun-*

dry etc. Co. v. Hall, 121 Mass. 272; Franklin Glass Co. v. Alexander, 2 N. H. 380, 9 Am. Dec. 92; Littleton Mfg. Co. v. Parke, 14 N. H. 543; New Hampshire Cent. R. Co. v. Johnson, 30 N. H. 390, 64 Am. Dec. 300; White Mountains R. Co. v. Eastman, 34 N. H. 124; Shattuck v. Robbins, 68 N. H. 565, 44 Atl. 694.

In New York and in Pennsylvania cases are to be found in which the same doctrine is recognized. See, for instance, Ft. Edward etc. Plank Road Co. v. Payne, 17 Barb. 567; Belmont Park Assn. v. Zoller, 6 Pa. Co. Ct. Rep. 266; and compare Delaware etc. Navigation Co. v. Sansom, 1 Binn. 70. But these are undoubtedly opposed to the weight of authority and to the settled law in these states: Small v. Herkimer Mfg. Co., 2 N. Y. 330; Buffalo & N. Y. Cent. R. Co. v. Dudley, 14 N. Y. 336; Rensselaer etc. Plank Road Co. v. Barton, 16 N. Y. 457, note (compare Seymour v. Sturgess, 26 N. Y. 134); Dayton v. Borst, 31 N. Y. 435; Northern R. Co. v. Miller, 10 Barb. 260; Troy & B. R. Co. v. Tibbits, 18 Barb. 297; Eastern Plank Road Co. v. Vaughan, 20 Barb. 155; Rensselaer etc. Plank Road Co. v. Wetzel, 21 Barb. 56; Odgensburgh etc. R. Co. v. Frost, 21 Barb. 541; Johnson v. Albany etc. R. Co., 40 How. Pr. 193; Sagory v. Dubois, 3 Sand. Ch. 466; In re Long Island R. R. Co., 19 Wend. 37, 32 Am. Dec. 429; Merrimac Min. Co. v. Levy, 54 Pa. St. 227, 93 Am. Dec. 697; Bavington v. Pittsburgh etc. R. Co., 34 Pa. St. 358.

In Connecticut etc. R. R. Co. v. Bailey, 24 Vt. 465, 58 Am. Dec. 181, the supreme court of Vermont, relying upon the cases in Massachusetts, held that in the absence of an express promise to pay for the shares subscribed, if the character of the corporation provided for forfeiture of the stock, that remedy was exclusive and no action could be maintained against the subscriber on any implied promise. There was, however, an express promise to pay in that case, and the remark of the court that assumpsit could not be based on an implied promise was a mere dictum and was overruled as such in Windsor Electric Light Co. v. Tandy, 66 Vt. 248, 44 Am. St. Rep. 838, 29 Atl. 248. The court in the later case held that a promise to pay must be implied from a subscription, and that an action might be had thereon notwithstanding that a statutory remedy by forfeiture existed. The latter remedy was regarded as cumulative merely.

B. Contrary View.—The rule supported by the great weight of authority is that a contract of subscription to the capital stock of a corporation imposes an obligation to pay for such stock although there is no promise in terms to do so. In Northern R. R. Co. v. Miller, 10 Barb. 260, a subscription contract is said to be an "express promise to pay for the shares thus taken." A more frequent and a more accurate statement is that from a contract of subscription to a certain number of shares of the capital stock of a corporation, a promise to pay therefor, unless expressly excluded by the terms of the contract, will be implied whether it be termed

"express" or "implied." However, a personal liability is held to arise from the contract of subscription and this liability is enforceable by an action at law.

Hartford etc. R. R. Co. v. Kennedy, 12 Conn. 499, is the leading case announcing this holding. Huntington, J., there considers the question at length, saying: "An answer to a single inquiry disposes of the principal and most important point in the present case. Did the defendant, by becoming and continuing a stockholder in this company, incur a personal obligation to pay the installments required by the directors, in the manner prescribed by the charter, on the shares of stock by him originally subscribed, and held by him, at the time such installments were called for and were due? We think such an obligation was created; and that the law, coinciding, in this case, with justice and good faith, will enforce it. It is true a promise to pay in precise terms does not appear to have been made. The defendant has not affixed his signature to an instrument which contains the words, 'I promise to pay'; but he has done an equivalent act. He has contracted with the plaintiffs to become a member of their corporation and to be interested in their stock to the extent of one hundred dollars for each share assigned to him, if that amount be required. This contract has been executed on the part of the plaintiffs. The shares which he has agreed to take, and for which a certificate of stock has been delivered to him, are part of a moneyed capital. They are to be paid for in money; and by voluntarily becoming a member of the corporation under the provisions of this charter, an implied assumpsit arises to pay the installments, on the terms, conditions and limitations mentioned in the charter. . . . We are unable to discover the slightest difference in principle, between the case of an individual who voluntarily becomes a stockholder by agreeing to receive and actually receiving the stock, consisting in money, without superadding in terms a promise to pay for it, and one where such promise is expressly made. In both cases, the corporation contract to sell or transfer to the stockholder a specified interest in their corporate funds, called shares; in both, the stockholder agrees to receive it; in both, there is the same legal consideration—on the part of the corporation, the expenses incurred by them, and a reliance upon the engagement that the installments will be paid to enable them to proceed in their undertaking; on the part of the stockholder, the benefit received by him, by his interest in the road, and his right to receive a proportion of the profits of the enterprise."

Accordingly, so far as the question has arisen, it is held in all but the four states already considered (Delaware, Maine, Massachusetts and New Hampshire—ante, III, b, 2, A) that a subscription to the stock of a corporation is a promise not merely to take, but also to pay for the shares subscribed, and upon this promise the subscriber is personally liable to the extent of the par value of such shares, collectible at such times as may be prescribed in the charter

or agreement of subscription: *Beene v. Cahawba etc. Ry. Co.*, 3 Ala. 660; *Selma etc. R. R. Co. v. Tipton*, 5 Ala. 787, 39 Am. Dec. 344; *Ventura etc. Ry. Co. v. Collins* (Cal.), 46 Pac. 287 (see, also, *San Joaquin etc. Co. v. Beecher*, 101 Cal. 70, 35 Pac. 349); *Hartford etc. R. Co. v. Kennedy*, 12 Conn. 499; *Ward v. Griswoldville Mfg.*, 16 Conn. 593; *Danbury etc. R. Co. v. Wilson*, 22 Conn. 435; *Kirksey v. Florida etc. Plank Road Co.*, 7 Fla. 23, 68 Am. Dec. 426; *Branch v. Augusta Glass Works*, 95 Ga. 573, 23 S. E. 128; *Milton v. Clayton*, 54 Iowa, 425, 37 Am. Rep. 213, 6 N. W. 685 (see, also, *Western Imp. Co. v. Des Moines Nat. Bank*, 103 Iowa, 455, 72 N. W. 657); *Instone v. Frankford Bridge Co.*, 5 Ky. (2 Bibb) 576, 5 Am. Dec. 638; *Fry v. Lexington etc. R. Co.*, 59 Ky. (2 Met.) 314; *Gill v. Kentucky etc. Gold etc. Min. Co.*, 70 Ky. (7 Bush) 635; *Cucullu v. Union Ins. Co.*, 2 Rob. (La.) 573; *Succession of Thomson*, 46 La. Ann. 1074, 15 South. 379; *Hughes v. Antietam Mfg. Co.*, 34 Mo. 316; *Dexter etc. Plank Road Co. v. Millerd*, 3 Mich. 91; *Carson v. Arctic Min. Co.*, 5 Mich. 288; *Atlantic Dynamite Co. v. Andrews*, 97 Mich. 466, 56 N. W. 858; *Greenville & C. R. Co. v. Cathcart*, 4 Rich. (S. C.) 89; *East Tennessee etc. R. Co. v. Gammon*, 37 Tenn. (5 Sneed) 567; *West Nashville Planing Mill Co. v. Nashville Sav. Bank*, 86 Tenn. 252, 6 Am. St. Rep. 835, 6 S. W. 340; *Puget Sound etc. R. Co. v. Onellette*, 7 Wash. 265, 34 Pac. 929; *Kummins v. Wilson*, 8 W. Va. 584; *Upton v. Tribilcock*, 91 U. S. 45; *Webster v. Upton*, 91 U. S. 65; *American Alkali Co. v. Campbell*, 113 Fed. 398. See, for cases in New York, Pennsylvania and Vermont, ante, III, b, 2, A.

C. California Mining Corporations.—It is held in *In re South Mountain Consol. Min. Co.*, 14 Fed. 347, 8 Saw. 366, affirming 5 Fed. 403, 7 Saw. 80, that a California mining corporation is in view of the statutes and customs of that state *sui generis*, so far as concerns the personal liability of a subscriber to its stock to pay par value therefor. In entering into a contract of subscription to the stock of such a corporation, no such liability was intended, the court held, and the statute imposed none. This holding is restricted in California to mining corporations (*Harmon v. Page*, 62 Cal. 448), and has not elsewhere been received with favor, the cases affirming it being considered either as based upon a local custom and statute or as enunciating an unsound principle: See *Atlantic Dynamite Co. v. Andrews*, 97 Mich. 466, 56 N. W. 858 (distinguishing *Young v. Erie Iron Co.*, 65 Mich. 129); *Kelly v. Clark*, 21 Mont. 291, 53 Pac. 959; *Gilkie v. Dawson Town and Gas Co.*, 46 Neb. 333, 64 N. W. 978, 1097.

c. Forfeiture or Sale of Shares.

1. Whether an Exclusive Remedy.—The rule in those states which hold that there is no promise to pay derivable by implication from a mere subscription arose, as we have seen (*supra*, III, a, 2, A), from a holding that where forfeiture or sale of the shares was provided for in the charter as a remedy when assessments become delinquent that remedy was, in the absence of an express promise to pay, exclusive.

According, however, to the great weight of authority, the principle that a subscription implies a promise to pay for the subscribed shares, it is immaterial that the charter provides a remedy by forfeiture or sale. Such a provision is construed as cumulative merely, and not as exclusive of the remedy of an action at law. These cases do not recognize the distinction made in Massachusetts and the other states adopting the Massachusetts rule, that while an express promise will support an action of assumpsit, although the charter supplies another remedy (forfeiture or sale), no promise to pay can be implied where another remedy is supplied. "If," says Huntington, J., in *Hartford etc. R. Co. v. Kennedy*, 12 Conn. 499, "the thirteenth section provides the only remedy to enforce the payment, and therefore excludes an implied promise to pay, it is not readily perceived why it should not cause an express promise to be legally inoperative. There is no other consideration to support the latter than that which sustains the former. . . . If, in consequence of the particular remedy provided, there is no legal presumption, from the admitted facts, that the stockholders intended to become personally responsible, how can the same facts sustain an express promise, where the same remedy may be applied?"

The doctrine upheld by the weight of authority, therefore, is that a provision for forfeiture or sale of the shares on the subscriber becoming delinquent in his payment therefor, is cumulative merely, and does not operate to take away the remedy afforded by the common law. "It clearly can make no difference in the application of this doctrine, whether the promise, upon which the common-law remedy by action is founded, be express or implied": *Selden, J., in Buffalo etc. Ry. Co. v. Dudley*, 14 N. Y. 336. To the same effect, see *Beene v. Cahawba etc. R. Co.*, 3 Ala. 660; *Carlisle v. Cahawba*, 4 Ala. 70; *Selma etc. Ry. Co. v. Tipton*, 5 Ala. 787, 39 Am. Dec. 344; *San Joaquin Land etc. Co. v. Beecher*, 101 Cal. 70, 35 Pac. 349; *San Bernardino Inv. Co. v. Merrill*, 108 Cal. 490, 41 Pac. 487; *Stockton etc. Works v. Hauser*, 109 Cal. 1, 41 Pac. 809 (the California cases are under a statute expressly permitting an election between remedy by action or by sale of delinquent shares); *Hartford etc. Ry. Co. v. Kennedy*, 12 Conn. 499; *Mann v. Cooke*, 20 Conn. 178; *Glenn v. Busey*, 5 Mackey (D. C.), 233; *Kirksey v. Florida etc. Plank Road Co.*, 7 Fla. 23, 68 Am. Dec. 426; *Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412; *Raymond v. Caton*, 24 Ill. 123; *Mandel v. Swan Land etc. Co.*, 154 Ill. 177, 45 Am. St. Rep. 124, 40 N. E. 462; *Western Imp. Co. v. Des Moines Nat. Bk.*, 103 Iowa, 455, 72 N. W. 657 (under statute); *Instone v. Frankfort Bridge Co.*, 5 Ky. (2 Bibb) 576, 5 Am. Dec. 638; *Gill v. Kentucky etc. Min. Co.*, 70 Ky. (7 Bush) 635; *Mexican Gulf R. Co. v. Viavant*, 6 Rob. (La.) 305; *New Orleans etc. S. S. Co. v. Briggs*, 27 La. Ann. 318; *Dexter etc. Plank Road Co. v. Millerd*, 3 Mich. 91; *Buffalo etc. R. Co. v. Dudley*, 14 N. Y. 336; *Rensselaer etc. Plank Road Co. v. Barton*, 16 N. Y. 457, note; *Rensselaer v. Wetsel*, 21 Barb. 56; *Northern R. Co. v. Miller*, 10 Barb. 260; *Troy etc. Ry.*

Co. v. Tibbits, 18 Barb. 297; Ogdensburgh R. & C. R. Co. v. Frost, 21 Barb. 541; Western R. Co. v. Avery, 64 N. C. 491; Merrimac Min. Co. v. Levy, 54 Pa. St. 227, 93 Am. Dec. 697; Greenville etc. R. Co. v. Cathcart, 4 Rich. (S. C.) 89; Northeastern etc. Ry. Co. v. Rodriguez, 10 Rich. 278; Stokes v. Lebanon etc. Turnpike Co., 25 Tenn. (6 Humph.) 241; Windsor Electric Light Co. v. Tandy, 66 Vt. 248, 44 Am. St. Rep. 838, 29 Atl. 248 (overruling dictum in Connecticut etc. Ry. Co. v. Bailey, 24 Vt. 465, 58 Am. Dec. 181; Puget Sound etc. R. Co. v. Ouillette, 7 Wash. 265, 34 Pac. 929; American Alkali Co. v. Campbell, 113 Fed. 398; Rockville etc. Turnpike Road v. Maxwell, 2 Cranch C. C. 451, Fed. Cas. No. 11,985.

2. Right to Sue for Deficiency Remaining After.

A. Under Statute.—While, therefore, a provision in the general law or the charter of a corporation giving to the latter the remedy of forfeiture or sale of the shares of delinquent subscribers, is not, by the weight of authority, exclusive of the right to bring an action to recover the amount subscribed, the question remains whether the corporation can do both. Can it both forfeit or sell the shares and bring a personal action against the subscriber to recover any deficiency which may remain unpaid?

(1) **Requiring Election Between Sale and Action.**—In many cases this is settled by statutory provisions which in terms either permit a suit after forfeiture or sale, or else compel an election between remedy by suit and by forfeiture or sale. Of the latter class the California statute is an instance. It provides for a declaration that certain stock is delinquent, but that "on the day specified for declaring the stock delinquent, or at any time subsequent thereto, and before the sale of the delinquent stock, the board of directors may elect to waive further proceedings under this chapter [i. e., by sale of shares] for the collection of delinquent assessments, or any part or portion thereof, and may elect to proceed by action to recover the amount of the assessment and the costs and expenses already incurred, or any part and portion thereof": Cal. Civ. Code, sec. 349. The statutes of that state make no express provision for a suit for any delinquency which may remain unpaid after a sale of the shares, and it is probable that the section quoted, when construed in connection with its context, would be held to prevent both a sale and a suit to recover an assessment on any particular shares. In order to bring a personal action to recover the delinquent assessment, "or any part or portion thereof," a waiver of the right to proceed by sale must be made as required by the section. So strictly is it construed that where the corporation has, by failure to make publication of the statutory notice of sale, lost its right to sell the stock, it is held that the corporation cannot then elect to waive further proceedings by sale and to proceed by action, although the attempted "election" is made within the period referred to in the section quoted. "A right of election between two remedies," says Harri-

son, J., in *San Bernardino Inv. Co. v. Merrill*, 108 Cal. 490, 41 Pac. 487, "which is conferred upon the condition of relinquishing one of the remedies by some positive act, must be exercised while both of the remedies are open. Unless there is a remedy to relinquish, there is no place for an election." Having lost the right to make the sale by failure to make due publication, there was no place for an "election," and the corporation could not, therefore, bring suit upon the delinquent subscription.

(2) Permitting Suits for Deficiency.

(a) *After Forfeiture.*—Statutory or charter provision of the other class referred to, those in which the right to sue for the deficiency after a forfeiture or sale is expressly given, are far more frequent. These ordinarily provide simply that on failure of the subscriber to pay the installments of his subscription as they become payable, the corporation shall have power to forfeit his stock, the subscriber, notwithstanding such forfeiture, being liable to the corporation for all calls owing upon such shares at the time of forfeiture; or, as is more frequent, shall have power to sell his shares and recover from the subscriber any deficiency remaining unpaid by the proceeds of the sale. For an instance of the first class—that where, notwithstanding a forfeiture of the delinquent's shares to the corporation, he remains liable for all calls up to the time of forfeiture, see *Mandel v. Swan Land etc. Co.*, 154 Ill. 177, 45 Am. St. Rep. 124, 40 N. E. 462, reversing 51 Ill. App. 204. In that case it is held that while an express statutory provision governing a foreign corporation which subjects a subscriber both to personal liability and to forfeiture of his shares will be enforced, such a provision is in conflict with the current of legislation in this country, and cannot depend on a by-law merely, but must exist in the act under which the foreign corporation was incorporated.

(b) *After Sale.*—The more equitable provision that the subscriber shall be personally liable for any deficiency remaining after a sale of his shares to pay delinquent assessments is not an uncommon one: See, for instance, *Danbury etc. Ry. Co. v. Wilson*, 22 Conn. 435; *York etc. Ry. Co. v. Ritchie*, 40 Me. 425; *York etc. Ry. Co. v. Pratt*, 40 Me. 447; *Lewey's Island Ry. Co. v. Bolton*, 48 Me. 451, 77 Am. Dec. 236; *Somerset Ry. Co. v. Clarke*, 61 Me. 379; *Murphy v. Patapsco Ins. Co.*, 6 Md. 99; *Portland etc. Ry. Co. v. Graham*, 52 Mass. (11 Met.) 1; *Stoneham Branch Ry. Co. v. Gould*, 68 Mass. (2 Gray) 277; *Lexington etc. Ry. Co. v. Staples*, 71 Mass. (5 Gray) 520; *Troy etc. R. Co. v. Newton*, 74 Mass. (8 Gray) 596; *Athol etc. R. Co. v. Inhabitants of Prescott*, 110 Mass. 213; *Western Ry. Co. v. Avery*, 64 N. C. 491; *Elizabeth City Cotton Mills v. Dunstan*, 121 N. C. 12, 61 Am. St. Rep. 654, 27 S. E. 1001; *Grays v. Lynchburg etc. Turnpike Co.*, 4 Rand. (Va.) 578. Such a provision, it is held in *Western Ry. Co. v. Avery*, 64 N. C. 491, and *Stakes v. Lebanon*

etc. Turnpike Co., 25 Tenn. (6 Humph.) 241, is cumulative merely, and does not prevent a suit for the entire amount due on the subscription. That is, the corporation may either sue for the entire amount due or it may sell the shares for what they will bring and maintain an action for the unpaid deficiency. But where the statute permits either a sale of the delinquent shares and a recovery of the deficiency or a forfeiture of the shares and a transfer of them to any responsible person who will subscribe for the same, the corporation must adopt one of the two modes of procedure. It cannot take both since they are inconsistent: Athol etc. R. Co. v. Inhabitants of Prescott, 110 Mass. 213.

(c) **Liability is Statutory.**—Where the general law or the charter of a corporation expressly provides that after the sale of the shares of a delinquent stockholder, action may be brought to enforce against him a personal liability for the deficiency, the action is based upon a statutory liability, and not upon the original agreement of subscription. "The action is not brought upon the promise in the subscription to pay the assessments from time to time, as they might be made. It is not upon an open executory contract to take and pay for two shares. But it is based upon the statute liability which arises only after legal assessments and a neglect to pay, and a sale for nonpayment and a deficiency after applying the proceeds of sale": Lewey's Island R. Co. v. Bolton, 48 Me. 451, 77 Am. Dec. 236. To the same effect, see Somerset R. Co. v. Clarke, 61 Me. 379; Bucksport & B. R. Co. v. Buck, 65 Me. 536.

(d) **Provisions as to Forfeiture and Sale Must be Strictly Complied with.**—The liability, then, arising upon the statute, the statute must be strictly complied with, and the remedy of forfeiture or sale pursued in strict accordance with the requirements of the statute, before there arises any personal liability to pay the deficiency remaining. If the sale is required to be made by order of the directors, it must be so made or no liability for the deficiency attaches: York etc. Ry. Co. v. Ritchie, 40 Me. 425. If it is required to be at public auction, a private sale will not suffice: Lewey's Island R. Co. v. Bolton, 48 Me. 451, 77 Am. Dec. 236; Portland etc. Ry. Co. v. Graham, 52 Mass. (11 Met.) 1. Notice must be given when and in the manner required by the statute and by-laws: Lexington etc. R. Co. v. Staples, 71 Mass. (5 Gray) 520; Portland etc. Ry. Co. v. Graham, 52 Mass. (11 Met.) 1; and if one of the assessments for the failure to pay which the sale was had, was void, there can be no recovery of any deficiency: Lewey's Island R. Co. v. Bolton, 48 Me. 451, 77 Am. Dec. 236; Stoneham Branch R. Co. v. Gould, 68 Mass. (2 Gray) 277. In Stokes v. Lebanon etc. Turnpike Co., 25 Tenn. (6 Humph.) 241, it is held that where the corporation has power to sell the stock for each call as it becomes delinquent and to sue for the deficiency, if any, it must do so as each successive call becomes delinquent, and cannot wait until all the calls are made, to employ

this remedy. The case is criticised in 2 Thompson on Corporations, section 1773.

Where the statute provides for a sale and the recovery of the balance due, there may be a recovery, although the stock is not sold, if it was exposed for sale, but not sold, because there were no bidders: *Grays v. Lynchburg etc. Turnpike Co.*, 4 Rand. (Va.) 578. Similarly, if the provision is that the stock shall be forfeited and transferred to any person applying for it, this imposes no duty on the company to offer it for sale, and failure to do so will not prevent recovery from the subscriber under the statute for the amount due: *Murphy v. Patapsco*, 6 Md. 99.

B. In Absence of Statutes.

(1) *After Forfeiture of Shares.*—Where the statute or charter does not in terms confer upon the corporation the privilege of suing to recover the calls or assessments due at the time of forfeiture, notwithstanding such forfeiture, the question whether the subscriber remains liable for such assessments arises. As we have seen (*ante*, III, c), the mere existence of the right to forfeit on nonpayment is cumulative, and does not exclude the remedy of an action on the subscription. By the weight of authority, however, the exercise of the right—that is, the actual forfeiture of the shares—bars (in the absence of statute) any further action for the amount due on the contract of subscription. The remedy of forfeiture may therefore be termed “alternative” rather than “cumulative” with respect to the other remedy by action at law. Where the former is given the corporation may, in most states (see *ante*, III, c), pursue either; but it cannot, in the absence of statute, pursue both. The right to forfeit the stock is treated not as a mortgage or security of the stock for the unpaid subscription, but gives to the subscription contract the nature and incidents of a conditional sale. “The effect of a strict forfeiture is to rescind the sale, and thereby condemn the stock to the use of the company, regardless of its value, or the amount of the payments which have been made upon it. The call may be for five dollars, and the value of the stock one hundred dollars, yet this difference between the call and the value is absolutely lost to the stockholder, and goes to increase the resources of the company. For these reasons, and as the remedy is optional with the company, there is propriety in holding that the sale is conditional, and that the forfeiture satisfies all arrears of calls”: *Carson v. Arctic Min. Co.*, 5 Mich. 288.

This theory that the right reserved to forfeit the shares on the nonpayment of calls makes the sale a conditional one is well stated by Gardiner, J., in the leading case, *Small v. Herkimer Mfg. Co.*, 2 N. Y. 330 (reversing *Herkimer Mfg. Co. v. Small*, 21 Wend. 273): “The sale was in effect conditional, with a right reserved to the vendor to reclaim the property upon nonpayment of any installment of the purchase money. When such right is exercised, it is al-

ways a bar to any further claim against the vendee upon his contract." In the absence of statute, therefore, while the existence of the right to forfeit for delinquent assessments is not a bar to an action on the subscription for unpaid installments, the exercise of the right is a bar to such an action: *Allen v. Montgomery R. Co.*, 11 Ala. 437; *Macon etc. R. Co. v. Vason*, 57 Ga. 314; *Mandel v. Swan Land etc. Co.*, 154 Ill. 177, 45 Am. St. Rep. 124, 40 N. E. 462; *Mexican Gulf Ry. Co. v. Viavant*, 6 Rob. (La.) 305; *Small v. Herkimer Mfg. Co.*, 2 N. Y. 330 (reversing *Herkimer Mfg. Co. v. Small*, 21 Wend. 273); *Buffalo etc. Ry. Co. v. Dudley*, 14 N. Y. 336; *Northern Ry. Co. v. Miller*, 10 Barb. 260; *Ogdensburg etc. R. Co. v. Frost*, 21 Barb. 541; *Johnson v. Albany etc. R. Co.*, 40 How. Pr. 193; *Rutland etc. Ry. Co. v. Thrall*, 35 Vt. 536; *Ashton v. Burbank*, 2 Dill. 435, Fed. Cas. No. 582; *Giles v. Hutt*, 3 Ex. 18; *Great Northern Ry. Co. v. Kennedy*, 4 Ex. 417. The language in the early Alabama case of *Selma etc. R. R. Co. v. Tipton*, 5 Ala. 787, 39 Am. Dec. 344, so far as it may be opposed to this rule, is obviously obiter dicta, relies upon the overruled case of *Herkimer Mfg. Co. v. Small*, 21 Wend. 273 (in 2 N. Y. 330), and to that extent must itself be regarded as in effect overruled by *Allen v. Montgomery R. Co.*, 11 Ala. 437.

(2) *After Sale of Shares.*—Where the provision is not for a forfeiture of delinquent shares to the company, but for a sale of such shares to extinguish the delinquency, the effect is otherwise. The power to sell does not make the subscription contract a conditional sale, but is regarded rather as in the nature of a mortgage or pledge. "The sale is a foreclosure, upon which the company can only make the amount of the calls—the surplus, if any, going to the defaulter": *Carson v. Arctic Min. Co.*, 5 Mich. 288. The rule, however, works both ways, and the delinquent, while entitled to any surplus there may be, is also liable for any deficiency that may remain after the sale. The difference between a provision for a strict forfeiture, and one for a sale and the return to the debtor of any surplus, is the difference between a conditional sale and a mortgage. In the former, the vendor cannot take advantage of the forfeiture and also sue for part of the purchase price, while in the latter the stock sold is treated as security only, and the delinquent is entitled to any surplus and liable for any deficiency: *Succession of Thomson*, 46 La. Ann. 1074, 15 South. 379; *Carson v. Arctic Min. Co.*, 5 Mich. 288; *Merrimac Min. Co. v. Bagley*, 14 Mich. 501; *Atlantic Dynamite Co. v. Andrews*, 97 Mich. 466, 56 N. W. 858. See, also, *Danbury etc. R. Co. v. Wilson*, 22 Conn. 435; *Great Northern Ry. Co. v. Kennedy*, 4 Ex. 417. In *Instone v. Frankfort Bridge Co.*, 5 Ky. (2 Bibb) 576, 5 Am. Dec. 638, the court held that a provision giving a corporation the right to sell the shares of a delinquent subscriber, and requiring any overplus to be held for such subscriber did not prevent recovery on the subscription where there had been no sale, but merely an unsuccessful attempt to sell. The court, however, went further, saying: "Had the shares been sold, their

right to sue the defendant would without doubt have been destroyed." So far as this may be intended to deny the right in such a case to sue for a deficiency, it is obviously an obiter dictum, and seemingly opposed to the weight of authority.

In two New Hampshire cases it is said that in the absence of an express promise to pay for the stock subscribed there can be no personal action "until the subscribers' shares have been sold to pay the assessment": *Shattuck v. Robbins*, 68 N. H. 565, 44 Atl. 694; *Rockingham Bldg. Co. v. Burlingame*, 67 N. H. 301, 31 Atl. 23 (quoting *New Hampshire R. R. Co. v. Johnson*, 30 N. H. 390, 403, 64 Am. Dec. 300. The implication that an action to secure a personal judgment against a subscriber, who has not expressly promised to pay, can be maintained either before or after a proceeding to sell his shares, is, it seems, opposed to the rule which prevails in New Hampshire (see ante, III, b, 2, A). That state adheres to the Massachusetts doctrine in this regard, and in the latter jurisdiction no personal liability attaches in the absence of an express promise to pay "even if the sum received from a sale of his shares according to the statute has not satisfied the assessment due upon it": *Mechanic's Foundry, and Machine Co. v. Hall*, 121 Mass. 272.

3. **Not an Inherent Power of Corporations.**—The power to forfeit or sell the shares of stock of a subscriber for delinquent assessments is not inherent in a corporation. Forfeiture or sale in such a case is a remedy unknown to the common law, and the power to apply it must be derived from the general law or the charter of the corporation. A mere grant of the power "to pass by-laws not inconsistent with existing law" will not suffice: *In re Long Island R. R. Co.*, 19 Wend. 37, 32 Am. Dec. 429. The power is not to be implied from such general provisions, nor is it incidental to the general powers of a corporation, but must come from a particular grant: *Westcott v. Minnesota Min. Co.*, 23 Mich. 145; *Minnehaha Driving Park Assn. v. Legg*, 50 Minn. 333, 52 N. W. 898; *Henkel v. Pioneer Sav. etc. Co.*, 61 Minn. 35, 63 N. W. 243; *In re Long Island R. R. Co.*, 19 Wend. 37, 32 Am. Dec. 429; *Elizabeth City Cotton Mills v. Dunston*, 121 N. C. 12, 61 Am. St. Rep. 654, 27 S. E. 1001; *Budd v. Multnomah St. Ry. Co.*, 15 Or. 413, 15 Pac. 659; *Morris v. Metalline Land Co.*, 164 Pa. St. 326, 44 Am. St. Rep. 614, 30 Atl. 240; *Chase v. East Tennessee etc. Ry. Co.*, 73 Tenn. (5 Lea) 415; *Cartwright v. Dickinson*, 88 Tenn. 476, 17 Am. St. Rep. 910, 12 S. W. 1030; *Raht v. Sevier Min. Co.*, 18 Utah, 290, 54 Pac. 889; *Schwab v. Frisco Min. Co.*, 21 Utah, 258, 60 Pac. 940; *Clise Investment Co. v. Washington Sav. Bank*, 18 Wash. 8, 50 Pac. 575. See, also, *Lesseps v. Architects' Co.*, 4 La. Ann. 316.

4. **Provisions Relating to Must be Strictly Complied with.**—Being, therefore, a mere creature of statute, the power to forfeit or sell shares of stock must be pursued in the strictest accordance with the terms of the statute. If the statute provides that the corporation

shall have power to make by-laws providing for such sale, the passage of valid by-laws is an essential; and a resolution which affects but one subscriber and has not the general operation necessary to a by-law, cannot sustain a forfeiture or sale: *Infester v. Murphy Mfg. Co.*, 95 Ill. App. 105; *Budd v. Multnomah St. Ry. Co.*, 15 Or. 413, 15 Pac. 659; *Clise Inv. Co. v. Washington Sav. Bank*, 18 Wash. 8, 50 Pac. 575. A provision allowing a sale will not authorize a forfeiture: *Minnehaha Driving Park Assn. v. Legg*, 50 Minn. 333, 52 N. W. 898; *Henkel v. Pioneer Sav. etc. Co.*, 61 Minn. 35, 63 N. W. 243. If the statute requires a public sale, a private sale will not be sufficient; notice must be given as required by statute, and in general all the proceedings leading up to or involving a forfeiture or sale of delinquent shares must comply strictly with the statutory requirements: See, in addition to the cases above cited, *Westcott v. Minnesota Min. Co.*, 23 Mich. 145; *Eastern Plank Road Co. v. Vaughan*, 20 Barb. 155; *Mitchell v. Vermont Copper Min. Co.*, 47 How. Pr. 218; *Germantown Pass. Ry. Co. v. Fitler*, 60 Pa. St. 124, 100 Am. Dec. 546; *Morris v. Metalline Land Co.*, 164 Pa. St. 326, 44 Am. St. Rep. 614, 30 Atl. 240; *Raht v. Sevier Min. Co.*, 18 Utah, 290, 54 Pac. 889; *Schwab v. Frisco Min. Co.*, 21 Utah, 258, 60 Pac. 940; *Johnson v. Lyttle's Iron Agency*, L. R. 5 Ch. Div. 687; *Clarke v. Hart*, 6 H. L. Cas. 633. In the last case, Lord Chelmsford says: "It is unnecessary to advert to the principle that forfeitures are strictissimi iuris, and that parties who seek to enforce them must exactly pursue all that is necessary in order to enable them to exercise this strong power": See, also, ante, III, c, 2, A, (2), (d).

5. **Necessity of Notice of Call Before.**—Where notice of the call is required by statute before a forfeiture or sale can be had, such notice must, under the rule just considered, be given, and in strict compliance with the statute. Even, however, in the absence of statute, a notice that a call or assessment has been made is necessary to authorize a forfeiture or sale for nonpayment of the assessment: *Hill v. Nisbet*, 100 Ind. 341; *Lake Ontario etc. R. R. Co. v. Mason*, 16 N. Y. 451; *Eastern Plank Road Co. v. Vaughan*, 20 Barb. 155; *Rutland etc. R. Co. v. Thrall*, 35 Vt. 536. See, in this connection, *McDowell v. Chicago Steel Works*, 124 Ill. 491, 7 Am. St. Rep. 381, 16 N. E. 454. And see post, V, c, 3.

d. **Attachment of and Execution on Shares.**—A discussion of the lien of a corporation upon its subscribed stock is outside the scope of this note. Where, however, the corporation, by issuing an ordinary certificate, has lost the seller's lien dependent on possession, if no statutory lien is involved, the corporation may attach the property of the delinquent subscriber under a statute allowing an attachment where no lien exists: *Lankershim Ranch Land etc. Co. v. Herberger*, 82 Cal. 600, 23 Pac. 134. And in *Clise Investment Co. v. Washington Sav. Bank*, 18 Wash. 8, 50 Pac. 575, it is held that a judgment against a subscriber for unpaid assessments may be satis-

fed by execution on his shares, the execution lien being subject to the lien of a pledgee with whom the subscriber has pledged the stock.

IV. Several Liability.

The fact that a subscription is made upon the same instrument as other subscriptions does not make the liability of the various subscribers a joint one. Each contracts for himself with the corporation, the contract of each is a several one, and the resultant liability is likewise several: *Curry v. Woodward*, 53 Ala. 371; *Ghio v. Beard*, 11 Mo. App. 21; *Orynski v. Loustannan* (Tex.), 15 S. W. 674. See, also, *Burnap v. Sylvania Butter Co.*, 7 Ohio N. P. 217.

V. Implied Conditions Precedent.

a. *Organization of Corporation.*—A subscription to the capital stock of a corporation, whether made before or after incorporation, imposes liability upon the subscriber only when certain conditions precedent, implied from the very nature of the contract, have been performed. Of these implied conditions, one of no little importance is the requirement that the corporation shall have a legal organization. The right of a stockholder to resist liability on his subscription because of a failure to organize a corporation or a defective organization is, however, considered at some length in the monographic note to *People v. Montecito Water Co.*, 33 Am. St. Rep. 176-186, on the defective formation of corporations, and for a consideration of the particular question here involved the reader is referred to that note at page 184. As to the estoppel of a subscriber or stockholder to question the validity of corporate organization in a suit by corporate creditors to enforce payment of unpaid subscriptions, see monographic note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 806, 873, at p. 827.

b. Subscription of All Corporate Stock.

1. *General Rule.*—One of the most important of the conditions precedent to a subscriber's liability which are implied from the contract of subscription is that relating to the amount of capital stock which must be taken before the liability attaches. It is a general and well-settled rule, subject to a few qualifications only (to be hereinafter considered), that where the capital stock of a corporation is fixed, it is implied in every contract of subscription, as a condition precedent to liability thereunder, that all the capital stock must be subscribed. Until all the capital stock is subscribed, payment of his subscription or any part thereof cannot be required of any subscriber. "It is," says Chief Justice Shaw, in *Stoneham Branch Ry. Co. v. Gould*, 68 Mass. (2 Gray) 277, "a rule of law too well settled to be now questioned that when the capital stock and the number of shares are fixed by the act of incorporation or by any by-law passed conformably to the act of incorporation, no assessment can be lawfully made on the share of any subscriber until the whole number of shares has been taken."

The rule rests on the very substantial bases of public policy and the protection of the rights of individual members. As is pointed out in *International etc. Assn. v. Walker*, 88 Mich. 62, 49 N. W. 1086, the capital stock of a corporation is a trust fund for creditors, but to be a fund at all it must be fully subscribed. "A corporation without subscribed capital would be a mere bubble, without responsibility, and liable to do great mischief in the mercantile world, putting forth false bases of credit, and preying upon the community by reason of such deception."

The protection of the rights of the individual subscriber is an even more cogent reason for the rule. "When a man subscribes a share to a stock to consist of one thousand shares, in order to carry on some designated enterprise, he binds himself to pay a thousandth part of the cost of such enterprise. If only five hundred are subscribed for, and he can have no assurance which he is bound to accept that the remainder will be taken, he would be held, if liable to assessment, to pay a five hundredth part of the cost of the enterprise, besides incurring the risk of an entire failure of the enterprise itself, and the loss of the amount advanced toward it": *Stoneham Branch Ry. Co. v. Gould*, 68 Mass. (2 Gray) 277.

The general rule is supported by an almost unbroken line of authorities, so lengthy as to render the citation of all here impracticable: See *Arkadelphia Cotton Mills v. Trimble*, 54 Ark. 316, 15 S. W. 776; *Santa Cruz R. Co. v. Schwartz*, 53 Cal. 106; *San Bernardino Inv. Co. v. Merrill*, 108 Cal. 490, 41 Pac. 487; *Stearns v. Sopris*, 4 Colo. App. 191, 35 Pac. 281; *Hendrix v. Academy of Music*, 73 Ga. 437; *Allman v. Havana etc. R. Co.*, 88 Ill. 521; *McCoy v. World's Columbian Exposition*, 186 Ill. 356, 78 Am. St. Rep. 288, 57 N. E. 1043; *Hoagland v. Cincinnati etc. R. Co.* 18 Ind. 452; *Peoria etc. R. Co. v. Preston*, 85 Iowa, 115; *Topeka Bridge Co. v. Cummings*, 3 Kan. 55; *Exposition Ry. etc. Co. v. Canal St. etc. Ry. Co.*, 42 La. Ann. 370, 7 South. 627; *Somerset etc. Ry. Co. v. Cushing*, 45 Me. 524; *Somerset etc. Ry. Co. v. Clarke*, 61 Me. 379; *Rockland etc. Steamboat Co. v. Sewall*, 78 Me. 167, 3 Atl. 181, 80 Me. 400, 14 Atl. 939; *Hughes v. Antietam Mfg. Co.*, 34 Md. 316; *Musgrove v. Morrison*, 54 Md. 161; *Salem Mill Dam Corp. v. Ropes*, 23 Mass. (6 Pick.) 23; *Central Tp. Co. v. Valentine*, 29 Mass. (10 Pick.) 142; *Cabot etc. Bridge v. Chapin*, 60 Mass. (6 Cush.) 50; *Katama Land Co. v. Jernegan*, 126 Mass. 155; *Stoneham Branch Ry. Co. v. Gould*, 68 Mass. (2 Gray) 277; *Worcester etc. R. R. Co. v. Hinds*, 62 Mass. (8 Cush.) 110; *Shurtz v. Schoolcraft etc. R. R. Co.*, 9 Mich. 270; *International etc. Assn. v. Walker*, 88 Mich. 62, 49 N. W. 1086; *Curry Hotel Co. v. Mullins*, 93 Mich. 318, 53 N. W. 360; *Masonic Temple Assn. v. Chanwell*, 43 Minn. 353, 45 N. W. 716; *Duluth Inv. Co. v. Wirt*, 63 Minn. 538, 65 N. W. 956; *Haskell v. Worthington*, 94 Mo. 560, 7 S. W. 481; *Sedalia etc. R. Co. v. Abell*, 17 Mo. App. 645; *McCann v. American Cent. Ins. Co.*, 4 Neb. 256; *Estabrook v. Omaha Hotel Co.*, 5 Neb. 76;

Macfarland v. West Side etc. Assn., 53 Neb. 417, 73 N. W. 736; Littleton Mfg. Co. v. Parker, 14 N. H. 543; Contoocook Val. Ry. Co. v. Barker, 32 N. H. 363; Jewett v. Valley Ry. Co., 34 Ohio St. 601; Willamette Freighting Co. v. Stannus, 4 Or. 261; Astoria etc. R. Co. v. Hill, 20 Or. 177, 25 Pac. 379; Read v. Memphis etc. Gas Co., 56 Tenn. (9 Heisk.) 545; Anderson v. Middle etc. Ry. Co., 91 Tenn. 44, 17 S. W. 803; Galveston Hotel Co. v. Bolton, 46 Tex. 633; Orynski v. Loustaunan (Tex.), 15 S. W. 674; Norwich Lock Mfg. Co. v. Hockaday, 89 Va. 557, 16 S. E. 877; Denny Hotel Co. v. Schram, 6 Wash. 134, 36 Am. St. Rep. 137, 32 Pac. 1002; Elderkin v. Peterson, 8 Wash. 674, 36 Pac. 1089; Birge v. Browning, 11 Wash. 249, 39 Pac. 643; Greenbriar Industrial Exp. v. Ocheltree, 44 W. Va. 626, 30 S. E. 78; Anvil Min. Co. v. Sherman, 74 Wis. 226, 42 N. W. 226; Milwaukee Brick etc. Co. v. Schoknecht, 108 Wis. 457, 84 N. W. 838; Wontner v. Shairp, 4 Com. B. 404.

There are some few cases opposed to this general rule. See, for instance, South Ga. etc. Ry. Co. v. Ayres, 56 Ga. 230; Rensselaer etc. Plank Road Co. v. Wetsel, 21 Barb. 56; Schenectady Plank Road Co. v. Thacher, 11 N. Y. 102 (for a criticism of the latter two cases, see Peoria etc. R. R. Co. v. Preston, 35 Iowa, 115, 120-121); Lynch v. Eastern etc. Ry. Co., 57 Wis. 430, 15 N. W. 743, 825; and compare, also, Auburn Opera House etc. Assn. v. Hill (Cal.), 32 Pac. 587 (affirmed 113 Cal. 382, 45 Pac. 695). In some the holding is plainly a dictum, most are in effect overruled by later cases in the same state, and all are opposed to the great weight of authority and the well-settled rule.

In Texas the general rule is conceded, but a distinction is made between subscribers who become such after and those who become such before incorporation. The implied condition that all the capital stock must be subscribed before any calls can legally be made is held to be applicable only to subscriptions made after incorporation: Belton Compress Co. v. Saunders, 70 Tex. 699, 6 S. W. 134; Orynski v. Loustaunan (Tex.), 15 S. W. 674.

2. Where Contract Shows Contrary Intent.

A. In Provisions of Subscription Agreement.

(1) **General Rule.**—The rule that all the capital stock must be subscribed before a subscriber can be made liable on his subscription, rests upon the theory that this is an implied condition of the contract of subscription. Where the contract itself shows an intention that all the stock need not be subscribed before liability attaches, there is plainly no room for an implication to the contrary, and the general rule is therefore inapplicable. The contract may in express terms provide that the subscription shall be binding on a certain sum being subscribed (as in Troy etc. Ry. Co. v. Newton, 74 Mass. (8 Gray) 596; St. Charles Mfg. Co. v. Britton, 2 Mo. App. 290), in which event the liability attaches whenever that sum is subscribed, whether it be equal to or less than the capital stock of the corporation.

The intention that the subscription shall be absolute without all the stock being taken need not, however, be thus boldly expressed. If the subscriber, by the terms of his agreement, evidences an intention that the corporation shall begin to prosecute work or do business before all the capital stock is taken, it is evident that he intends his subscription to be available as capital for these purposes. The question is one of intention, and such a provision inserted in the subscription agreement plainly shows that the subscriber intends his subscription to become absolute and contemplates the collection of calls and assessments before all the capital stock has been taken: *Arkadelphia Cotton Mills v. Trimble*, 54 Ark. 316, 15 S. W. 776; *Sedalia etc. Ry. Co. v. Abell*, 17 Mo. App. 645. (See in this connection, post, p. 372.) The same is true where the subscription agreement provides that in order to facilitate work the undersigned subscribers would pay their subscription as the work progressed: *Anderson v. Middle etc. Ry. Co.*, 91 Tenn. 44, 17 S. W. 803.

On the other hand, a provision in a contract of subscription to the capital stock of a contemplated corporation to the effect that the capital stock should be not less than two hundred and fifty thousand dollars, and that the subscription should be binding if one hundred thousand dollars were subscribed within sixty days has been held to bear no evidence of an intention that the subscriber should be liable for calls before all the stock was taken. If, therefore, the actual capital stock of the corporation as formed was five hundred thousand dollars, although over two hundred and fifty thousand dollars has been subscribed and one hundred thousand dollars was subscribed within sixty days, there can be no collection of calls until the entire capital stock of five hundred thousand dollars is taken: *International Fair etc. Assn. v. Walker*, 88 Mich. 62, 49 N. W. 1086 (overruling as to this 83 Mich. 386, 47 N. W. 338). It is to be noted, however, that by the law under which the corporation in this case was created, all the capital stock was required to be subscribed in the first instance, no provision being made for unsubscribed capital.

If the subscription as agreed upon contains a condition requiring a certain amount to be subscribed, the subscription is not absolute until that amount is taken, although the condition was omitted from the agreement when reduced to writing, if such written agreement was signed only on the representation that the condition would be performed: *Brewers' Fire Ins. Co. v. Burger*, 10 Hun, 56.

(2) **Effect of Express Unconditional Promise to Pay.**—In *West v. Crawford*, 80 Cal. 19, 21 Pac. 1123, certain parties entered into a contract of subscription to the stock of a contemplated corporation, in which, inter alia, each promised to pay twenty per cent of the par value of the shares subscribed by him, in five days after the articles of incorporation were filed. This the court, it would seem quite properly, held showed an intention to pay at the time named, regardless of whether or not the capital stock was all subscribed at that time.

In a number of cases, however, where the facts were by no means so strong as in the case referred to, it is held that an express promise to pay a certain sum without any condition expressed, as distinguished from an "express promise to pay, or only a promise to pay legal assessments, or . . . only an implied promise as for legal assessments," is not conditional upon all of the capital stock being subscribed: *Skowhegan etc. R. R. Co. v. Kinsman*, 77 Me. 370. See to the same effect, *Lail v. Mt. Sterling Coal Road Co.*, 76 Ky. (13 Bush) 32; *Kennebec etc. R. Co. v. Jarvis*, 34 Me. 360; *Bucksport etc. R. Co. v. Buck*, 65 Me. 536; *Rockland etc. Steamboat Co. v. Sewall*, 80 Me. 400, 14 Atl. 938, 939; *Worcester City Hotel v. Dickinson*, 72 Mass. (6 Gray) 586; and see, also, *Warwick etc. R. R. Co.*, 11 R. I. 131; *Milwaukee Brick etc. Co. v. Schoknecht*, 108 Wis. 457, 84 N. W. 838. It is to be noted that in most of the cases cited the capital stock of the corporation was not fixed at the time of the making of the subscription in question, and the cases may, perhaps, be rested on this ground: See post, V, b, 3. So far, however, as these cases may seem to hold that there is any distinction between an express promise to pay and one implied, with respect to the existence of the implied condition that all the capital stock must be subscribed, they seem insupportable on principle.

B. In Statutes.—The principles we have just been discussing are equally applicable whether the intent that the subscription be subject to calls before all the capital stock is taken appears from the agreement of subscription proper, or is found in the statute or the articles of incorporation under which the corporation is organized and which form a part of the subscription contract. The cases already cited are those in which the intent was derivable from the subscription paper, but the same rules apply where the statute or articles are involved.

(1) **Provision for Assessments Before All Stock Subscribed.**—In some instances the statutes expressly provide that the stock subscribed may be assessed when a certain fractional part of the entire capital stock is taken. In such a case there is no question. A subscription made in view of a statute of this kind and subject to its provisions is enforceable when, and only when, the amount of capital stock prescribed by the statute has been taken: See, as instances, *San Bernardino Inv. Co. v. Merrill*, 108 Cal. 490, 41 Pac. 487; *Ventura etc. Ry. Co. v. Hartman*, 116 Cal. 260, 48 Pac. 65; *Mandel v. Swan Land etc. Co.*, 154 Ill. 177, 45 Am. St. Rep. 124, 40 N. E. 462 (see, also, *Mandel v. Swan Land Cattle Co.*, 51 Ill. App. 204, these and the Massachusetts case following are with reference to English corporations formed under the Companies Acts); *Anglo-American Land etc. Co. v. Dyer*, 181 Mass. 593, 64 N. E. 416; *Fairview Ry. Co. v. Spillman*, 23 Or. 587, 32 Pac. 688; *Ornamental Pyrographie Co. v. Brown*, 2 Hurl. & C. 63, 32 L. J. Ex. 190.

(2) **Provision for Corporation Doing Business Before All Stock Subscribed.**—Where the statute provides that the corporation may prosecute the work for which it was created, or, generally, that it may do business when any certain portion of the capital stock has been subscribed, such provision carries with it the right in the corporation to collect the subscriptions to its stock when the amount named shall have been subscribed. The grant of a power to do business carries with it the necessity of securing capital for that purpose, and the subscriber to the stock of a corporation created under a law permitting it to do business when a fractional part of the capital stock is taken impliedly consents that he shall thereupon become liable for calls in order that capital may be realized to take advantage of the power granted: *Nichols v. Burlington etc. Plank Road Co.*, 4 G. Greene (Iowa), 42; *Hunt v. Kansas etc. Bridge Co.*, 11 Kan. 412; *Boston etc. R. Co. v. Wellington*, 113 Mass. 79; *Sedalia etc. Ry. Co. v. Abell*, 17 Mo. App. 645; *Lincoln Shoe Mfg. Co. v. Sheldon*, 44 Neb. 279, 62 N. W. 480 (distinguishing *Livesey v. Omaha Hotel Co.*, 5 Neb. 50); *Jewett v. Valley Ry. Co.*, 34 Ohio St. 601; *Willamette Freighting Co. v. Stannus*, 4 Or. 261; *Anvil Min. Co. v. Sherman*, 74 Wis. 226, 42 N. W. 226; *Milwaukee Brick etc. Co. v. Schoknecht*, 108 Wis. 457, 84 N. W. 838. Compare, however, *Penobscot etc. R. Co. v. White*, 41 Me. 512, 66 Am. Dec. 257; and compare, also, where a certain amount of stock in a railroad corporation was required to be "paid in" before construction work on a railroad might begin, *Branch v. Augusta Glass Works*, 95 Ga. 573, 23 S. E. 128; *Agricultural Branch R. Co. v. Winchester*, 95 Mass. (13 Allen) 29; *McDermott v. Donegan*, 44 Mo. 85. In *Hanover Junction etc. R. R. Co. v. Haldeman*, 82 Pa. St. 36, the corporation was empowered to dispose of its capital stock, "in whole or in part," from time to time, and when ten per cent of its capital stock was subscribed it was "clothed with the full powers of a corporation." This, it was held, removed the implication that the corporation could not recover from subscribers until all its minimum capital stock had been subscribed.

(3) **Provision for Organization of Corporation Before All Stock is Subscribed.**—A provision that a corporation may organize when a certain amount of capital stock (less than the whole) has been subscribed should not, it seems on principle, have the effect of changing the implication that all the capital stock must be subscribed before the subscribers are subject to calls. Organization (except in the incurring of preliminary expenses—as to which see post, V, b, 6), unlike the power to do business, does not necessarily contemplate the incurring of debts nor make available capital a necessity, and there seems to be no reason for relaxing the rule that liability on a subscription is conditional upon all the stock being taken, simply because the corporation may organize before this. The case of *Galveston Hotel Co. v. Bolton*, 46 Tex. 633, is in accord with this view.

See, however, as more or less opposed, *Hoagland v. Cincinnati etc. R. Co.*, 18 Ind. 452; *Penobscot R. Co. v. White*, 41 Me. 512, 66 Am. Dec. 257; *McDermott v. Donegan*, 44 Mo. 85; *Schenectady Plank Road Co. v. Thacher*, 11 N. Y. 102 (criticised in *Peoria etc. R. Co. v. Preston*, 35 Iowa, 115).

3. Where Capital Stock is not Fixed.

A. In General.—The rule that before a subscriber can be held liable on his contract the entire capital stock must have been subscribed obviously assumes that the amount of the capital stock of the corporation is fixed. In many cases, however, the amount of the capital stock is not determined by either the contract of subscription or by the statutes and articles under which incorporation was effected. In some only the minimum amount is prescribed; in some the maximum; in others both a maximum and a minimum. What, then, is the rule in such cases? Does it require that the capital stock be fixed and the entire amount as fixed be subscribed, or is the doctrine that all the stock must be subscribed before the subscriber is liable for calls inapplicable where the amount of that stock is undetermined?

B. Effect of Provision for Calls When Certain Number of Shares are Subscribed.—Where the statute expressly provides that upon a certain number of shares being subscribed the shares subscribed shall be subject to assessments, the question is unimportant. Such was the provision in *White Mts. R. R. v. Eastman*, 34 N. H. 124. There the charter provided that the capital stock should consist of not less than five hundred nor more than ten thousand shares; that upon five hundred being subscribed the directors might proceed to make assessments thereon, and that as necessary the capital stock might be increased from time to time, no more than one hundred dollars to be assessed upon each share and all shares subscribed for to be assessed equally. The court says: "The five hundred shares having been subscribed for, the corporation were empowered at once to proceed and make and collect assessments upon them. . . . To hold that the corporation must have determined how far they would go in the end in the creation of stock, before they could assess upon the first five hundred shares would defeat the object of the legislature in giving the power to assess on the first five hundred as soon as subscribed for, and to add to the capital as from time to time required; because, in order that all the shares should be equally assessed, it would be necessary to create the whole number of shares at once which might ever be required, and assess upon all *pari passu*; or after assessing the first five hundred shares at one hundred dollars each, then to assess all others to the full amount of one hundred, though by so doing an amount of funds might be raised beyond the necessities of the corporation": See, also, *Troy etc. R. Co. v. Newton*, 74 Mass. (8 Gray) 596.

C. Effect of Provision for Doing Business When Certain Number of Shares are Prescribed.—A provision that the corporation shall proceed to construct its railroad or do its corporate business when a certain number of shares have been taken involves, as we have seen (*ante*, V, b, 2, B, (2)), the power to assess when that number is taken. Where such a provision is incorporated in the charter, the rule just considered applies therefore, and subscriptions are collectible when the specific number of shares have been taken, although the total amount of capital stock has not been fixed: *Lexington etc. R. Co. v. Chandler*, 54 Mass. (13 Met.) 311; *Boston etc. R. Co. v. Wellington*, 113 Mass. 79.

D. General Rule—Amount of Capital Stock Must be Fixed and Subscribed.—In the absence of such provisions, the rule supported by the weight of authority is that the amount of capital stock of the corporation must be determined, if not in the charter, then by some appropriate corporate act, and that the amount thus determined must be fully subscribed before a subscriber can be held liable on his contract of subscription. "Before an assessment can be legally made, the number of shares or the amount of capital stock must be definitely fixed. This may be done in the charter. If so, there must be a subscription for the prescribed amount, before an assessment can be made. If not done by the legislature, the amount must be determined by the directors or stockholders. Until the number of shares forming the capital stock is fixed, there is no capital stock, and no assessments can be rightfully laid and legally collected": *Somerset R. R. Co. v. Clarke*, 61 Me. 379. To the same effect, see *Somerset R. R. Co. v. Cushing*, 45 Me. 524; *Pike v. Bangor etc. R. R. Co.*, 68 Me. 445; *Skowhegan etc. R. Co. v. Kinsman*, 77 Me. 370; *Lexington etc. R. R. Co. v. Chandler*, 54 Mass. (13 Met.) 311; *Worcester etc. R. Co. v. Hinds*, 62 Mass. (8 Cush.) 110; *Troy etc. R. R. Co. v. Newton*, 74 Mass. (8 Gray) 596.

E. Contrary View.—In the very states, however, in which this rule is laid down, there is a singular diversity of authority, and in a number of cases it is held that where the amount of capital stock is not fixed, the principle that all the capital stock must be subscribed before the liability of a subscriber attaches is plainly inapplicable. The theory of these cases is, that: "There being no certain number of shares or amount of capital fixed by the charter, the promise could not have been conditional that the corporation should have a fixed amount of capital or a certain number of shares": *Kennebec etc. R. R. Co. v. Jarvis*, 34 Me. 360. To the same effect, see *York etc. R. Co. v. Pratt*, 40 Me. 447; *Bucksport etc. Ry. Co. v. Buck*, 65 Me. 536; *Worcester City Hotel v. Dickinson*, 72 Mass. (6 Gray) 586; *Warwick R. R. Co. v. Cady*, 11 R. I. 131. In *Penobscot etc. R. Co. v. Bartlett*, 78 Mass. (12 Gray) 244, 71 Am. Dec. 753, the same result was reached, but on the further fact found by the court, that the statute

there under consideration did not appear to require or contemplate that the directors should fix the capital stock.

In all these cases there was an express promise to pay a certain sum, and this circumstance is insisted upon in the opinions. Unless the amount payable were certain, there could, of course, be no enforceable liability where the capital stock was not fixed, but it is not perceived why the circumstance that the amount is fixed should override the general rule that the subscription of the entire capital stock is a condition precedent to liability on the subscription. This rule is, however, based on an implied condition, and the circumstance that the amount subscribed was certain, together with the fact that no definite amount of capital stock was provided for may well show that no such condition of liability was in the minds of the subscribers.

Another consideration insisted upon in some of these cases is that where the amount of stock is fixed by the directors or by by-law, and not by the charter, it is alterable at any time. "The by-laws might be altered at any annual meeting, or at a special meeting called for that purpose. The subscribers must have known when their subscriptions were made that the amount of capital stock then provided for was subject to enlargement or diminution by a vote of the corporation. The contract of a subscriber to the stock cannot, therefore, be considered as made upon condition that the corporation should have a certain number of shares or a fixed capital": *Kennebec etc. R. Co. v. Jarvis*, 34 Me. 360. See, also, in this connection, *Bucksport etc. R. Co. v. Buck*, 65 Me. 536; *Lexington etc. R. R. Co. v. Chandler*, 54 Mass. (13 Met.) 311.

4. What Subscriptions may be Counted.

A. In General.—The rule that all the capital stock of a corporation must be subscribed as a condition precedent to the liability of a subscriber for calls contemplates that there be actual, valid, bona fide subscriptions for the full amount. If the contract is to become binding only upon a certain amount being subscribed, a guaranty that that amount will be subscribed is not a compliance with the condition. It must actually be subscribed: *Branch v. Augusta Glass Works*, 95 Ga. 573, 23 S. E. 128. Nor where a subscription is conditioned upon "sufficient funds being subscribed for the purpose" of building a ferry, the amount required must be subscribed; the condition will not be performed if part of the necessary expense is to be recovered from the prospective profits of the enterprise: *People's Ferry Co. v. Balch*, 74 Mass. (8 Gray) 303. If the condition is that a certain sum be subscribed within a certain time, it is performed if that amount, inclusive of the conditional subscriber's subscription, is subscribed within the time named: *Montpelier etc. R. R. Co. v. Langdon*, 45 Vt. 137.

B. Must be Binding on Subscribers.—The subscriptions to the capital stock must, moreover, be valid and binding on the subscribers in order that they may be computed in determining whether the

condition of another subscriber's liability—i. e., that all or a certain amount of the stock has been subscribed—is performed. If some of the subscriptions were by married women and void, they cannot be computed in determining whether the condition has been fulfilled: *Appeal of Hahn* (Pa.), 7 Atl. 482. So where a subscription by an agent was unauthorized: *California etc. Hotel Co. v. Russell*, 88 Cal. 277, 26 Pac. 105 (see *California Hotel Co. v. Collander*, 94 Cal. 120, 28 Am. St. Rep. 99, 29 Pac. 859); and compare *Baile v. Calvert Educational Soc.*, 47 Md. 117.

If a corporation is wholly without power to subscribe to the stock of another corporation, its subscription cannot be counted in ascertaining whether the amount of stock of the latter corporation, necessary to make its subscribers liable to calls, has been taken: *Berry v. Yates*, 24 Barb. 199; *Denny Hotel Co. v. Schram*, 6 Wash. 184, 36 Am. St. Rep. 137, 32 Pac. 1002. Where, however, the subscriptions made by corporations have in fact been paid, or where the corporation may be and has been estopped from questioning its liability thereunder, another subscriber will not be excused from his liability because of the ultra vires nature of the corporate subscription: *McCoy v. World's Columbian Exposition*, 186 Ill. 356, 78 Am. St. Rep. 288, 57 N. E. 1043 (affirming 87 Ill. App. 605); *Walter S. Wood Harvester Co. v. Jefferson*, 71 Minn. 367, 74 N. W. 149. And, in general, if persons subscribing to the stock of a corporation are themselves estopped from denying their liability, another subscriber cannot set up the invalidity of the former's subscription to escape liability on his own: *Nickum v. Burckhardt*, 30 Or. 464, 60 Am. St. Rep. 822, 47 Pac. 788, 48 Pac. 474. Nor can he urge the invalidity of other subscriptions, where sufficient shares have been taken without counting those subscriptions to fix his liability: *Baile v. Calvert Educational Soc.*, 47 Md. 117; *Boston etc. R. Co. v. Wellington*, 113 Mass. 79.

C. Conditional Subscriptions.—Where a certain number of shares or a certain amount of stock is required to be subscribed in order that a certain subscriber may be subject to calls, the amount of stock named must be taken by unconditional subscriptions. The condition of a subscriber's liability that all the capital stock be taken is not performed, if the other subscriptions thereto are dependent upon various conditions, some of which may never be performed: *New York etc. R. Co. v. Hunt*, 39 Conn. 75 (distinguished in *Ridgefield etc. R. Co. v. Brush*, 43 Conn. 86); *Brand v. Lawrenceville Branch R. Co.*, 77 Ga. 506, 1 S. E. 255; *Ticonic Water Power & Mfg. Co. v. Lang*, 63 Me. 480; *Cabot etc. Bridge v. Chapin*, 60 Mass. (6 Cush.) 50; *Troy etc. R. Co. v. Newton*, 74 Mass. (8 Gray) 596. Where, however, the conditions are performed or waived, the subscriptions are in effect absolute, and may be computed in determining whether the amount of stock has been subscribed necessary to charge subscribers with liability for calls: *Danbury etc. R.*

Co. v. Wilson, 22 Conn. 435; Brand v. Lawrenceville etc. R. R. Co., 77 Ga. 506, 1 S. E. 255. Nor is their conditional nature material, where, without counting such subscriptions, the necessary amount of stock has been subscribed: Boston etc. R. Co. v. Wellington, 113 Mass. 79. Whether a provision that stock is to be paid for by the doing of work, furnishing materials, etc., makes it "conditional" in the sense here employed, see New York etc. R. Co. v. Hunt, 39 Conn. 75; Ridgesfield etc. R. Co. v. Bush, 43 Conn. 86; Phillips v. Covington etc. Bridge Co., 59 Ky. (2 Met.) 219; Troy etc. R. Co. v. Newton, 74 Mass. (8 Gray) 596.

D. Must be Bona Fide.—The rule that all the capital stock must be subscribed before the liability for calls attaches obviously contemplates bona fide subscriptions by responsible persons. So far, however, as concerns the responsibility of the subscribers, bona fides is the test. If they were apparently able to pay, and their subscription was taken in good faith, the fact that they were, or soon after became, insolvent, is immaterial. The right of the corporation to collect its assessments cannot be made to depend upon the solvency of every subscriber to its stock at the time of his subscription. If, therefore, subscriptions of the required amount are obtained in good faith, the financial irresponsibility of certain of the subscribers is not a defense to the others when sued upon their subscriptions: Penobscot R. Co. v. Dummer, 40 Me. 172, 63 Am. Dec. 654; Penobscot v. White, 41 Me. 512, 66 Am. Dec. 257; Lewey's Island R. Co. v. Bolton, 48 Me. 451, 77 Am. Dec. 236; Salem Milldam Corp. v. Ropes, 26 Mass. (9 Pick.) 187, 19 Am. Dec. 363. See, also, Baile v. Calvert Educational Soc., 47 Md. 117. And, in the absence of proof to the contrary, it will be assumed that the subscriptions were by responsible parties, and were received in good faith: Belfast etc. R. Co. v. Inhabitants of Brooks, 60 Me. 568.

5. Increased Stock.—In the preceding discussion, the rule that an implied condition precedent to the liability of a subscriber was that all the capital stock be subscribed has been considered with reference to "original" or "formative" stock. In Read v. Memphis etc. Gas Co., 56 Tenn. (9 Heisk.) 545, the same rule is applied where, after a subscription by the defendant to the stock of a corporation, there is an increase, and it is there held that the entire amount of the stock as increased must be subscribed before the defendant can be held liable on his subscription.

The case is, however, opposed to the weight of authority. There is a distinction between increased and original stock. In the latter all must be subscribed before calls can be made, while the rule does not hold in the case of increased stock. A subscriber to the increased stock cannot escape liability on the ground that all has not been subscribed, and, a fortiori, a subscriber to the original stock cannot insist that if the stock has been increased all of the stock as thus increased must be subscribed before he is liable on his sub-

scription to the original stock: *Gettysburgh Nat. Bank v. Brown*, 95 Md. 367, ante, p. 339 (principal case), 52 Atl. 975; *Clarke v. Thomas*, 34 Ohio St. 46; *Willamette Freighting Co. v. Stannus*, 4 Or. 261; *Greenbriar Industrial Exposition v. Ocheltree*, 44 W. Va. 626, 30 S. E. 78. A subscriber to increased stock may, of course, make his subscription conditional that all such stock be subscribed, and such a condition will be enforced: *Appeal of Hahn (Pa.)*, 7 Atl. 482.

6. **Preliminary Expenses.**—The general rule that the liability of a subscriber attaches only on performance of the implied condition precedent that all the capital stock be subscribed is subject also to the exception that he is responsible for preliminary expenses, notwithstanding the failure to perform that condition. While he cannot be held liable for calls made or assessments levied to advance the general objects and purposes of the charter, until all the stock is taken, preliminary expenses—"expenses of a preliminary nature, necessarily incurred to obtain knowledge on the subject of the undertaking, or for the purpose of forwarding the subscription, and extending the public patronage," etc.—rest on a different footing. These expenses are necessarily contemplated by the subscriber, and an assessment levied to collect disbursements for these purposes is valid and binding, though part of the capital stock remains unsubscribed: *Covington etc. Plank Road Co. v. Moore*, 3 Ind. 510; *Salem Mill Dam Corp. v. Ropes*, 23 Mass. (6 Pick.) 23, 26 Mass. (9 Pick.) 187, 19 Am. Dec. 363; *Central Turnpike Co. v. Valentine*, 27 Mass. (10 Pick.) 142; *Littleton Mfg. Co. v. Parker*, 14 N. H. 543; *Anvil Min. Co. v. Sherman*, 74 Wis. 226, 42 N. W. 226; *Milwaukee Brick Co. v. Schoknecht*, 108 Wis. 457, 84 N. W. 838.

7. **Where Subscription is for Particular Purpose.**—In *Iowa etc. Ry. Co. v. Perkins*, 28 Iowa, 281, the defendant subscribed a certain amount to the stock of a railroad corporation, the sum subscribed to be expended on a certain portion of the construction work. Liability on the subscription was resisted, on the ground that the corporate stock had not been fully subscribed. The court said, however: "It is unnecessary to determine the question raised by defendant in its application to stock subscribed generally to the capital of the company, and without the conditions and provisions embodied in the subscription of defendant. As to defendants' subscription the question presents a very different phase. He subscribes for a specific object, and the money he pays in as a part of the capital of the company is to be expended for a particular purpose—the building of a specified portion of the road. It is obvious that as plaintiff had a legal existence and could prosecute the work or building the part of road to which defendants' subscription could alone be applied, that payments can be enforced according to the terms of the subscription."

While this note is concerned, strictly speaking, with the liability of a subscriber to the corporation only, it may be well to note that

where a plaintiff has contracted with a certain number of persons to furnish materials, etc., to them, each in that instrument subscribing a certain sum to a prospective corporation to defray the cost, the liability of each such person to the one agreeing to furnish the materials is a several liability and may be enforced by the latter, although the entire capital stock of the corporation is not subscribed: *Ada Dairy Assn. v. Mears*, 123 Mich. 470, 82 N. W. 258; *Gibbons v. Ellis*, 83 Wis. 434, 53 N. W. 701. See, also, *Davis v. Johnson*, 49 Mo. App. 240; *Burnap v. Sylvania Butter Co.*, 7 Ohio N. P. 217.

8. Waiver of or Estoppel to Insist on Condition.

A. In General.—The rule that in the absence of statute no call or assessment can be collected upon subscriptions to the capital stock of a corporation until all the capital stock has been subscribed is based, as we have seen (ante, V, b, 1), partly upon considerations of public policy, but mainly on the necessity of protecting the individual subscriber from being compelled to contribute a larger share than he intended and from the risk of altogether losing the amount subscribed by reason of insufficient capital being at hand to carry on the projected enterprise. "It may be regretted that there has been any relaxation of that rule," says Gilfillan, C. J., in *Masonic Temple Assn. v. Channell*, 43 Minn. 353, 45 N. W. 716. "But it is so thoroughly established that a subscriber to stock may by his acts debar his right, when called upon to pay for his stock, to object on the ground that the entire stock has not been subscribed for, as to be no longer an open question."

This condition, being implied only and primarily for the subscriber's benefit, may be waived by him, or he may by his acts estop himself from insisting upon it: *California Southern Hotel Co. v. Callender*, 94 Cal. 120, 28 Am. St. Rep. 99, 29 Pac. 859; *Auburn etc. Assn. v. Hill* (Cal.), 32 Pac. 587; *Ridgefield etc. R. Co. v. Reynolds*, 16 Conn. 375; *Hendrix v. Academy of Music*, 73 Ga. 437; *Rutz v. Esler etc. Mfg. Co.*, 3 Ill. App. 83; *Somerset etc. R. R. Co. v. Cushing*, 45 Me. 524; *Stillman v. Dougherty*, 44 Md. 380; *Garling v. Boechtel*, 41 Md. 305; *Musgrove v. Morrison*, 54 Md. 161; *Cabot etc. Bridge v. Chapin*, 60 Mass. (6 Cush.) 50; *Masonic Temple Assn. v. Channell* 43 Minn. 353, 45 N. W. 716; *Walter A. Wood Harvester Co. v. Jefferson*, 71 Minn. 367, 74 N. W. 149; *Inter-Mountain Pub. Co. v. Jack*, 5 Mont. 568, 6 Pac. 20; *Livesey v. Omaha Hotel Co.*, 5 Neb. 50; *Estabrook v. Omaha Hotel Co.*, 5 Neb. 76; *Macfarland v. West Side Imp. Assn.*, 53 Neb. 417, 73 N. W. 736; *Contocook Val. R. Co. v. Barker*, 32 N. H. 363; *Dayton etc. R. Co. v. Hatch*, 1 Disn. (Ohio) 84; *Fairview etc. R. Co. v. Spillman*, 23 Or. 587, 32 Pac. 688; *Doak v. Stahlman* (Tenn.), 58 S. W. 741; *Anderson v. Middle etc. R. Co.*, 91 Tenn. 44, 17 S. W. 803; *Kampman v. Tarver* (Tex. Civ. App.), 29 S. W. 1144.

B. Where Condition Imposed by Statute.—In *Oldtown etc. R. Co. v. Veazie*, 39 Me. 571, it is held that where the charter of a corporation provided that its minimum capital stock should be a certain amount, the subscription of this amount was a condition precedent to the liability of a subscriber, and was a condition which could not be waived by him. After saying that the facts present did not necessarily show an intention to waive this condition, the court says: "There is, however, a more perfect answer to this position. It is that the corporations could not, by any acts alleged to operate by way of waiver or estoppel, relieve the corporation from its obligation to have the capital required by its charter. If a vote had been passed by them with entire unanimity that they would waive all objection on account of a deficiency of capital, and that they would proceed to make assessments on the shares subscribed and to build the road, it would have been but a violation of the charter, and illegal and void. Otherwise, they might by vote relieve the corporation and themselves from all obligation to have any capital, and, acting upon the same rule, they might relieve themselves and the corporation from any obligation imposed by the government, and make their charter whatever they desired it to be, however different from that granted to them by the state."

This view recognizes that one of the bases of the implied condition precedent to a subscriber's liability that all the stock be subscribed is public policy. While, however, it may be regretted (as it is in a Minnesota case already quoted—ante, V, b, 8, A) that there has been any relaxation of the rule, and whatever may be the effect of any acts by a subscriber upon the right of the state to object to a corporation proceeding with its enterprise before its stock is fully subscribed for, the weight of authority is that as between the corporation and the subscriber the latter may waive or estop himself from insisting on this condition, and this, although the condition is imposed by a provision of statute: See, for instance, *New York etc. R. Co. v. Hunt*, 89 Conn. 75; *Hendrix v. Academy of Music*, 73 Ga. 437; *Fairview R. Co. v. Spilman*, 23 Or. 587, 32 Pac. 688.

C. What Amounts to Waiver of, etc.

(1) **In General.**—Whether or not the acts alleged to have been done by a subscriber, and which are relied upon to debar his right to resist liability on an assessment because the requisite amount of stock was not subscribed do in point of fact show an intent to waive this condition is a question of fact and for the jury: *Hendrix v. Academy of Music*, 73 Ga. 437; *Estabrook v. Omaha Hotel Co.*, 5 Neb. 76; *Hurds v. Platte etc. Imp. Co.*, 35 Neb. 263, 53 N. W. 73.

(2) **Payment of Calls.**—If his acts are consistent only with the idea that knowing the necessary amount of capital stock had not been subscribed, he intended he should be liable as a subscriber, nevertheless they amount to a waiver of that condition. If, for instance, with knowledge of the facts, he pays calls, receives profits,

etc., upon his shares, his act in doing so is consistent only with the fact that he regards himself as a shareholder, and such acts are accordingly held to amount to a waiver of the condition that any particular amount of capital stock must be subscribed: *California Southern Hotel Co. v. Callender*, 94 Cal. 120, 28 Am. St. Rep. 99, 29 Pac. 859; *Musgrove v. Morrison*, 54 Md. 161; *Walter A. Wood Harvester Co. v. Jefferson*, 71 Minn. 367, 74 N. W. 149; *Inter-Mountain Pub. Co. v. Jack*, 5 Mont. 568, 6 Pac. 20; *Dayton etc. R. Co. v. Hatch*, 1 Dism. (Ohio) 84. On the other hand, the payment of merely preliminary expenses is consistent with the idea that the subscriber means to insist upon this condition before being held liable for calls and assessments generally, and such payment will not, therefore, be construed as a waiver of this condition: *Livesey v. Omaha Hotel Co.*, 5 Neb. 50. Moreover, the payment of calls must have been with knowledge of the facts: *New York etc. R. Co. v. Hunt*, 39 Conn. 75; *Somerset etc. R. Co. v. Cushing*, 45 Me. 524; and if induced by misrepresentation will not operate as a waiver: *Ridgefield etc. R. Co. v. Bush*, 43 Conn. 86. As before said, the facts must show an intention to act and be liable as a shareholder, although the condition that all the stock be subscribed is not performed.

(3) *Acting as Stockholder, etc.*—Where a subscriber attends meetings and votes his stock for purposes which involves an outlay, such that the necessity of an assessment on the subscribed stock is necessarily contemplated, if these acts are done with the knowledge that the capital stock has not been subscribed, they amount to a waiver of the condition that it must be, and the subscriber is liable, although the full capital stock is not taken: *Garling v. Baechtel*, 41 Md. 305; *Cabot etc. Bridge v. Chapin*, 60 Mass. (6 Cush.) 50; *Masonic Temple Assn. v. Channell*, 43 Minn. 353, 45 N. W. 716; *Dayton etc. R. Co. v. Hatch*, 1 Dism. (Ohio) 84; *Kampman v. Tarver* (Tex. Civ. App.), 29 S. W. 1144. Mere attendance at a stockholders' meeting, where he votes against expenditures which would necessitate an assessment, or at which he is practically a spectator, do not amount to a waiver of this condition: *International Fair etc. Assn. v. Walker*, 88 Mich. 62, 49 N. W. 1086; *New Hampshire Cent. Ry. Co. v. Johnson*, 30 N. H. 390, 64 Am. Dec. 300; *Orynski v. Loustanaun* (Tex.), 15 S. W. 674; *Wartner v. Shairp*, 4 Com. B. 404. So, likewise, of mere acts of participation in the organization of the corporation: *Masonic Temple Assn. v. Channell*, 43 Minn. 353, 45 N. W. 716; *Livesey v. Omaha Hotel Co.*, 5 Neb. 50; and one may, by attending meetings, estop himself from denying that he was a subscriber and yet not thereby estop himself from insisting on the condition that all the capital stock be subscribed before he can be held liable on his subscription: *International Fair etc. Assn. v. Walker*, 88 Mich. 62, 49 N. W. 1086.

(4) *Acting as Officer, Director, etc.*—Acting as an officer, or director of the corporation, attending meetings as such and participating in proceedings to carry on the business for which the cor-

poration is created, where done before the capital stock is all taken and with knowledge of this fact impliedly waives any right to insist that the subscription of all such stock is a condition precedent of one's liability. Such acts are consistent only with the idea that the stock subscribed is available as capital: See *Auburn Opera House etc. Assn. v. Hill* (Cal.), 82 Pac. 587; *Rietz v. Ealer etc. Mfg. Co.*, 3 Ill. App. (3 Bradw.) 83; *Masonic Temple Assn. v. Channell*, 43 Minn. 353, 45 N. W. 716; *Macfarland v. West Side Imp. Assn.*, 53 Neb. 417, 73 N. W. 736; *Dayton etc. R. Co. v. Hatch*, 1 Disn. (Ohio) 84. Compare, however, *Ridgefield etc. R. R. Co. v. Reynolds*, 46 Conn. 375.

(5) **Distinction Between Waiver and Estoppel.**—In most of the cases "waiver" and "estoppel" are used in this connection as interchangeable terms. See, however, as distinguishing the two, *Masonic Temple Assn. v. Channell*, 43 Minn. 353, 45 N. W. 716; *Macfarland v. West Side Imp. Assn.*, 53 Neb. 417, 73 N. W. 736.

c. Calls and Assessments.

1. Necessity for.

A. Where Maturity of Subscription or Installments Fixed by Contract or Statute.—The question whether a call or assessment is or is not a condition precedent to the liability of a subscriber to the capital stock of a corporation is determined by the provisions of the subscription agreement and of the statute and articles of incorporation to which the corporation is subject. Where the contract of subscription contains a promise to pay the amount subscribed in whole or in part at a certain specified date or dates, the obligation to pay matures at the time agreed upon, and no call or assessment is necessary to fix the subscriber's liability: *West v. Crawford*, 80 Cal. 19, 21 Pac. 1123; *West v. Belding* (Cal.), 21 Pac. 1136; *Estell v. Knightstown etc. Co.*, 41 Ind. 174; *Waukon etc. R. Co. v. Dwyer*, 49 Iowa, 121; *Cucullu v. Union Ins. Co.*, 2 Rob. (La.) 573; *Haskell v. Sells*, 14 Mo. App. 91; *Northwood Union Shoe Co. v. Pray*, 67 N. H. 435, 32 Atl. 770. So if the subscription agreement makes no provision as to the time of payment, while the charter provides that all capital stock is to pay within two years, if that length of time has elapsed there need be no averment of calls: *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294.

B. Where Maturity is not Fixed.—Ordinarily, however, no certain time for the payment of the amount subscribed is prescribed in the contract of subscription or in the statutes, etc., governing the corporation, but subscriptions are usually made payable either in express terms or by implication, as the board of directors may by calls or assessments require them to be paid. In such a case a call by the proper body is a condition precedent to the subscriber's liability to pay. Until such call his liability is for no fixed or certain amount, and until then there can be no action upon his subscription: See *Ventura etc. Ry. Co. v. Hartman*, 116 Cal. 260, 48 Pac. 65; *North etc. Ry. Co. v. Spullock*, 88 Ga. 283, 14 S. E. 478;

Spangler v. Indiana etc. Ry. Co., 21 Ill. 276; Banet v. Alton etc. Ry. Co., 13 Ill. 504; Lamar Ins. Co. v. Moore, 84 Ill. 575; Glenn v. Howard, 65 Md. 40, 3 Atl. 895; Halsey Engine Co. v. Donovan, 57 Mich. 318, 23 N. W. 828; Grosse Isle Hotel Co. v. l'Anson, 42 N. J. L. 10, 43 N. J. L. 442; Seymour v. Sturgess, 26 N. Y. 134; Kilbreath v. Gaylord, 34 Ohio St. 305; Germania Iron M. Co. v. King, 94 Wis. 439, 69 N. W. 181. Compare, however, Champion Fire Kindler Co. v. Bischoff, 74 Mo. App. 537; Lake Ontario etc. Ry. Co. v. Mason, 16 N. Y. 451; Williams v. Meyer, 41 Hun, 545.

2. **Validity of**—In General.—As is said in the beginning of this note no attempt will here be made to discuss at any length the essential or formal requisites of a valid call or assessment. The call must, of course, be by the proper authority, usually the board of directors, and ordinarily the determination by that body that the call is necessary or proper cannot be reviewed by a subscriber sued upon his subscription for the amount of the call: See *Visalia etc. Ry. Co. v. Hyde*, 110 Cal. 632, 52 Am. St. Rep. 136, 43 Pac. 10; *Worcester City Hotel v. Dickinson*, 72 Mass. (6 Gray) 586; *Angle-American Land etc. Co. v. Dyer*, 181 Mass. 593, 64 N. E. 416; *Chouteau Ins. Co. v. Floyd*, 74 Mo. 286; *Elderkin v. Peterson*, 8 Wash. 674, 36 Pac. 1089; *American Alkali Co. v. Campbell*, 113 Fed. 398. Unless the necessity of the making the call is by the contract expressly made a condition of the subscriber's liability: *Roberts v. Mobile etc. R. R. Co.*, 32 Miss. 373. Compare *Williams v. Meyer*, 41 Hun, 545. The call must be general and equal in its operation; *Germania Iron Min. Co. v. King*, 94 Wis. 439, 69 N. W. 181; *North Milwaukee Townsite No. 2 v. Bishop*, 103 Wis. 492, 79 N. W. 785; unless the inequality of the call upon the various subscribers is caused by the fact that some have already paid more than others: *Brockway v. Gadsden Mineral Land Co.*, 102 Ala. 620, 15 South. 431. As to the defense that owing to compromises with other subscribers the collection of a call from a particular one would result in discrimination, see *Macon etc. R. R. Co. v. Vason*, 57 Ga. 314; *Succession of Thomson*, 46 La. Ann. 1074, 15 South. 379.

3. Notice of.

A. **Where Required by Statute, etc.**—Where the contract of subscription or, as is more frequently the case, the statutes or articles of incorporation require that notice of calls be given the subscriber or that a demand for payment be made upon him, the authorities are uniform in holding that such provisions are mandatory, and an action cannot be brought on the subscription until the statute has been complied with: *Mississippi etc. R. R. Co. v. Gaster*, 20 Ark. 455; *Alabama etc. R. R. Co. v. Rowley*, 9 Fla. 508; *Macon etc. R. R. Co. v. Vason*, 57 Ga. 314; *Banet v. Alton etc. R. R. Co.*, 13 Ill. 504; *Cole v. Joliet Opera House Co.*, 79 Ill. 96; *Heaton v. Cincinnati etc. R. R. Co.*, 16 Ind. 275, 79 Am. Dec. 430; *Granite Keokuk Co. v. Michael*, 54 Md. 65; *Dexter etc. Plank Road Co. v. Millard*,

3 Mich. 91; *McCarty v. Selmsgrove etc. R. R. Co.* 87 Pa. St. 332; *Butland etc. R. R. Co. v. Thrall*, 35 Vt. 536; *Elderkin v. Petersen*, 8 Wash. 674, 36 Pac. 1089. A provision in the statute which requires notice of calls before shares can be forfeited for their non-payment does not necessarily require notice of a call before an action can be brought thereon: *Smith v. Indiana etc. R. R. Co.*, 12 Ind. 61; *Hill v. Nisbet*, 100 Ind. 341; *Lake Ontario etc. R. R. Co. v. Mason*, 16 N. Y. 451; *Eastern Plank Road Co. v. Vaughan*, 20 Barb. 155. Where, however, the statute provides for notice of a call in "all cases," notice will be required as well when a suit is contemplated as when forfeiture of the shares is sought: *Elderkin v. Peterson*, 8 Wash. 674, 36 Pac. 1089.

Provisions in the statute relative to the time at which the notice must be given, what it must contain, etc., are to be strictly followed. If the statute allows assessments to be made upon such notice being given as the by-laws may provide, provision for notice must have been made by a by-law. A resolution will not suffice: *Germania Iron Co. v. King*, 94 Wis. 439, 69 N. W. 181; *North Milwaukee Townsite No. 2 v. Bishop*, 103 Wis. 492, 79 N. W. 785. If the charter requires a sixty-day notice, or that any other particular length of time elapse between notice and suit, the time of the notice is essential: *Mississippi etc. R. R. Co. v. Gaster*, 20 Ark. 455; *Cole v. Joliet Opera House Co.*, 79 Ill. 96. If the statute requires that the notice specify the place where the call is payable, a statement therein of the person to whom it is payable will not suffice: *Dexter etc. Plank Road Co. v. Millard*, 3 Mich. 91.

The manner in which notice is to be given when specified by the statute must ordinarily be followed, although it is perhaps the law that personal notice will in all cases be sufficient: *Mississippi etc. R. R. Co. v. Gaster*, 20 Ark. 455; *Jones v. Sisson*, 6 Gray, 288; *McCarty v. Selmsgrove R. R. Co.*, 87 Pa. St. 332. See, also, *Schenectady etc. Plank Road Co. v. Thatcher*, 11 N. Y. 102; and compare *Smith v. Indiana etc. R. R. Co.*, 12 Ind. 61. Where, however, no mode is provided in the charter, or where neither publication of notice nor notice by mail is provided for, attempted notice by these means is not a compliance with the statutory requirement: *Hughes v. Antietam Mfg. Co.*, 34 Md. 316; *Lake Ontario etc. R. R. Co. v. Mason*, 16 N. Y. 451.

B. Where not Required by Statute.—In the absence of some statute or provision in the by-laws requiring notice of a call or demand of payment before suit can be brought thereon, the authorities are in conflict as to whether it is necessary. According to one line of cases it is regarded as a condition precedent to the right of recovery. There is, under this view, no presumption that the stockholders have notice of the acts of the directors, and a valid call being a condition precedent of the subscriber's liability, the performance of this condition being within the exclusive control

of the corporation, notice of its performance is held requisite: *Carlisle v. Carlisle etc. R. R. Co.*, 4 Ala. 70; *Alabama etc. R. R. Co. v. Rowley*, 9 Fla. 508; *Germania Iron Co. v. King*, 94 Wis. 439, 69 N. W. 181. See, also, *Essex Bridge Co. v. Tuttle*, 2 Vt. 393. Personal notice is, of course, sufficient: *Alabama etc. R. R. Co. v. Rowley*, 9 Fla. 508.

By the weight of authority, however, unless notice of calls or a demand for payment is required by the charter or by-laws, none need be given. The subscribers, it is said, are bound to take notice of all corporate acts, and unless the forfeiture of the shares is sought (as to this see ante, III, c. 5), no notice of call or demand for payment is required: *Eppes v. Mississippi etc. R. Co.*, 35 Ala. 83 (see, also, *Grubbs v. Vicksburg etc. R. R. Co.*, 50 Ala. 398); *Wilson v. Wills Valley R. R. Co.*, 33 Ga. 466; *Heaston v. Cincinnati etc. R. R. Co.*, 16 Ind. 275, 79 Am. Dec. 430; *Hill v. Mobet*, 100 Ind. 341; *Haskell v. Sells*, 14 Mo. App. 91. There is, of course, no necessity for a demand of payment where the time for payment of the calls is fixed by the contract of subscription: *Swan v. Pittsburgh etc. Assn.*, 6 Kan. App. 572, 51 Pac. 583.

d. *Tender of Certificates of Stock.*—We have already (ante, II, a) touched upon the distinction between a subscription to and a purchase of shares of the capital stock of a corporation. Where the contract is one of purchase, the rules applicable to sales generally control, and there must be a tender of the subject matter of the sale before the vendee can recover the purchase price. Where the contract is one of subscription, however, the rule is otherwise. "The effect of the ordinary subscription to the capital stock of a corporation is to constitute the subscriber a shareholder immediately, with the right to vote at meetings, and share in the dividends, and subject him to a liability to contribute to the amount of his subscription when called upon in a legal manner. His engagement is created directly by the act of subscription. It is the subscription that makes him a shareholder—a written acknowledgment on the part of the corporation of his interest in the corporate franchise and property. It has been repeatedly held that a tender of a certificate for shares is never a condition precedent to the liability of a shareholder to contribute the amount of his shares after a proper call [citing authorities]. The case of an ordinary subscription for shares in a corporation differs from a sale and purchase. Where a person agrees to take or purchase shares, many authorities hold that it is the intention to buy the certificates as a salable article. The delivery of the certificates and payment of the price are considered concurrent acts, and in a failure to carry out the contract neither party can charge the other without averring a tender of performance": *Astoria etc. R. Co. v. Hill*, 20 Or. 177, 25 Pac. 379. See, also, cases cited, ante, II, a.

So far, then, as concerns the necessity of a tender of certificates of stock before suit on a contract of subscription to recover a call, the authorities are uniformly to the effect that unless made a condition by the subscription agreement, no such tender is necessary:

Fulgam v. Macon, 44 Ga. 597; *South Georgia etc. R. Co. v. Ayres*, 50 Ga. 230; *Chandler v. Northern Cross R. Co.*, 18 Ill. 190; *New Albany R. Co. v. McCormick*, 10 Ind. 499, 71 Am. Dec. 337; *Vawter v. Ohio etc. R. Co.*, 14 Ind. 174; *Drover v. Evans*, 59 Ind. 454; *Slipher v. Earhart*, 83 Ind. 173; *Shelbyville v. Shelbyville etc. Turnpike Co.*, 58 Ky. (1 Met.) 54; *Smith v. Gower*, 63 Ky. (2 Duvall) 17; *Kannebec etc. R. Co. v. Jarvis*, 84 Me. 360; *Webb v. Baltimore etc. R. Co.*, 77 Md. 92, 39 Am. St. Rep. 396, 26 Atl. 113; *Columbia Electric Co. v. Dixon*, 46 Minn. 463, 49 N. W. 244; *Marson v. Deither*, 49 Minn. 423, 52 N. W. 38; *Harvester Co. v. Jefferson*, 71 Minn. 367, 74 N. W. 149 (compare *St. Paul etc. Ry. Co. v. Robbins*, 23 Minn. 439, and *Minneapolis Harvester Works v. Libby*, 24 Minn. 327); *Ollesheimer v. Thompson Mfg. Co.*, 44 Mo. App. 172; *Lincoln Shoe Mfg. Co. v. Sheldon*, 44 Neb. 279, 62 N. W. 480; *Kohlmets v. Calkins*, 16 App. Div. 518, 44 N. Y. Supp. 1031; *Battershall v. Davis*, 31 Barb. 323; *James v. Cincinnati etc. R. Co.*, 2 Dism. (Ohio) 261; *Astoria etc. R. R. Co. v. Hill*, 20 Or. 177, 25 Pac. 379; *Paducah etc. Ry. Co. v. Parks*, 86 Tenn. (2 Pick.) 554, 8 S. W. 42; *Dallas Cotton etc. Mills v. Clancy (Tex.)*, 15 S. W. 194.

The tender of certificates may, of course, be made necessary by a provision in the contract of subscription. This is held to result where the action is on a promissory note given in payment of the subscription, and providing for the issuance of certificates on maturity of the note: *Courtright v. Deeds*, 37 Iowa, 503; *Cooper v. McKee*, 49 Iowa, 286; *Lawrence v. Smith*, 50 Iowa, 703; *Hedge v. Gibson*, 58 Iowa, 656, 12 N. W. 713. So, also, where the promise to pay assessments was expressly made dependent upon the delivery of certain bonds, a tender was held a condition precedent to action: *Belfast etc. R. Co. v. Moore*, 60 Me. 561. In *James v. Cincinnati etc. R. Co.*, 2 Dism. (Ohio) 261, the agreement was that certificates should be issued on the payment of each installment, but the court held no tender necessary, although it required an averment of readiness and willingness to deliver. To the same effect, see *Walter A. Woods Harvester Co. v. Jefferson*, 57 Minn. 456, 59 N. W. 532; *Walter A. Woods Harvester Co. v. Jefferson*, 71 Minn. 367, 74 N. W. 149; *St. Louis Rawhide Co. v. Hill*, 72 Mo. App. 142.

VI. Who Liable.

a. **Subscriber not Liable for Calls Made Before Subscription.**
One who subscribes to the capital stock of a corporation is not responsible for calls made prior to his subscription. The call could not operate on stock which was not subscribed at the time the call was made: *Pike v. Bangor etc. R. Co.*, 68 Me. 445. It is not, however, a defense that the corporate liability which necessitated the call was incurred prior to the defendant becoming the owner of the stock: *Visalia etc. R. R. Co. v. Hyde*, 110 Cal. 632, 43 Pac. 10; nor if the stock was subscribed on the same day that the call was made will the day be split into fractions in order that the call may be presumed

to have been subsequent to the subscription: *San Gabriel etc. Co. v. Dennis* (Cal.), 34 Pac. 441.

b. Where Party, Appearing on Books as Owner, is Trustee, etc. One who subscribes to the capital stock of a corporation in his own name cannot resist liability thereon on the ground that his subscription was in fact made on a secret trust, and that another is the legal owner of the stock: *Ollesheimer v. Thompson Mfg. Co.*, 44 Mo. App. 173; see, also, *Long v. Pennsylvania Ins. Co.*, 6 Pa. St. 421; *Mann v. Currie*, 2 Barb. 294. Where, however, he appears on the stock-books as holding the shares in a fiduciary capacity only, he cannot be made personally responsible for the unpaid balance: *Buswell v. Bristol*, 49 Conn. 251; *Biggio v. Sandbeger*, 8 Ohio N. P. 13. Compare, also, *Winston v. Brooks*, 129 Ill. 64, 21 N. E. 514, affirming *Winston v. Dorsett*, 27 Ill. App. 546. The question arises more frequently in suits by corporate creditors to subject subscribers to liability for their unpaid subscriptions, and in this connection see monographic note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 832.

c. On Transfer of Shares.

1. General Rule—Person Appearing on Books as Owner at Time of Call.—Where a subscriber to the capital stock of a corporation transfers his stock to a third person, and has such transfer entered upon the books of the corporation, he ceases, according to the weight of authority, to be liable for future calls. The consent of the corporation to the transfer is, in effect, a novation, a release of the transferor, and an acceptance of the transferee as liable for future calls. Accordingly, for calls made subsequent to the time the transfer became effective on the books of the corporation, the assignor is not, in the absence of statute, responsible, but such calls are collectible from his assignee, who, by his receipt of the stock, and consent to become a stockholder on the corporation books, assumes the liability: *Visalia etc. R. Co. v. Hyde*, 110 Cal. 632, 52 Am. St. Rep. 136, 43 Pac. 10; *Hartford etc. R. Co. v. Booman*, 12 Conn. 530; *Haynes v. Palmer*, 13 La. Ann. 240; *McKim v. Glenn*, 66 Md. 479, 8 Atl. 130; *Bingham v. Mead*, 92 Mass. (10 Allen) 245; *Chateau Spring Co. v. Harris*, 80 Mo. 382; *Vale Mills v. Spalding*, 62 N. H. 605; *Isham v. Buckingham*, 49 N. Y. 216; *Billings v. Robinson*, 94 N. Y. 415; *Rochester etc. Land Co. v. Raymond*, 4 App. Div. 600, 39 N. Y. Supp. 145; *Cowles v. Cromwell*, 25 Barb. 413; *Cole v. Ryan*, 52 Barb. 618; *Palmer v. Lawrence*, 5 N. Y. Super. Ct. (3 Sand.) 161; *In re Long Island R. R.*, 19 Wend. 37, 32 Am. Dec. 429; *Cole v. Adams*, 19 Tex. Civ. App. 507, 49 S. W. 1052; *Stewart v. Walla Walla Pub. Co.*, 1 Wash. 521, 20 Pac. 605.

The assignor remains liable, however, for calls made before the transfer on the books of the company, although they are not payable until after the transfer is effected. Upon the call being made, the assignor becomes charged with a definitive debt—a sum fixed and certain. This he is bound to pay, and cannot release himself there-

from by a subsequent transfer: *American Alkali Co. v. Campbell*, 113 Fed. 398.

The point of time, moreover, when the transfer becomes effective with respect to the corporation, is when the transfer is entered on the books of the latter. Until that time, there is no consent to a novation of the parties by the corporation, and a secret transfer cannot effect such a substitution. The party appearing as the stockholder in the books of the company is liable as such: *Russell v. Easterbrook*, 71 Conn. 50, 40 Atl. 905; *Louisiana Ins. Co. v. Gordon*, 8 La. 174; *Kruger v. Hanover Nat. Bank*, 72 Miss. 462, 16 South. 351; *Vale Mills v. Spaulding*, 62 N. H. 605; *Mann v. Currie*, 2 Barb. 294; *Upton v. Burnham*, 3 Biss. 431, Fed. Cas. No. 16,798, and cases cited, ante, p. 288, in this subd. See, in this connection, *Isham v. Buckingham*, 49 N. Y. 216, where the corporation was held to have waived the requirement that the transfer appear on its books.

2. **Bona Fides of Transfer.**—In order that the transaction may operate to release the transferrer and substitute in his stead the transferee, it must be bona fide, and not a fraud on the corporation: See *Rochester etc. Land Co. v. Raymond*, 4 App. Div. 600, 39 N. Y. Supp. 145; *Muskingum Valley Turnpike Co. v. Ward*, 13 Ohio, 120, 42 Am. Dec. 191; *Stewart v. Walla Walla Pub. etc. Co.*, 1 Wash. 521, 20 Pac. 605. The question of bona fides in this connection, however, is of but little relative importance, where the action is by the corporation, the great majority of the cases in which it is considered being those in which the rights of creditors or of other shareholders are involved. As to this, see monographic note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 830.

3. **Necessity of Express Promise by Transferee to Pay Subscription.**—In Pennsylvania, the courts have taken a peculiar position. They do not require (as we have seen is required in some few states, ante, III, b, 2, A) that the original subscriber to stock should make an express promise to pay for the shares subscribed in order that he may be held personally liable for calls, but they do hold that an assignee is not thus liable in the absence of an express promise to pay. In other words, unless the assignee of an original subscriber makes an express promise to pay for subsequent calls on the shares assigned, he is not personally liable therefor, although the transfer be entered on the books of the corporation. Whatever remedy exists is either against the original subscriber, who remains liable, or against the shares themselves by forfeiture or sale: *Palmer v. Ridge Min. Co.*, 34 Pa. St. 288; *Frank's Oil Co. v. McCleary*, 63 Pa. St. 317 (distinguishing *Merrimac Min. Co. v. Levy*, 54 Pa. St. 227, 93 Am. Dec. 697); *Messersmith v. Sharon Sav. Bank*, 96 Pa. St. 440. See, also, *West Philadelphia Canal Co. v. Innes*, 3 Whart. 198. See, however, as limiting this doctrine where the creditors of an insolvent corporation seek to recover unpaid subscriptions from the transferee of stock: *Bell's Appeal*, 115 Pa. St. 88, 2 Am. St. Rep. 532, 8 Atl. 177. Where the owner of stock promises a purchaser that he will pay calls,

the corporation cannot maintain an action on such promise: *Crown Slate Co. v. Allen*, 199 Pa. St. 239, 48 Atl. 968.

Under a Pennsylvania statute forbidding the transfer of shares, without the consent of the directors, of one "indebted to the company," it is held that a subscription, although no calls have been made, makes the subscriber "indebted to the company": *Pittsburg etc. R. R. Co. v. Clarke*, 29 Pa. St. 146; *Graff v. Pittsburg etc. R. R. Co.*, 31 Pa. St. 489. See, also, in this general connection, *American Alkali Co. v. Campbell*, 113 Fed. 398.

4. Statutory Provisions.—The general rule that a transfer of stock on the books of the corporation operates to relieve the assignor from liability for further calls, and to substitute the assignee in his stead, may, of course, be changed by statute. In Virginia, for instance, the liability of the assignor is not released by the transfer of the stock: See *Morris v. Glenn*, 37 Ala. 628, 7 South. 90; *McKim v. Glenn*, 65 Md. 479, 8 Atl. 130; *Glenn v. Hunt*, 120 Mo. 330, 25 S. W. 181; *Hamilton v. Glenn*, 85 Va. 901, 9 S. E. 189; *Priest v. Glenn*, 51 Fed. 400. 2 C. C. A. 305. In other states, the liability of the assignor is continued for a certain period, as for one year, after the transfer, and this is held to mean after a transfer on the books of the company: See *Kruger v. Hanover Nat. Bank*, 72 Miss. 462, 16 South. 351, and statutes of Maine, Mississippi, and Wisconsin, there referred to.

In Tennessee, it is held that the banking law of 1859-60 made the original subscriber liable until the entire subscription was paid, notwithstanding assignments: *Marr v. Bank of West Tennessee*, 72 Tenn. (4 Lea) 578. Where a charter provided that "no transfer of stock should exempt the party transferring it from the obligation of paying installments afterward called for until fifty per cent shall have been paid," the exemption from liability because of a transfer did not, it was held, extend to a call made payable prior to the transfer, although over fifty per cent of the subscription had been paid at the time of transfer: *Vicksburg etc. R. Co. v. McKeen*, 14 La. Ann. 724.

5. Liability of Bona Fide Assignee.—The scope of this note being restricted to a discussion of the liability of a subscriber to the corporation, no attempt will be made to discuss the liability of bona fide assignees of corporate stock where the certificates appear to be for full-paid stock. This will be found considered in the note to *West Nashville Planing Mill Co. v. Nashville Sav. Bank*, 6 Am. St. Rep. 838-840; and so far as relates to suits by creditors for unpaid subscriptions, in the monographic note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 806-873.

VII. Defenses.

a. Statute of Limitations.

1. General Rule—Runs from Time Each Installment is Payable.—It is a rule of general application that the period prescribed by statute of limitations within which action must be brought on a cause of action begins to run only from the time the cause of action accrues. The

rule is equally applicable to actions brought on a contract of subscription by a corporation. If, as is usual, the subscription is payable on calls being made by the directors, the great weight of authority is that the statute begins to run against each call only from the time it becomes due and payable. The theory of this holding is well expressed in *Glenn v. Williams*, 60 Md. 93: "The contract contemplated the exercise of judgment and discretion on the part of the president and directors as to the times and amounts of future payments on the stock, and there was nothing due from the stockholders until such amounts were determined on and regularly called for. Until a regular call made, there was no unconditional liability on the part of the stockholder to pay. Until then he could not know when to pay, or how much he would be required to pay. The subscription, therefore, was conditional, as to the times and amounts of payment; and consequently, there was no fixed obligation of the stockholder to pay, and no right of action against him, until an assessment and call made, either by the president and directors or by the order of a court of competent jurisdiction. It is for the amount of the assessment made that the right of action accrues, and not for the whole balance of the unpaid subscription, unless the whole amount be called for; and it is only from the time of the assessment and call made that the statute runs in favor of the defendant. This is the settled doctrine upon the subject and it has been fully recognized and approved by this court."

It is, then, from the time when each call is made, due and payable, and the cause of action has accrued thereon, that, by the weight of authority, the statute of limitations begins to run against an action to recover the amount of that installment: *Curry v. Woodward*, 53 Ala. 371; *Macon etc. R. Co. v. Vason*, 52 Ga. 326; *Great Western Tel. Co. v. Gray*, 122 Ill. 630, 14 N. E. 214; *Consol. Assn. of Planters v. Lord*, 35 La. Ann. 425; *Baltimore etc. Turnpike Co. v. Barnes*, 6 Har. & J. (Md.) 57; *Glenn v. Williams*, 60 Md. 93; *Fitzgerald v. Union Sav. Bank (Neb.)*, 90 N. W. 994; *Western R. Co. v. Avery*, 64 N. U. 491; *Kilbreath v. Gaylord*, 34 Ohio St. 305; *Lewis v. Glenn*, 84 Va. 947, 6 S. E. 866; *Glenn v. Marbury*, 145 U. S. 499, 12 Sup. Ct. Rep. 914; *Priest v. Glenn*, 51 Fed. 405, 2 C. C. A. 311; *Dorsheimer v. Glenn*, 51 Fed. 404, 2 C. C. A. 309; *Priest v. Glenn*, 51 Fed. 400, 2 C. C. A. 305. Similarly, an action brought to recover a deficiency due after sale of a delinquent subscriber's shares is not barred by the statute until the period of limitations has elapsed between the ascertainment of the amount of the balance due (i. e., from the time of the sale) and the commencement of the action: *Cape Fear etc. Nav. Co. v. Wilcox*, 52 N. C. (7 Jones), 481, 78 Am. Dec. 260; *Cape Fear etc. Nav. Co. v. Caston*, 63 N. C. 264. When once a call is made it becomes a stated account and the statute of limitations relating to "open accounts" is inapplicable: *New Orleans etc. R. Co. v. Lea*, 12 La. Ann. 388; *New Orleans etc. Co. v. Estlin*, 12 La. Ann. 184.

In an Alabama case (*Semple v. Glenn*, 91 Ala. 245, 24 Am. St. Rep. 894, 6 South. 46, 9 South. 265), the general rule just stated is admitted to be the proper doctrine, but prescription is distinguished from the operation of the statute of limitations, and it is held that where more than twenty years have elapsed since a subscription without any recognition of his liability on the part of the subscriber, the doctrine of prescription is applicable, and there is a conclusive presumption of payment.

2. Doctrine that Call Must be Made Within Statutory Period.—

The rule that the statute of limitations begins to run against an action on a subscription only from the time a proper call was made and payable, or the subscription became otherwise due (as where originally made payable at certain times), while supported by the weight of authority is not universally followed. In at least two states the rule seems otherwise. In *Great Western Tel. Co. v. Purdy*, 83 Iowa, 430, 50 N. W. 45, it is held that the corporate officers cannot by failure to make a call for a long period defeat the operation of the statute by their own inaction. "Surely," says the court, "it would be wholly unreasonable to say that the company had not the right to commence an action for the reason that it had not ordered payment and given notice thereof. . . . It is the case of a creditor or obligee holding, by the terms of his contract, the power to acquire, by his own act, the right to maintain an action upon the contract. It is plain that this power must be exercised at a just and reasonable time, and not hastened or delayed to the prejudice of the other party." Accordingly, where no call binding on the defendant had been made for over ten years, his liability or his subscription was held barred by the statute of limitations.

Similarly, in Pennsylvania, although the rule is recognized that the statute runs from the date of call only, yet it is held that unless the call itself is made within the statutory period (six years) after the subscription, the right to make the call (unless the delay be satisfactorily explained) will be held from analogy to the statute to be barred: *Pittsburgh etc. R. R. Co. v. Byers*, 32 Pa. St. 22, 72 Am. Dec. 770; *McCully v. Pittsburgh etc. R. R. Co.*, 32 Pa. St. 25; *Pittsburgh etc. R. R. Co. v. Graham*, 36 Pa. St. 77; *Shackamaxon Bank v. Disston*, 4 Pa. Co. Ct. Rep. 201. If the delay to make any calls be explained by evidence that it was in accordance with and the result of a corporate policy, in which the defendant subscriber acting as director, had concurred, the delay will not operate as a bar, though it exceeds the period of six years: *In re Lindsay*, 19 Pa. Co. Ct. Rep. 3.

b. Inability of Corporation to Deliver Stock.—The general subject of fraudulent and overissued corporate stock is considered in the monographic note to *First Avenue Land Co. v. Parker*, 87 Am. St. Rep. 847. The obligation of a subscriber to pay and of a corporation to confer upon him the rights of a stockholder are mutual. If the entire capital stock of the company has been exhausted by

prior issues to other persons it has thereby rendered itself unable to perform its part of the contract and cannot recover on the subscription. There can obviously be no recovery on a subscription to stock which the corporation is unable to deliver: *Clark v. Turner*, 73 Ga. 1; *Leigh v. Chattanooga etc. R. Co.*, 104 Ga. 13, 30 S. E. 381. Similarly, where the subscribed capital exceeds that allowed by the charter and there is no apportionment of the stock, there can be no liability upon any of the subscriptions: *Bristol Creamery Co. v. Tilton*, 70 N. H. 239, 47 Atl. 591. A mere allegation, however, that the promoters of the corporation secured subscriptions to more than the authorized stock is not a defense to an action on the subscription in the absence of an averment that the excess of subscription entered into the actual stock of the corporation when organized: *Shick v. Citizens' Enterprise Co.*, 15 Ind. App. 329, 57 Am. St. Rep. 230, 44 N. E. 230.

c. *Miscellaneous Defenses.*—In general, the defenses available to a subscriber when sued upon his subscription are those which concern the contract itself. They are such matters as nonperformance of conditions precedent, the invalidity of the contract, the statute of limitations, etc. It is not a defense that the corporation or its directors have engaged in ultra vires acts, nor that the corporate officers have indulged in fraud or mismanagement. These are violations of duty to be prevented or redressed by other means and in other proceedings. They do not furnish a defense to the enforcement of liability on a contract of subscription: *Cravens v. Eagle Cotton Mills*, 120 Ind. 6, 16 Am. St. Rep. 298, 21 N. E. 981; *Oldham v. Mt. Sterling Imp. Co. (Ky.)*, 45 S. W. 779; *Sedalia etc. R. Co. v. Abell*, 17 Mo. App. 645. Similarly, the failure to prosecute or abandonment of work on the corporate enterprise is not a valid defense to an action upon a subscription: *Hardy v. Merriweather*, 14 Ind. 203; *McMillan v. Maysville etc. R. Co.*, 54 Ky. (15 B. Mon.) 218, 68 Am. Dec. 181; *Salem Milldam Corp. v. Ropes*, 26 Masa. (9 Pick.) 187; *Buffalo etc. R. Co. v. Clark*, 22 Hun, 359; *Crossman v. Penrose Ferry Bridge Co.*, 26 Pa. St. 69; *Dallas Cotton etc. v. Clancey (Tex.)*, 15 S. W. 194.

VIII. Conflict of Laws.

Where the liability of a subscriber to the stock of a corporation is sought to be enforced in a state or country other than that where the corporation is created, the law of the latter place governs. "It is a familiar principle that a corporation, and all who deal with it, are bound by the law of its creation, and all such laws as may be legitimately prescribed for its government by the sovereign authority from which it derives its corporate existence. All persons, therefore, becoming stockholders in the company must be conclusively presumed to have contracted with reference to and assumed all the liability prescribed by the law of the domicile of the corporation. Such presumption is indulged, because the corporation must of necessity be controlled by the existing law of the state

where it has its being, and it has no power to accept a party as a stockholder on its books with a view to any other principle than that prescribed by the law of the state": *McKim v. Glenn*, 66 Md. 479, 8 Atl. 130. To the same effect see *Morris v. Glenn*, 87 Ala. 628, 7 South. 90; *Fish v. Smith*, 73 Conn. 377, 84 Am. St. Rep. 161, 47 Atl. 71; *Mandel v. Swan Land etc. Co.*, 154 Ill. 177, 45 Am. St. Rep. 124, 40 N. E. 462; *Bank of China, Japan and the Straits v. Morse*, 44 App. Div. 435, 61 N. Y. Supp. 268; *Crofoot v. Thatcher*, 19 Utah, 212, 57 Pac. 171. In *Nashau Sav. Bk. v. Anglo-Am. Land Mtg. etc. Co.*, 108 Fed. 764, 48 C. C. A. 15, it is held in accordance with this rule that when a foreign (English) corporation sues in a particular state to recover a call, the question whether the power to forfeit the delinquent stock is an exclusive remedy depends upon the foreign law and not upon the *lex fori*. See in this general connection the monographic note to *Fowler v. Lamson*, 37 Am. St. Rep. 168-175, on the enforcement in other states of the personal liability of stockholders.

BOSTOCK v. SAMS.

[95 Md. 400, 52 Atl. 665.]

MANDAMUS Will Issue to Compel the Granting of a Building Permit when the requisite formalities prescribed by ordinance have been complied with. (p. 398.)

BUILDING—Common-law Right to Erect and to Determine the Character of.—Every citizen has the common-law right to acquire title to a tract of land in a city, and build thereon as his taste, convenience, or interest suggests, or his means justify, without taking into consideration whether his building will conform in general character and appearance to others previously erected in the same locality. (p. 400.)

MUNICIPAL CORPORATIONS—Buildings, Ordinances Undertaking to Determine Character of.—A municipal ordinance authorizing the withholding of a permit for the erection of a building if it does not conform in general character to the buildings previously erected in the same locality, and will tend to materially diminish the value of the surrounding improved or unimproved property, is not justified by a grant to the municipality of the power to regulate buildings and pass ordinances for the preservation of order and securing property and persons from danger, violence, and destruction, and maintaining the peace, good government, health, and welfare of the city. (p. 402.)

MUNICIPAL ORDINANCE—When not Validated.—A new charter continuing in force, until repealed, all existing municipal ordinances does not validate ordinances which the municipality had not the power to enact. (p. 403.)

MUNICIPAL ORDINANCES—When Valid in Part though Void in Part.—A municipal ordinance containing a provision which is invalid because of want of power to enact it, may be enforced as to its other provisions which can be given full effect without granting effect to the invalid parts. (p. 404.)

Application for mandamus, which was dismissed in the trial court, and the petitioner appealed.

Edgar H. Gans and William J. O'Brien, Jr., for the appellant.
William Pinkney Whyte, for the appellees.

407 JONES, J. This case originated in a petition for a mandamus filed in the court of common pleas of Baltimore City by the appellants against the appellees, to compel the latter to issue to the former a permit to erect a building upon a lot situated at the northeast corner of Mount Royal and Maryland avenues in the city of Baltimore. The case will turn upon the powers and duties of the appellees, composing the appeal tax court, a subdepartment of the municipal government of Baltimore City under the provisions of its charter, in respect to the issuing of a permit of the kind applied for. These powers and duties are defined in the following provisions of the ordinances of the city now codified and appearing in the City Code (1893), in article 50, as sections 24, 25, 27, and 28, and which read as follows:

"Sec. 24. It shall not be lawful for any person, without a permit from the appeal tax court, to erect within the limits of the city any building upon a new foundation, whether in connection with an existing building or not, or to pull down any old building or part of a building to the ground, and build upon the old foundation, or to put an additional story upon any building or part of a building by increasing the height of the walls; and any person or persons who may build within the city of Baltimore shall be required to take out a permit for each and every house he or they may purpose to build.

408 "Sec. 25. All persons receiving permission for the erection of any special improvements from the city council shall, before commencing the erection of the same, obtain the indorsement of the appeal tax court on said permit."

"Sec. 27. Whenever application accompanied by the payment of the cost of the advertisement provided for in section 28 is made to the judges of the appeal tax court for a permit or permits to erect any new building or buildings on any street or avenue of the width of fifty feet or more, the person or persons making such application shall be required, before such permit or permits shall be granted, to file with the appeal tax

court a plat accurately describing the piece or parcel of ground to be improved, giving the front and depth thereof, its distance from the nearest established corner of a street, lane or alley, and the number of improvements (if more than one) proposed to be erected thereon; also an accurate description of the frontage, height, depth, material to be used in the proposed building or buildings, and the general appearance and cost of same.

"Sec. 28. It shall be the duty of the judges of the appeal tax court to grant such permits on application, without charge, except as hereinbefore provided, and to keep a record of all permits issued; provided, that no such permit shall be granted unless in the judgment of the said judges of the appeal tax court, or a majority of them, the size, general character and appearance of the building or buildings to be erected will conform to the general character of the buildings previously erected in the same locality, and will not in any way tend to depreciate the value of surrounding improved or unimproved property; and provided further, that before any such permit shall be granted, at least ten days' notice by advertisement inserted in some daily newspaper shall be given by the appeal tax court that application for such permit has been made. And before any permit shall be granted to erect any building or buildings within the limits of the city of Baltimore, the applicant shall first satisfactorily prove to the judges of the appeal tax court that provision has been made for such drainage as the topography of the ground requires."

⁴⁰⁹ The petition for mandamus filed by the appellants alleged that the appellant Frank C. Bostock had leased for a valuable consideration from a certain William P. Harvey, who was the owner thereof the lot of ground which has been referred to, and was in possession thereof with authority from the owner to erect thereon the building for the erection of which a permit was applied for; and that he had entered into an agreement with the appellant, Edgar M. Noel, to erect for a consideration a building on the said lot; and that for the purpose of executing this agreement the said Noel had duly applied to the appeal tax court for a permit to erect said building. The petition then sets out the provisions of the ordinances of the city regulating the application for, and the granting of permits for, the erection of buildings within the city, and shows upon its face that all of the requirements of the said provisions were complied with by the appellants in making application for the permit which they seek to have granted in this case. The petition then

shows that the appellees composing the appeal tax court refused the application of the appellants for a permit to erect the building therein indicated, and passed an order to that effect in which they assigned as reasons for their refusal that the plans and specifications for the proposed building "presented to the inspector of buildings and examined by the appeal tax court" did not, in their opinion, "conform to the general character of the buildings in the said locality," and that the use of the building proposed to be erected "will be for the purposes of a zoo"; among which purposes was "to show wild animals, in reality conducting a continuous circus upon one of the most beautiful streets in the city of Baltimore." It also appeared from the petition that Mount Royal avenue, the street upon which the building was proposed to be erected, was more than fifty feet in width.

The appellees in their answer admit all the allegations of fact of the petition except those contained in the first paragraph thereof, which were that the appellant Bostock had leased and was tenant in possession of the lot upon which the ⁴¹⁰ building for the erection of which the permit was applied for, was to be erected, and had entered into an agreement with the appellant Noel to construct a building thereon. These allegations they refused to admit and called for proof of the same. The defense made by the answer was in substance and effect that the appellees had a discretion as to the granting or refusing of the permit, and were justified in their refusal thereof because the building for which the permit was applied for "would not conform to the general character of the buildings previously erected in the same locality, and would tend materially to depreciate the value of the surrounding improved or unimproved property." The answer was demurred to and the demurrer was overruled. The petitioners then joined issue upon that part of the answer which did not admit the allegations of the petition contained in the first paragraph thereof, and demurred to all other parts thereof, which demurrer being overruled, the petitioners joined issue thereon "as far as said answer in any way denies the averment of facts contained in the petition."

The case was then tried before the court without a jury. Testimony was taken and there was proof on the part of the appellants going to show that the appellant Bostock had, with the owner of the lot upon which the proposed building was to be erected, a contract founded upon a valuable consideration which gave him the right to erect a building upon said lot, and that

said Bostock had possession of the lot for that purpose if a permit could be obtained; and that he had entered into an agreement with the appellant Noel for a consideration to have a building erected thereon. At the conclusion of the testimony the petitioners offered a prayer to the effect that if the court should find from the evidence—1. "That on the twenty-second day of October, 1901, the petitioner, Frank C. Bostock, was, and now still is, the tenant in possession of the lot of ground mentioned in the petition with authority from the owner thereof to erect thereon the building mentioned in said petition"; 2. "And that on said day the petitioner, Edgar M. Noel, as agent and builder for the petitioner, Frank C. Bostock, ⁴¹¹ applied for the permit mentioned in said petition"; 3. "That then under the pleading in this case the verdict must be for the petitioners." This prayer was refused by the court, to which refusal the petitioners excepted. The court ordered that the writ of mandamus be refused, and the petition therefor be dismissed. From this order the petitioners have appealed.

It will be seen from the course of the pleading and the nature of the defense relied upon by the appellees that the most important and the substantial inquiry involved in the case before us is as to what lawful discretion is given to the appellees to withhold a permit, upon application made, by virtue of the proviso in the ordinance of the city regulating the issuing of permits which is embodied in section 28 of the City Code, and which reads as follows: "Provided, that no such permit shall be granted unless in the judgment of the said judges of the appeal tax court, or a majority of them, the size, general character and appearance of the building or buildings to be erected, will conform to the general character of the buildings previously erected in the same locality, and will not in any way tend to depreciate the value of surrounding improved or unimproved property." Treating this proviso as not being contained in the provisions of the ordinances relating to the granting of permits that have been recited, and assuming that the allegations of the petition for mandamus, in respect to the tenancy and possession of the appellant Bostock, of the lot of ground mentioned in the petition as the site of the proposed building, to have been sufficiently proved, it having been admitted on the face of the pleadings that all the requisites and formalities prescribed by the ordinance to accompany an application for a permit to build had been complied with, it became the duty by the very terms of the ordinance of the appeal tax court to issue the permit upon

the application of the appellants as made. What remained to be done, therefore, by the appellees would, upon the hypothesis stated, have become a plain duty and a mere ministerial act which they could not arbitrarily refuse to perform and upon such refusal mandamus would lie to compel the performance of the duty: *Brayshaw v. Ridout*, 79 Md. 454, 49 Atl. 515.

412 Taking up, now, for consideration the defense set up by the appellees based upon the discretion with which they claim to be invested perforce the proviso which had been recited, the fundamental question to be determined is whether this proviso is a valid part of the ordinance under which the appellees were called upon to act, and as to this the first inquiry is, Was the corporation, the mayor and city council of Baltimore, empowered by any provision of its charter to prescribe the conditions contained in the proviso in the connection in which it occurs? As a guide to this inquiry, we may very aptly quote from what was said by Mr. Dillon in his admirable work on *Municipal Corporations* in relation to the construction of the powers of such corporations: "The fundamental and universal rule which is as reasonable as it is necessary, is, that while the construction is to be just, seeking first of all for the legislative intent in order to give it fair effect, yet any ambiguity or doubt as to the extent of the power is to be determined in favor of the state or general public, and against the state's grantee." Then, after saying that this is not so directly applicable to municipal as to private corporations, he proceeds as follows: "But it is equally applicable to grants of power to municipal and public bodies which are out of the usual range, or which may result in public burdens or which in their exercise touch the right to liberty or property or, as it may be compendiously expressed, any common-law right of the citizen or inhabitant": 1 *Dillon on Municipal Corporations*, 4th ed., p. 148, sec. 91. Again, at page 394, section 317 of the same work it is said: "Since all the powers of a corporation are derived from the law and its charter, it is evident that no ordinance or by-law of a corporation can enlarge, diminish or vary its powers."

The foregoing citations are made as a clear and terse statement of the rules and principles of law applicable to the case at bar, and not because we think there is need that they should be fortified by citing authority. Now, undoubtedly, the proviso in the ordinance here under consideration attempts to confer powers that affect the citizen in his right of property and his common-law right. It cannot be contended that the 412

citizen has not the common-law right to acquire title to a lot of land, qualified or absolute, in a city as elsewhere, and to build upon and improve it as his taste, his convenience or his interest may suggest or as his means may justify, without taking into consideration whether his buildings and improvements will conform in "size, general character and appearance" to the "general character of the buildings previously erected in the same locality"; even though there might be those in whose "judgment" his so building might in some way "tend to depreciate the value of surrounding improved or unimproved property." Notwithstanding the delicate power conferred by the proviso in question—a power to control the citizen in the exercise of important and valuable gifts of property—the power is conferred in the most vague and general terms and an unlimited and unregulated discretion is given to an agency of the city government thereunder. No standard is set up according to which this judgment is to be exercised; nor means provided by which it is to be instructed or controlled, and the citizen is left helpless to question its exercise in any particular case. What is meant by the "general character of the buildings previously erected"? And what is there to define and fix this? What is to determine the locality within the bounds of which the conformity of building provided for by the ordinance is to be required? What is to be its extent, and what its limits? What is the depreciation of property against which the ordinance seeks to guard? Is it a present and immediate depreciation, or is it to be a depreciation which may, in the judgment or opinion of the appeal tax court, occur sometime in either a near or a remote future, and which in fact may never occur? A right to create power so vague and undefined in its scope, so entirely unrestricted in its exercise, and so essentially arbitrary in its character, designed to abridge important and valuable property rights of the citizen, if it can be conferred at all upon a municipal corporation, ought to be found to be so conferred in very clear terms or by some necessary implication.

Nowhere in the charter of the city of Baltimore can it be ⁴¹⁴ found that there is conferred upon the corporation, by any express legislative provision, the power implied in the ordinance under consideration. Nor can such power be deduced by any reasonable implication from any of the specific or general powers enumerated and granted in the charter. The general powers are found enumerated in section 6 of the charter as enacted by act

of 1898, chapter 123. Without undertaking to quote at large this enumeration of powers granted, it may be affirmed of them that those which are therein contained to authorize the regulation of building within the city look to regulations to guard against dangers to arise from an unsafe construction of buildings; or from constructing them of inflammable materials: or in such manner as might prove offensive, or deleterious to health; or in a way to involve danger to other property, or to life or limb. In other words, they are powers which fall within the purview of what is known as the police power. The proviso under consideration has no reference to any of the objects specified or provided for in the authority given the corporation to make regulations as to buildings. It contains no suggestion that it was intended to provide for the public safety; nor to safeguard the health or morals of the community; nor to preserve public order; nor in any way to be promotive of any object which calls for the exercise of the police power. Under subtitle "Police Power" of section 6 of the charter, this power is conferred that the city may "pass ordinances for preserving order, and securing property and persons from violence, danger and destruction, protecting the public and city property, rights and privileges from waste or encroachment, and for promoting the great interests and insuring the good government of the city." While thus a broad discretion is given the corporation to use the police power, the nature of the power is clearly indicated in the terms and in the connection in which it is granted; and the nature of the objects and purposes for which it is to be used is pointed out. None of these objects or purposes can be subserved by compelling the citizen to conform a building which he may desire to erect to the "general character" of ⁴¹⁵ the building which his neighbor may previously have erected; nor to take into consideration whether, however lawful the character of his structure, or the use for which it is intended, may be, its erection will in the uncontrolled opinion of a designated agency of the corporation, "in any way tend" to depreciate the value of property in an undefined locality.

It is further provided in section 6 of the charter subtitle "Welfare and Other Powers" that the city may pass "such ordinances as it may deem expedient in maintaining the peace, good government, health and welfare of the city of Baltimore." This, in effect, is but a repetition of the grant of the general power which has just been referred to as contained in subtitle "Police Power" of this same section, and does not further en-

large the scope of the powers of the corporation. Under this general power, the municipality, acting within the limits of legitimate corporate authority, and to carry out and make effective its lawful powers, may pass ordinances prescribing general regulations applicable alike to all citizens, and by which each may regulate his conduct and know his rights and his duty as a member of the corporation; but it is not consistent with any express or implied power that is to be found in the municipal charter that any individual, or any agency of the corporation should be invested with the unrestrained and unregulated power and authority to say, in each particular case as it arises, what the good government and welfare of the community may demand when dealing with and undertaking the control of, the rights of the citizen in respect to the enjoyment and use of his property, as has been done by the provision of the ordinances of the city here brought under consideration if the same is to be held valid. The right of the corporation to confer such a power cannot therefore be derived from any implication.

Since we can find no legislative grant of authority to the city of Baltimore under its charter to enact the provision of municipal legislation upon which we have here to pass, either express or to be implied from any of the legitimate and recognized powers of the corporation, we are constrained to hold ⁴¹⁶ the same ultra vires and void. The case at bar bears a strong analogy to the case of *Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239, in which the question was as to the validity of a provision in an ordinance giving to the mayor of the city the power to revoke permits that had been granted for the use of steam-engines within the limits of the city. This court found that ample power had been granted to the city to regulate the use of steam-engines within the limits thereof; but that the character of power attempted to be exercised in enacting the provision of municipal legislation there drawn in question, was not appropriate or legitimate to be implied for carrying the granted power into effect, and the provision referred to was pronounced inoperative and void because it committed the doing of an act affecting valuable rights of the citizen "to the unrestrained will of a single public officer," and laid down "no rules by which its impartial execution" could be secured or "partiality or oppression prevented." The court saying that if the officer chose to act only in particular cases, there was nothing "in the ordinance to guide or control him." The characterization of the power attempted to be exercised in that case and the

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It is argued that though the authority to enact the proviso of the ordinance here in question was not originally given by the legislature, yet it was ratified and made effective by the third section of the act of 1898, chapter 123. This does not result ⁴¹⁷ from a proper construction of the section of the act of 1898 referred to. In the first place only such ordinances as were not inconsistent with the act were ratified, and if this ordinance contained provisions that implied powers conferred upon the corporation which the act did not intend to grant, but withheld, then the ordinance was plainly inconsistent with the act. But the provision of the act of 1898 which is here invoked as ratifying the ordinance in question has no reference to validating invalid ordinances, and was not intended to have such operation and effect. It was merely intended to preserve the municipal status as to all laws and ordinances that might be in force at the date of the adoption of the charter provided by the act of 1898, chapter 123, and to continue them in force, in the passing of the corporation from the control of the old charter to that of the new, with the same effect and no more, as if the change in the charter had not been made.

We have not thought it necessary to notice specially the ground of the refusal of the appellees to grant the permit applied for by the appellants, based upon the alleged use which the building proposed to be erected was intended for. The ordinance in question does not profess to give the appeal tax court the right or power to go into such inquiry upon application being made for these permits; and no such inquiry is within the scope of their duty or their powers in that connection. If the building which the appellants propose to erect

shall be put to the use it is alleged to be intended for, and a question shall then be raised as to the legality of that use, such question will then become one of interest to the community, and of more serious import to those owning and making use of the property in question; but it has no place in this discussion.

We may take up, now, the action of the trial court upon the pleadings and upon the appellant's exception. The demurrer to the whole answer of the appellees was properly overruled. The petition in its first paragraph alleged matters of fact which the answer did not admit, and it was proper these allegations as to the tenancy and possession of the property and the right ⁴¹⁸ of the appellants to build thereon should be sustained by proof in order to show that the petition for mandamus was bona fide and founded upon substantial right. The second demurrer to all that part of the answer not embraced in the denial it made of the facts alleged in the first paragraph of the petition ought to have been sustained for reasons appearing in the foregoing expression of views. The prayer of the appellants ought to have been granted. All the facts of the case except those set out in the prayer had been admitted, and upon a finding by the court of the only facts in issue the appellants were entitled to a finding in their favor. The proof showed that they had acquired for a valuable consideration a right to build upon the lot described in their application for a permit, and had authority from the owner of the lot so to do, and were in possession of the same for the purpose of building upon it, and this was sufficient to entitle them to the permit.

In holding that part of the ordinance of the city upon which the appellees relied for their defense, and which was specifically quoted in stating this defense, void, the rest of the ordinance is not affected thereby, since it can have full effect as to its general objects and purposes with this provision stricken out. In the case of *Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239, as also in the case of *Vansant v. Harlem Stage Co.*, 59 Md. 330, the ordinances drawn in question were only avoided in part. It follows from the views expressed in the foregoing opinion of the court that the order of the court below refusing the mandamus in this case must be reversed.

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Building Regulations.—As to the power of municipalities to require that certain kinds of buildings shall be equipped with fire-escapes, see Arms v. Ayer, 192 Ill. 601, 85 Am. St. Rep. 357, 61 N. E. 851. As to their power to fix fire limits, see Lemmon v. Town of Guthrie Center, 113 Iowa, 36, 86 Am. St. Rep. 361, 84 N. W. 986; Eureka v. Wilson, 15 Utah, 67, 62 Am. St. Rep. 904, 48 Pac. 150; First Nat. Bank v. Saris, 129 Ind. 201, 28 Am. St. Rep. 185, 28 N. E. 434; Fire Department v. Gilmour, 149 N. Y. 453, 52 Am. St. Rep. 748, 44 N. E. 177. It has been held that such power exists under the general welfare clauses commonly contained in city charters: Kaufman v. Stein, 138 Ind. 49, 46 Am. St. Rep. 368, 37 N. E. 333; Mayor v. Hoffman, 29 La. Ann. 651, 29 Am. Rep. 345. Compare Pye v. Peterson, 45 Tex. 312, 23 Am. Rep. 608; Kneedler v. Norristown, 100 Pa. St. 368, 45 Am. Rep. 383. A charter creating a health department, with authority to regulate the manner of erecting buildings, but conferring no general police powers nor any power concerning the general welfare, has been held not to justify an ordinance requiring the outer walls of buildings to be of a specified thickness: State v. Peterson, 45 N. J. L. 310, 46 Am. Rep. 772.

THE CONSTITUTIONALITY OF BUILDING REGULATIONS.

- I. Scope of the Note.
- II. The General Authority to Enact Building Regulations, and the Limitations Thereon.
- III. Requiring Permits for the Erection of Buildings.
- IV. Restricting the Location of Buildings.
- V. Limiting the Height of Buildings.
- VI. Regulations Intended to Promote the Public Health, Safety or Morals.
- VII. The Application of Building Regulations to Structures Already Completed.

I. Scope of the Note.—The validity of building regulations has been drawn in question (1) where they were imposed directly by the legislature and it has been insisted that they were not within the legislative power, and (2) when they were found in some municipal ordinance and the claim was that the legislature had not granted, or could not grant, to the municipality the power to enact the ordinances assailed. We shall not here enter upon the consideration of the question what provisions in municipal charters, or in other statutes relating to municipalities, authorize them to enact and enforce building regulations, but shall rather confine ourself to the constitutional question, whether a building regulation, supposing it to be supported by some statute, may still be regarded as within the constitutional authority of the legislature.

II. The General Authority to Enact Building Regulations and the Limitations Thereon.—Of course, the authority to enact and enforce building regulations can be sustained only on the ground that it

is a part of the police power. This power may be exercised directly by the state, or its exercise may, in proper cases, be delegated to cities and other municipal corporations, and in every case where the statute relied upon purports to authorize the imposition of the regulation, the question is whether it is a legitimate exercise of the police power. While the decisions upon the subject are too infrequent to be relied upon with confidence, we apprehend that here, as elsewhere, certain limitations upon the exercise of the police power exist and must be respected, among which are that the regulation in question must not be arbitrary in its character, must be one which the courts will not judicially notice to be unnecessary, and must have a tendency to promote the public welfare or safety. The principal case presents, it is true, only the question of whether the ordinance was one the power to enact which had been conferred upon the municipality assuming to enact it, but we think the reasoning of the court to be equally applicable to general statutes upon the subject, and hence that it may be safely affirmed that a building regulation, however enacted, must not unnecessarily interfere with rights of property, and if it assumes in any manner to regulate the location, dimensions, appliances, or material of buildings on the property of private proprietors, it must be declared unconstitutional, unless its enactment can be defended on the ground that it is necessary for the protection or preservation of the public health or safety. In other countries regulations are often made and enforced whose object is merely to assure greater beauty and regularity in building in the great municipalities, but it is believed that regulations of this character cannot be sustained in this country.

III. Requiring Permits for the Erection of Buildings.—It is doubtless within the power of the legislature to require persons proposing to erect buildings within the limits of municipalities to apply to some board or public officer for permission so to do (*Hasty v. City of Huntington*, 105 Ind. 540, 5 N. E. 559), provided such board or officer is not vested with arbitrary authority to grant or withhold such permission, or is not authorized to withhold it for some reason which cannot be sustained without the impairment of constitutional rights. It is true that in *Commissioners of Easton v. Covey*, 74 Md. 262, 22 Atl. 266, the general power to prohibit the erection of a building without first obtaining permission of the town commissioners was affirmed, and the court was very injudicious in the use of the language in which it expressed its opinion, for it declared in general and unqualified terms that an ordinance "to regulate the erection of new buildings within the corporate limits by providing that no building shall be erected without a permit first obtained from the commissioners is not only reasonable, but useful and even essential to the welfare and prosperity of the town," and that "the commissioners have a discretion to grant or refuse the permit in each case on an application therefor." The

real question, however, involved in that case was the validity of an ordinance intended to protect the public from danger by fire and which denied the right to erect frame buildings within specified limits except upon permit granted therefor, and the general language employed by the court would now doubtless be repudiated by it: *Bostock v. Sams*, 95 Md. 400, ante, p. 394, 52 Atl. 665. Manifestly, every law or ordinance requiring building permits which may fairly be construed as conferring upon any officer or board the power to withhold them arbitrarily or in the exercise of a discretion for the regulation or control of which no means are provided, must be pronounced unconstitutional. "The right of a person to use and improve his property as to him seems proper, consistent with the law, is a constitutional right of which he cannot be deprived by the mere will or pleasure of the city council or other officer appointed by it": *City of Sioux Falls v. Kirby*, 6 S. Dak. 62, 60 N. W. 156. "It is equally clear that if an ordinance is passed by a municipal corporation, which upon its face restricts the right of dominion which the individual may otherwise exercise without question, not according to any general or uniform rule, but so as to make the absolute enjoyment of his own dependent upon the arbitrary will of the governing authorities of the city or town, it is unconstitutional and void, because it fails to furnish a uniform rule of action, and leaves the right of property subject to the despotic will of alderman who may exercise it so as to give exclusive profits or privileges to particular persons": *State v. Tenant*, 110 N. C. 609, 28 Am. St. Rep. 715, 14 S. E. 387.

IV. *Restricting the Location of Buildings.*—The owner of a lot or other parcel of land has the right to build upon any part of it, and any statute which undertakes to interfere with this right is, to the extent of the interference, a taking of his property which, if for private use, cannot be authorized at all, and if for a public purpose, can be authorized only on the condition of making just compensation. Where a statute assumed to change the line of a public street and the effect of the change was to add to the street lands which were before private property, but it was provided that the act should not interfere with buildings already erected, it was held that if an owner tore down his building, the land at once became impressed with a public use as a part of the street, and, as a necessary consequence, he became entitled to compensation from the city for the part thus added to the street: *City of Philadelphia v. Linnard*, 97 Pa. St. 242; *Widening of Chestnut Street*, 118 Pa. St. 593, 12 Atl. 585. Sometimes a like result has been sought to be accomplished by less direct methods, as where a statute extends the apparent width of a street by prohibiting the erection of any building within a specified distance therefrom. This cannot be done without compensating the owner. "The use of a given object is a most essential and beneficial quality or attribute of property; without it all other elements which go to make property

would be of no value. If the city were allowed to deprive a defendant of the use of his entire lot, it would leave in his hands but a barren and barmecidal title; and what is true of property rights as an integer is true of each fractional portion": *City of St. Louis v. Hill*, 116 Mo. 527, 22 S. W. 861.

V. Limiting the Height of Buildings.—By the common law, as we understand it, the owner of property had the same dominion above as beneath it, and hence had as much right to maintain structures above it as to exercise any other right or incident of ownership. It has nevertheless been assumed, rather than decided, in the few cases in which the question has been presented, that it is within the power of the legislature to limit the height to which buildings may be constructed and maintained, at least within the limits of populous municipalities: *Attorney General v. Williams*, 174 Mass. 476, 55 N. E. 77, 178 Mass. 330, 59 N. E. 812; *People v. D'Oench*, 111 N. Y. 359, 18 N. E. 862; but in the one case the statute provided for compensation to the parties injuriously affected, and in the other it was held inapplicable to the class of buildings against which it was sought to be enforced. Therefore, neither decision may be regarded as conclusive, though doubtless both expressed the views of the members of the court in which they were pronounced. Under a statute limiting the height of buildings to seventy feet on a small tract of land west of the statehouse on Boston Common, and providing for the compensation of every person who might be deprived of rights existing under the constitution, it was insisted that no one had any right to erect buildings of the height specified after their erection had been prohibited by the legislature, and that such prohibition was within its police power. It was claimed that the statute had been enacted partly for the interest of the public as travelers on the highway and partly in the interest of the commonwealth as owner of the property; "that one object, at any rate, was to save the dignity and beauty of the city at its culminating point, for the pride of every Bostonian and the pleasure of every member of the state." In response to the suggestion made by the attorney general that the statute was within the legislative power, even if construed so as not to entitle property owners to compensation, the court said: "Of course it is possible to read this as the attorney general would have us read it, as importing an exercise of the police power so far as legislature constitutionally could go, and as saving a remedy for all damages beyond the limit. If interpreted in that way it lets in the argument just stated. The objection to the interpretation is that it supposes the legislature without clear words to have used the police power in one of its extreme manifestations for a purpose which, although conceded to be public, is a purpose which may be described as of luxury rather than of necessity, and which, in part, after all, is for the benefit of the statehouse land and its proprietor merely as much. So that to sustain the restriction to its whole extent under the police power

would be a startling advance upon anything heretofore done. If it should be suggested that the restriction might be sustained under the police power beyond a certain number of feet from the ground and compensation allowed for the restriction between that height and seventy feet, apart from the difficulty of fixing a constitutional limit by feet and inches, which might not be insuperable (see *Quinn v. New York etc. R. R. Co.*, 178 Mass. 150, 151, 55 N. E. 891), the answer is that the constitutional difficulty would not grow appreciably less until we reach a point at which the restriction became nugatory, because it was beyond the height to which anyone wished to build. Apart from the difficulties which we have stated, and simply reading the words without consideration of consequences, while we can gather that the legislature was willing to take anything without paying for it that this court should say that it could, we do not find anything that even suggests a legislative adjudication that the public welfare requires that the petitioners' property should be restricted without compensation to them. For the foregoing reasons we are of opinion that the construction adopted by the attorney general must be rejected, and therefore we do not find it necessary to express an opinion whether a law, in which the legislature, either with a declaration of purposes such as we have imagined for this act or without it, should give clear expression to its intent to restrict these buildings in the exercise of its police power without payment, would infringe the constitution. Such a law certainly would present grave difficulties even when approached with all the presumptions that exist in favor of a legislative decision, and with the duty to uphold it unless it was impossible to do so": *Parker v. Commonwealth*, 178 Mass. 199, 59 N. E. 634.

Certainly, it cannot be maintained that the legislature has an absolute right to restrict the height of buildings, for the exercise of such a power might render property substantially, is not absolutely, worthless. We apprehend that the power, if it exists at all, must be exercised within reasonable limits, and that its exercise cannot be sustained in any case unless it appears that a building of the height prohibited must impair the public health and safety.

VI. Regulations Intended to Promote the Public Health, Safety, or Morals, and reasonably adapted to those purposes, are within the police power and may be enforced when enacted by the state legislature or by municipal corporations whose charters or other grants of authority give them power to enact local regulations upon these subjects. The most familiar instances are laws and ordinances prescribing fire limits and prohibiting the construction, moving, and, in some instances, the repair, of buildings within those limits unless of materials noncombustible, or comparatively so: *Canapa v. City of Birmingham*, 92 Ala. 358, 9 South. 180 Ex parte *Fisk*, 72 Cal. 125, 13 Pac. 310; *McCloskey v. Krelling*, 76 Cal. 511, 18 Pac. 433; *Ford v. Thralkill*, 84 Ga. 169, 10 S. E. 600; *Ward v. City of Murphysboro*,

citizen has not the common-law right to acquire title to a lot of land, qualified or absolute, in a city as elsewhere, and to build upon and improve it as his taste, his convenience or his interest may suggest or as his means may justify, without taking into consideration whether his buildings and improvements will conform in "size, general character and appearance" to the "general character of the buildings previously erected in the same locality"; even though there might be those in whose "judgment" his so building might in some way "tend to depreciate the value of surrounding improved or unimproved property." Notwithstanding the delicate power conferred by the proviso in question—a power to control the citizen in the exercise of important and valuable gifts of property—the power is conferred in the most vague and general terms and an unlimited and unregulated discretion is given to an agency of the city government thereunder. No standard is set up according to which this judgment is to be exercised; nor means provided by which it is to be instructed or controlled, and the citizen is left helpless to question its exercise in any particular case. What is meant by the "general character of the buildings previously erected"? And what is there to define and fix this? What is to determine the locality within the bounds of which the conformity of building provided for by the ordinance is to be required? What is to be its extent, and what its limits? What is the depreciation of property against which the ordinance seeks to guard? Is it a present and immediate depreciation, or is it to be a depreciation which may, in the judgment or opinion of the appeal tax court, occur sometime in either a near or a remote future, and which in fact may never occur? A right to create power so vague and undefined in its scope, so entirely unrestricted in its exercise, and so essentially arbitrary in its character, designed to abridge important and valuable property rights of the citizen, if it can be conferred at all upon a municipal corporation, ought to be found to be so conferred in very clear terms or by some necessary implication.

Nowhere in the charter of the city of Baltimore can it be ⁴¹⁴ found that there is conferred upon the corporation, by any express legislative provision, the power implied in the ordinance under consideration. Nor can such power be deduced by any reasonable implication from any of the specific or general powers enumerated and granted in the charter. The general powers are found enumerated in section 6 of the charter as enacted by act

of 1898, chapter 123. Without undertaking to quote at large this enumeration of powers granted, it may be affirmed of them that those which are therein contained to authorize the regulation of building within the city look to regulations to guard against dangers to arise from an unsafe construction of buildings; or from constructing them of inflammable materials; or in such manner as might prove offensive, or deleterious to health; or in a way to involve danger to other property, or to life or limb. In other words, they are powers which fall within the purview of what is known as the police power. The proviso under consideration has no reference to any of the objects specified or provided for in the authority given the corporation to make regulations as to buildings. It contains no suggestion that it was intended to provide for the public safety; nor to safeguard the health or morals of the community; nor to preserve public order; nor in any way to be promotive of any object which calls for the exercise of the police power. Under subtitle "Police Power" of section 6 of the charter, this power is conferred that the city may "pass ordinances for preserving order, and securing property and persons from violence, danger and destruction, protecting the public and city property, rights and privileges from waste or encroachment, and for promoting the great interests and insuring the good government of the city." While thus a broad discretion is given the corporation to use the police power, the nature of the power is clearly indicated in the terms and in the connection in which it is granted; and the nature of the objects and purposes for which it is to be used is pointed out. None of these objects or purposes can be subserved by compelling the citizen to conform a building which he may desire to erect to the "general character" of ⁴¹⁵ the building which his neighbor may previously have erected; nor to take into consideration whether, however lawful the character of his structure, or the use for which it is intended, may be, its erection will in the uncontrolled opinion of a designated agency of the corporation, "in any way tend" to depreciate the value of property in an undefined locality.

It is further provided in section 6 of the charter subtitle "Welfare and Other Powers" that the city may pass "such ordinances as it may deem expedient in maintaining the peace, good government, health and welfare of the city of Baltimore." This, in effect, is but a repetition of the grant of the general power which has just been referred to as contained in subtitle "Police Power" of this same section, and does not further en-

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Order reversed and cause remanded, with costs to the appellants.

Ordinances and Statutes may be Void in part and valid in part: Ex parte Byrd, 84 Ala. 17, 5 Am. St. Rep. 328, 4 South. 397; Fort Smith v. Scrags, 70 Ark. 549, 91 Am. St. Rep. 100, 69 S. W. 679; Eureka v. Wilson, 15 Utah, 67, 62 Am. St. Rep. 904, 48 Pac. 150; State v. Washburn, 167 Mo. 680, 90 Am. St. Rep. 430, 67 S. W. 592; State v. Davis, 130 Ala. 148, 89 Am. St. Rep. 23, 30 South. 344.

Building Regulations.—As to the power of municipalities to require that certain kinds of buildings shall be equipped with fire-escapes, see Arms v. Ayer, 192 Ill. 601, 85 Am. St. Rep. 357, 61 N. E. 851. As to their power to fix fire limits, see Lemmon v. Town of Guthrie Center, 113 Iowa, 36, 86 Am. St. Rep. 361, 84 N. W. 986; Eureka v. Wilson, 15 Utah, 67, 62 Am. St. Rep. 904, 48 Pac. 150; First Nat. Bank v. Sarls, 129 Ind. 201, 28 Am. St. Rep. 185, 28 N. E. 434; Fire Department v. Gilmour, 149 N. Y. 453, 52 Am. St. Rep. 748, 44 N. E. 177. It has been held that such power exists under the general welfare clauses commonly contained in city charters: Kaufman v. Stein, 138 Ind. 49, 46 Am. St. Rep. 368, 37 N. E. 333; Mayor v. Hoffman, 29 La. Ann. 651, 29 Am. Rep. 345. Compare Pye v. Peterson, 45 Tex. 312, 23 Am. Rep. 608; Kneedler v. Norristown, 100 Pa. St. 368, 45 Am. Rep. 383. A charter creating a health department, with authority to regulate the manner of erecting buildings, but conferring no general police powers nor any power concerning the general welfare, has been held not to justify an ordinance requiring the outer walls of buildings to be of a specified thickness: State v. Peterson, 45 N. J. L. 310, 46 Am. Rep. 772.

THE CONSTITUTIONALITY OF BUILDING REGULATIONS.

- I. Scope of the Note.
- II. The General Authority to Enact Building Regulations, and the Limitations Thereon.
- III. Requiring Permits for the Erection of Buildings.
- IV. Restricting the Location of Buildings.
- V. Limiting the Height of Buildings.
- VI. Regulations Intended to Promote the Public Health, Safety or Morals.
- VII. The Application of Building Regulations to Structures Already Completed.

I. Scope of the Note.—The validity of building regulations has been drawn in question (1) where they were imposed directly by the legislature and it has been insisted that they were not within the legislative power, and (2) when they were found in some municipal ordinance and the claim was that the legislature had not granted, or could not grant, to the municipality the power to enact the ordinances assailed. We shall not here enter upon the consideration of the question what provisions in municipal charters, or in other statutes relating to municipalities, authorize them to enact and enforce building regulations, but shall rather confine ourself to the constitutional question, whether a building regulation, supposing it to be supported by some statute, may still be regarded as within the constitutional authority of the legislature.

II. The General Authority to Enact Building Regulations and the Limitations Thereon.—Of course, the authority to enact and enforce building regulations can be sustained only on the ground that it

is a part of the police power. This power may be exercised directly by the state, or its exercise may, in proper cases, be delegated to cities and other municipal corporations, and in every case where the statute relied upon purports to authorize the imposition of the regulation, the question is whether it is a legitimate exercise of the police power. While the decisions upon the subject are too infrequent to be relied upon with confidence, we apprehend that here, as elsewhere, certain limitations upon the exercise of the police power exist and must be respected, among which are that the regulation in question must not be arbitrary in its character, must be one which the courts will not judicially notice to be unnecessary, and must have a tendency to promote the public welfare or safety. The principal case presents, it is true, only the question of whether the ordinance was one the power to enact which had been conferred upon the municipality assuming to enact it, but we think the reasoning of the court to be equally applicable to general statutes upon the subject, and hence that it may be safely affirmed that a building regulation, however enacted, must not unnecessarily interfere with rights of property, and if it assumes in any manner to regulate the location, dimensions, appliances, or material of buildings on the property of private proprietors, it must be declared unconstitutional, unless its enactment can be defended on the ground that it is necessary for the protection or preservation of the public health or safety. In other countries regulations are often made and enforced whose object is merely to assure greater beauty and regularity in building in the great municipalities, but it is believed that regulations of this character cannot be sustained in this country.

III. Requiring Permits for the Erection of Buildings.—It is doubtless within the power of the legislature to require persons proposing to erect buildings within the limits of municipalities to apply to some board or public officer for permission so to do (*Hasty v. City of Huntington*, 105 Ind. 540, 5 N. E. 559), provided such board or officer is not vested with arbitrary authority to grant or withhold such permission, or is not authorized to withhold it for some reason which cannot be sustained without the impairment of constitutional rights. It is true that in *Commissioners of Easton v. Covey*, 74 Md. 262, 22 Atl. 266, the general power to prohibit the erection of a building without first obtaining permission of the town commissioners was affirmed, and the court was very injudicious in the use of the language in which it expressed its opinion, for it declared in general and unqualified terms that an ordinance "to regulate the erection of new buildings within the corporate limits by providing that no building shall be erected without a permit first obtained from the commissioners is not only reasonable, but useful and even essential to the welfare and prosperity of the town," and that "the commissioners have a discretion to grant or refuse the permit in each case on an application therefor." The

real question, however, involved in that case was the validity of an ordinance intended to protect the public from danger by fire and which denied the right to erect frame buildings within specified limits except upon permit granted therefor, and the general language employed by the court would now doubtless be repudiated by it: *Bostock v. Sams*, 95 Md. 400, ante, p. 394, 52 Atl. 665. Manifestly, every law or ordinance requiring building permits which may fairly be construed as conferring upon any officer or board the power to withhold them arbitrarily or in the exercise of a discretion for the regulation or control of which no means are provided, must be pronounced unconstitutional. "The right of a person to use and improve his property as to him seems proper, consistent with the law, is a constitutional right of which he cannot be deprived by the mere will or pleasure of the city council or other officer appointed by it": *City of Sioux Falls v. Kirby*, 6 S. Dak. 62, 60 N. W. 156. "It is equally clear that if an ordinance is passed by a municipal corporation, which upon its face restricts the right of dominion which the individual may otherwise exercise without question, not according to any general or uniform rule, but so as to make the absolute enjoyment of his own dependent upon the arbitrary will of the governing authorities of the city or town, it is unconstitutional and void, because it fails to furnish a uniform rule of action, and leaves the right of property subject to the despotic will of alderman who may exercise it so as to give exclusive profits or privileges to particular persons": *State v. Tenant*, 110 N. C. 609, 28 Am. St. Rep. 715, 14 S. E. 387.

IV. *Restricting the Location of Buildings.*—The owner of a lot or other parcel of land has the right to build upon any part of it, and any statute which undertakes to interfere with this right is, to the extent of the interference, a taking of his property which, if for private use, cannot be authorized at all, and if for a public purpose, can be authorized only on the condition of making just compensation. Where a statute assumed to change the line of a public street and the effect of the change was to add to the street lands which were before private property, but it was provided that the act should not interfere with buildings already erected, it was held that if an owner tore down his building, the land at once became impressed with a public use as a part of the street, and, as a necessary consequence, he became entitled to compensation from the city for the part thus added to the street: *City of Philadelphia v. Linnard*, 97 Pa. St. 242; *Widening of Chestnut Street*, 118 Pa. St. 593, 12 Atl. 585. Sometimes a like result has been sought to be accomplished by less direct methods, as where a statute extends the apparent width of a street by prohibiting the erection of any building within a specified distance therefrom. This cannot be done without compensating the owner. "The use of a given object is a most essential and beneficial quality or attribute of property; without it all other elements which go to make property

would be of no value. If the city were allowed to deprive a defendant of the use of his entire lot, it would leave in his hands but a barren and barmecidal title; and what is true of property rights as an integer is true of each fractional portion": *City of St. Louis v. Hill*, 116 Mo. 527, 22 S. W. 861.

V. Limiting the Height of Buildings.—By the common law, as we understand it, the owner of property had the same dominion above as beneath it, and hence had as much right to maintain structures above it as to exercise any other right or incident of ownership. It has nevertheless been assumed, rather than decided, in the few cases in which the question has been presented, that it is within the power of the legislature to limit the height to which buildings may be constructed and maintained, at least within the limits of populous municipalities: *Attorney General v. Williams*, 174 Mass. 476, 55 N. E. 77, 178 Mass. 330, 59 N. E. 812; *People v. D'Oench*, 111 N. Y. 359, 18 N. E. 862; but in the one case the statute provided for compensation to the parties injuriously affected, and in the other it was held inapplicable to the class of buildings against which it was sought to be enforced. Therefore, neither decision may be regarded as conclusive, though doubtless both expressed the views of the members of the court in which they were pronounced. Under a statute limiting the height of buildings to seventy feet on a small tract of land west of the statehouse on Boston Common, and providing for the compensation of every person who might be deprived of rights existing under the constitution, it was insisted that no one had any right to erect buildings of the height specified after their erection had been prohibited by the legislature, and that such prohibition was within its police power. It was claimed that the statute had been enacted partly for the interest of the public as travelers on the highway and partly in the interest of the commonwealth as owner of the property; "that one object, at any rate, was to save the dignity and beauty of the city at its culminating point, for the pride of every Bostonian and the pleasure of every member of the state." In response to the suggestion made by the attorney general that the statute was within the legislative power, even if construed so as not to entitle property owners to compensation, the court said: "Of course it is possible to read this as the attorney general would have us read it, as importing an exercise of the police power so far as legislature constitutionally could go, and as saving a remedy for all damages beyond the limit. If interpreted in that way it lets in the argument just stated. The objection to the interpretation is that it supposes the legislature without clear words to have used the police power in one of its extreme manifestations for a purpose which, although conceded to be public, is a purpose which may be described as of luxury rather than of necessity, and which, in part, after all, is for the benefit of the statehouse land and its proprietor merely as much. So that to sustain the restriction to its whole extent under the police power

would be a startling advance upon anything heretofore done. If it should be suggested that the restriction might be sustained under the police power beyond a certain number of feet from the ground and compensation allowed for the restriction between that height and seventy feet, apart from the difficulty of fixing a constitutional limit by feet and inches, which might not be insuperable (see *Quinn v. New York etc. R. R. Co.*, 178 Mass. 150, 151, 55 N. E. 891), the answer is that the constitutional difficulty would not grow appreciably less until we reach a point at which the restriction became nugatory, because it was beyond the height to which anyone wished to build. Apart from the difficulties which we have stated, and simply reading the words without consideration of consequences, while we can gather that the legislature was willing to take anything without paying for it that this court should say that it could, we do not find anything that even suggests a legislative adjudication that the public welfare requires that the petitioners' property should be restricted without compensation to them. For the foregoing reasons we are of opinion that the construction adopted by the attorney general must be rejected, and therefore we do not find it necessary to express an opinion whether a law, in which the legislature, either with a declaration of purposes such as we have imagined for this act or without it, should give clear expression to its intent to restrict these buildings in the exercise of its police power without payment, would infringe the constitution. Such a law certainly would present grave difficulties even when approached with all the presumptions that exist in favor of a legislative decision, and with the duty to uphold it unless it was impossible to do so": *Parker v. Commonwealth*, 178 Mass. 199, 59 N. E. 634.

Certainly, it cannot be maintained that the legislature has an absolute right to restrict the height of buildings, for the exercise of such a power might render property substantially, is not absolutely, worthless. We apprehend that the power, if it exists at all, must be exercised within reasonable limits, and that its exercise cannot be sustained in any case unless it appears that a building of the height prohibited must impair the public health and safety.

VI. Regulations Intended to Promote the Public Health, Safety, or Morals, and reasonably adapted to those purposes, are within the police power and may be enforced when enacted by the state legislature or by municipal corporations whose charters or other grants of authority give them power to enact local regulations upon these subjects. The most familiar instances are laws and ordinances prescribing fire limits and prohibiting the construction, moving, and, in some instances, the repair, of buildings within those limits unless of materials noncombustible, or comparatively so: *Canepa v. City of Birmingham*, 92 Ala. 358, 9 South. 180 Ex parte Fisk, 72 Cal. 125, 13 Pac. 310; *McCloskey v. Kreling*, 76 Cal. 511, 18 Pac. 433; *Ford v. Thralkill*, 84 Ga. 169, 10 S. E. 600; *Ward v. City of Murphysboro*,

77 Ill. App. 549; *King v. Davenport*, 98 Ill. 305, 38 Am. Rep. 89; *First Nat. Bank v. Sarlls*, 129 Ind. 201, 28 Am. St. Rep. 185, 28 N. E. 434; *City of Monroe v. Hoffman*, 29 La. Ann. 651, 29 Am. Rep. 345; *State v. O'Neil*, 49 La. Ann. 1171, 22 South. 352; *Wadleigh v. Gilman*, 12 Me. 403, 28 Am. Dec. 188; *City of Salem v. Maynes*, 123 Mass. 372; *Brady v. Northwestern L. Co.*, 11 Mich. 425; *Alexander v. Greenville*, 54 Miss. 659; *Eichenlaub v. St. Joseph*, 113 Mo. 395, 21 S. W. 8; *Griffin v. City of Gloversville*, 67 App. Div. 403, 73 N. Y. Supp. 684; *State v. Johnson*, 114 N. C. 846, 19 S. E. 599; *Hubbard v. Medford*, 20 Or. 315, 25 Pac. 640; *Kneedler v. Norristown*, 100 Pa. St. 368, 45 Am. Rep. 384; *Klinger v. Bickel*, 117 Pa. St. 326, 11 Atl. 555; *Knoxville v. Bird*, 12 Lea., 121, 47 Am. Rep. 326; *Pye v. Peterson*, 45 Tex. 312, 23 Am. Rep. 608; *City of Eureka v. Wilson*, 15 Utah, 67, 62 Am. St. Rep. 904, 48 Pac. 150; *Roanoke v. Bolling* (Va.), 43 S. E. 343; providing for fire-escapes: *Arms v. Ayer*, 192 Ill. 601, 85 Am. St. Rep. 357, 61 N. E. 851; *Willy v. Mulledy*, 78 N. Y. 316, 34 Am. Rep. 536; *Pauley v. Steam etc. Co.*, 131 N. Y. 96, 29 N. E. 999; *Schott v. Harvey*, 105 Pa. St. 222, 51 Am. Rep. 201; *Schmalzried v. White*, 97 Tenn. 36, 36 S. W. 393; or for the inclosure of dangerous places: *City of New York v. Williams*, 4 E. D. Smith, 516, 15 N. Y. 502; or for the proper construction and maintenance of water-closets, cesspools, sewers, etc.: *Sprigg v. Garrett Park*, 89 Md. 406, 43 Atl. 813; *Commonwealth v. Roberts*, 155 Mass. 281, 29 N. E. 522. So a statute was sustained which required that all tenement-houses have water furnished in sufficient quantity at one or more places on each floor, occupied or intended to be occupied by one or more families, and that all tenement-houses shall be furnished with a like supply of water by the owners thereof when they shall be directed to do so by the board of health: *Health Department v. Rector*, 145 N. Y. 32, 45 Am. St. Rep. 579, 39 N. E. 833. The general limitations upon the power of the legislature in respect to building regulations are thus described in the case last cited: "The act must tend in some appreciable and clear way toward the accomplishment of some of the purposes which the legislature has the right to accomplish under the exercise of the police power. It must not be exercised ostensibly in favor of the promotion of some such object, while really it is an evasion thereof and for a distinct and totally different purpose, and the court will not be prevented from looking at the true character of the act as developed by its provisions. By any statement in the act itself or in its title showing that it was ostensibly passed for some object within the police power. The court must be able to see some clear and real connection between the assumed purpose of the law and the actual provisions thereof, and it must see that the latter do tend in some plain and appreciable manner toward the accomplishment of some of the objects for which the legislature may use this power."

VII. The Application of Building Regulations to Structures Already Completed.—In the vast majority of instances building regula-

tions are retrospective in their character, or, more accurately speaking, are not intended to apply to structures already completed. This, however, is a question of expediency rather than of power, and there is little doubt that the legislature may require changes in existing buildings, at least when intended to subserve sanitary purposes: *Commonwealth v. Roberts*, 155 Mass. 281, 29 N. E. 522. One of the chief objections made to the ordinance in question in *Health Department v. Rector*, 145 N. Y. 32, 45 Am. St. Rep. 579, 39 N. E. 833, was that it required buildings already in existence to be so changed, if necessary, as to furnish water in sufficient quantity at one or more places on each floor occupied, or intended to be occupied, by one or more families. In considering this point, the court said: "In both cases the object must be within some of the acknowledged purposes of the police power, and such purpose must be possible of accomplishment at some reasonable cost, regard being had to all the surrounding circumstances. There might at first seem to be some difference as to the principle which obtained in enacting conditions upon complying with which the owner might be permitted to erect a structure within the limits of a city or village, or for certain purposes, and the enactment of provisions which would necessitate the alteration of structures already in existence. In the first place it might be urged that the discretion of the legislature in enacting conditions for buildings might be more extensive, because the owner would be under no necessity of building; it would be a matter of choice and not of compulsion, and in choosing to build it might be said that he accepted the condition, while in the second case he would have no choice and would be compelled to alter or improve the existing building as directed by law. The difference, however, is, as it seems to me, really not one of principle, but only of circumstances. Although the owner in the one case is not compelled to build, yet he is limited in the use to which he may put his property by the provisions of the law. He cannot build as he wishes to, unless upon the condition of a compliance with the law, and he may very probably be so situated, as to location of property and in other ways, that it is really a necessity for him to use his property in the way proposed, and which he cannot do without expending considerable sums above what he would otherwise be called upon to do in order to comply with those provisions. They must, therefore, be reasonable, as already stated. When one's use of his property is thus circumscribed and limited, what might otherwise be called his rights are plainly interfered with, and the justification therefore can only be found in this police power. So, when the owner of an existing structure is called upon to make such alterations, while the necessity may seem to be more plainly present, still it may exist in both cases, and the only justification in either is the same."

WAGNER v. UPSHUR.

[95 Md. 519, 52 Atl. 509.]

POLICE—Right to Seize Property Which may be Used for a Criminal Purpose.—If Property may be Used for Legal as Well as Illegal Purposes, as where it is a musical slot-machine, which may also be used for gambling, the presumption cannot be indulged that the owner intended to use it for the illegal purpose, and the police have no authority to seize it as a preventive measure, unless it is first established that the article was procured or held for an illegal purpose. (p. 413.)

POLICE—Criminal Use of Article, How to be Established so as to Warrant Its Seizure by.—Articles which may or may not be used for a criminal purpose cannot be seized by the police until it has been first established that the article was procured, held, or used for an illegal purpose, and that cannot be so established except by proceedings in a court of criminal jurisdiction. (p. 414.)

W. Calvin Chestnut and Gans & Haman, for the appellant.

Alonzo L. Miles, for the appellees.

519 FOWLER, J. This is the second appeal in this case. The first will be found reported in the case of Police Commissioners v. Wagner, 93 Md. 190, 86 Am. St. Rep. 423, 48 Atl. 455. In the case just cited it is said, Page, J., delivering the opinion: "This is an action of replevin to recover a musical slot-machine. The third plea is that the article is a gambling device or instrument intended and designed to be
520 used by the plaintiff and others in violation of the gambling laws of the state, which can be put to no legitimate use, and was detained by the defendants, in the discharge of their official duty to prevent such violation, and to be used, if necessary, as evidence against the plaintiff. To this plea the plaintiff replied that at the time the machine was taken there was no charge pending against the plaintiff for any violation of the gambling laws of this or any other state; that the plaintiff was not arrested, nor has he since been arrested, nor any warrant issued for his arrest on any such charge, nor has any such charge been preferred against him; and that the said machine was not taken and retained by the defendants for use as evidence against any other person." The defendants demurred to this replication, but their demurrer was overruled and the judgment being for the plaintiff, the defendant appealed. We held on the appeal in 93 Md., 86 Am. St. Rep. and 48 Atl., that articles which are designed to be used in violation of the

criminal law and which can be used for no legitimate purpose, may be summarily seized by the police authorities under a statutory power to prevent crime; and the seizure of such articles is not a taking of property without due process of law within the constitutional inhibition. We therefore reversed the judgment in the first case and remanded for new trial. Upon the second trial the plaintiffs amended their replication to the third plea and replied as follows: "The 'musical slot-machine' mentioned in the declaration was not a gambling device or instrument intended or designed to be used by the plaintiff and others in violation of the gambling laws of the state, which could be put to no legitimate use, but on the contrary, said machine was a lawful instrument and capable of being put to many legitimate uses and purposes." In other respects the amended replication is the same as in the former appeal.

At the conclusion of the evidence the plaintiff offered two prayers and the defendant demurred to the evidence and asked the court to take the case from the jury. The court refused the prayers of both sides and ruled as follows: "If the court finds that the machine seized by the defendant ⁵²¹ and replied in this case by the plaintiff was a machine for gambling, and was used or intended to be used by the plaintiff as such, contrary to the laws of this state, the verdict must be for the defendants, though the court may further find that the said machine had devices attached by which it could be used as a music box or to register the number of customers, or a merchandise machine as described by the witness Michael, or in other innocent ways, if the court finds said devices were attached to said machine fraudulently for the purpose of evading the laws of this state against gambling machines, and that said machine was intended to be and was used mainly as a machine for gambling, though it may have been occasionally used for other purposes mentioned for the purpose of evading the laws of this state against gambling machines."

The only exception before us which we need consider is presented by the ruling upon the plaintiff's prayers and the granting of the prayer formulated by the trial judge himself. The judgment was for the defendant, and the plaintiff has appealed.

The question presented here, although one of considerable importance, is a narrow one, and is, we think, controlled by

the views announced in the former appeal (*Police Commissioners v. Wagner*, 93 Md. 192, 86 Am. St. Rep. 423, 48 Atl. 455). Thus, in the former case it is said: "In the case at bar, the property seized under the concessions of the demurrer is an instrument intended and designed to be used by the plaintiff and others in violation of the gambling laws,' and one of such a character that 'it can be put to legitimate use.' It does not, therefore, belong to the class of articles that may or may not be used for legal purposes. If it did, the presumption cannot be made that the owner intended it for illegal purposes, and however the law may be otherwise, it is clear upon principle and authority that no seizure can be made as a preventive measure without it had first been properly established that the article was procured and held for an illegal purpose." Then again, toward the end of the opinion, referring to authorities cited: "Those are cases where the article seized may be put to legal as well as illegal purposes, and until it has been shown ⁵²² before the proper tribunal that it was designed to be put or has been put to an illegal use, it may not be seized as a preventive measure."

The doctrines thus clearly announced in the former appeal conclusively settle the following propositions, first, that only such property or articles as are intended to be used in violation of law and can be used for no legitimate purpose can be summarily seized by the police authorities; secondly, that articles or property that may or may not be used for legal purposes cannot be seized until it has first been properly established that the article was procured, held or used for an illegal purpose; and, thirdly, that in order to properly establish that the article was designed to be put or has been put to an illegal use, there must be a proceeding in a court of criminal jurisdiction, and the question of the guilt or innocence of the owner of or person who uses the article cannot be determined in the replevin case.

Testing the instruction granted by the learned judge below by these principles, we think it will clearly appear that he has fallen into error; for while we held in the former appeal that a machine like the one here in question, which the prayer concedes can be used either for legal or illegal purposes, may not be summarily seized by the police authorities, his instruction is based upon the proposition that such a seizure of such a machine is legal if the court in the replevin case find that it

was used, or intended to be used, by the plaintiff for gambling, and that the devices for such innocent use were fraudulently attached to the machine for the purpose of evading the laws of this state against gambling. While the questions of fact as to the guilt of the plaintiff of the charge of gambling submitted by this instruction would be properly submitted to a jury, or to the court sitting as a jury, in a criminal proceeding, they have no proper place in a civil proceeding like an action of replevin—otherwise, as suggested by counsel for appellant, “the result would be to cause a forfeiture of property for crime by indirectly convicting of crime in a civil proceeding.” But there is another objection to the prayer raised by ⁵²³ the plaintiff’s special exception—to the effect that there is no legally sufficient evidence to show that the innocent features of the machine were fraudulently attached thereto for the purpose of violating the gambling laws of the state. We have carefully examined the record and are of opinion not only that this exception is well taken, but that there is an absolute failure of proof on this point. It follows, therefore, without the further consideration of other objections which were urged against the granted instruction, that we are of opinion it is erroneous and should not have been granted.

The plaintiff’s second prayer is, we think, a clear and proper statement of the law applicable to the case and should have been granted. By it the plaintiff requested the court to declare as the law of the case, “that if the court, sitting as a jury, finds that, as a matter of fact, the musical slot-machine mentioned in the pleadings and evidence is an article that may or may not be used for legal purposes, that the plaintiff was entitled to the possession thereof when taken by the defendants, and that the same was then seized and taken by the defendants, then the verdict must be for the plaintiff, there being no evidence in this case legally sufficient to prove that at the time of the seizure of the machine by the defendants, it had been shown before the proper tribunal that said machine was designed to be put or had been put to an illegal use; there being no evidence legally sufficient to show that at the time of said seizure there was any charge preferred against the plaintiff or others for any crime committed in connection with said machine, or any evidence legally sufficient to show that said machine was seized and held by the defendants for use as evidence against the plaintiff or others.”

It is hardly necessary to say that it is conceded that an article like the one which is the subject of this case may always be seized and held for use as evidence against the owner, possessor or others in a criminal proceeding against them or of them.

Judgment reversed and cause remanded, and new trial awarded.

Gambling Apparatus is subject to summary seizure and detention or destruction under the police power of a state, if not belonging to that class of articles which may or may not be used for legal purposes: Board of Police Commrs. v. Wagner, 93 Md. 182, 86 Am. St. Rep. 423, 48 Atl. 455; Frost v. People, 193 Ill. 635, 86 Am. St. Rep. 852, 61 N. E. 1054.

JACKSON SQUARE LOAN AND SAVINGS ASSOCIATION v. BARTLETT

[95 Md. 661, 53 Atl. 426.]

SPENDTHRIFT TRUSTS—Validity of and When Created.—

A devise or bequest of property upon the trust or confidence that the trustee will, during the life of the cestui que trust, pay the income as it accrues, and not by way of anticipation, to him, for the support of himself and his family, without any power on his part to charge, encumber, or anticipate such income, creates a spendthrift trust which is valid, and his creditors cannot reach his income or interest. (pp. 417, 418.)

Laurie H. Riggs and Charles B. Backman, for the appellant.

Frank Gosnell, for the appellee.

662 SCHMUCKER, J. This is an appeal from a decree of the circuit court of Baltimore City, passed in a case stated, construing the will of the late Vashti Bartlett. The only question presented by the record is whether the equitable interest of the testatrix's son, George W. B. Bartlett, in the trust estate created by her will is liable to attachment under a judgment against him held by the appellant.

The testatrix by her will, after making several minor bequests, gave the residue of her estate to John H. Heald (now deceased) in trust, as to one-half, for the benefit of her son

in law, Charles W. C. McCoy, for life, with remainder to his children. And, as to the other one-half, for her son, George W. B. Bartlett, in the manner hereinafter set forth, for his life, with remainder to his children. The income of the share to be held in trust for the son in law was directed to be paid to him as it accrued during his life without any restriction, but the income of the son's share was limited by the terms of the following clause of the will: "Secondly. As to the other moiety or equal half part of all my said residuary estate, I devise and bequeath the same to the said John H. Heald, and his heirs or successors in the trust. Upon trust and special confidence that my said trustee, during the lifetime of my said son, George W. B. Bartlett, do pay the income thereof as it shall accrue, and not by way of anticipation, to him, my said son, for the support of himself and his family, the receipt of my said son to be a sufficient acquittance to my said trustee therefor, but my will is that my said son shall have no power to charge, encumber or anticipate the said income." It appears from the record that George had at the death of the testatrix a wife and four children, all of whom are still living.

By an earlier clause of the will the testatrix forgave her son George a number of debts, "with all interest and arrears of interest thereon," and it is admitted in the record that she had prior to her death paid his debts and obligations to the extent of a large sum of money. The corpus of the estate held in trust under the will for the son does not exceed five thousand dollars in ^{cash} value, and it consists of securities in the hands of the appellee, Alice R. Bartlett, who has succeeded to the office of trustee under the will.

The appellant having recovered its judgment against the son George, sued out an attachment thereon and caused it to be laid in the hands of Alice R. Bartlett, trustee, with the intention of binding the equitable life estate of the defendant in the trust estate. There was no income in the hands of the trustee at the time of the laying of the attachment, but before the institution of the present case she had collected two hundred and eighty-five dollars of income, which will suffice to pay the appellant's judgment if it be liable therefor.

There is no doubt of the right of a testator, as the absolute owner of his property, to prescribe, according to his own judgment and preferences, the terms upon which his bounty shall be enjoyed by those on whom he sees fit to bestow it, so long as those terms do not violate the policy of the law. It has

been held by this court in several recent cases, after an exhaustive review of the authorities upon the subject, that it is not against the policy of the law to give by will to a beneficiary an equitable right to the income of trust property for his life without the power of anticipation on his part and to the entire exclusion of his alienee or creditor. The question in such cases is not one of the power, but of the intention, of the testator to prohibit the anticipation or exclude the creditor or alienee, and if the court is satisfied of the intention of the testator in that respect, it is bound to respect his purpose and enforce it: *Smith v. Towers*, 69 Md. 88-90, 9 Am. St. Rep. 398, 14 Atl. 497, 15 Atl. 92; *Reid v. Safe Deposit etc. Co.*, 86 Md. 467, 38 Atl. 899; *Brown v. Macgill*, 87 Md. 163, 164, 67 Am. St. Rep. 334, 39 Atl. 613.

We think that the provisions of the will in the present case manifest an intention on the part of the testatrix that the income of the portion of her estate now under consideration should be applied as it accrued to the support of her son George and his family, without the power on his part to anticipate it or to charge it directly or indirectly with liability for his debts or obligations. So long as he lived she was willing that he should be the channel through which her bounty ⁶⁸⁴ should be applied to its ultimate objects and so she directed the payment of the income to him for that purpose, but in order that it might be from time to time available for their continued support, he was deprived of all power to charge, encumber or anticipate it. After his death the trustee was empowered to apply to the maintenance of George's children, during their minority, the income of the respective shares of the trust estate which would pass to them absolutely on their arrival at lawful age. While the testatrix desired her son, as the head of his family, to make the application to them of her bounty so long as he lived, she knew from personal experience that he was prone to run in debt, and she sought by the terms of her will to protect her bounty from the vicissitudes to which she feared his weakness might expose it.

This intention of the testatrix is made more distinctly apparent from the fact that while she found it expedient to hedge in with restrictions the income to arise from the portion of her estate devoted to the benefit of her son and his family, there is a total absence in her will of any such precautions in reference to the income of the share of the estate given in trust for the son in law for life with remainder to his children.

Neither the face of the will nor the admissions in the record contain any intimations that the son in law was afflicted with spendthrift tendencies, and the testatrix doubtless felt that it would be prudent to give him a degree of control over his property which it would be injudicious to accord to her own son.

The will, it is true, does not in express terms say that the son's share of the income shall not be liable to seizure or condemnation under execution or attachment for his debts, but it says so in effect in the broad provision that the son shall have no power to charge or encumber it. This limitation upon his powers over the income was obviously inserted in the will in furtherance of the express purpose of the testatrix that it should be applied to "the support of himself and his family." She could therefore not possibly have intended that his creditors should be able to seize it and thus deprive the objects ^{ees} of her bounty of the very aid and protection which she intended to confer upon them: *Winthrop v. Clinton*, 196 Pa. St. 472, 79 Am. St. Rep. 729, 46 Atl. 437.

The decree appealed from will be affirmed with costs.

Spendthrift Trusts are considered in the monographic notes to *Garland v. Garland*, 24 Am. St. Rep. 686-697; *Smith v. Towers*, 9 Am. St. Rep. 405-408; *Freeman on Executions*, 4th ed., secs. 116, 189a, 459. See, also, *Board of Charities v. Lockard*, 198 Pa. St. 572, 82 Am. St. Rep. 817, 48 Atl. 496; *Winthrop Co. v. Clinton*, 196 Pa. St. 472, 79 Am. St. Rep. 729, 46 Atl. 435; *Munroe v. Dewey*, 176 Mass. 184, 79 Am. St. Rep. 304, 57 N. E. 340.

CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

FIALA v. AINSWORTH.

[63 Neb. 1, 88 N. W. 135.]

BOND OF BANK CASHIER.—A condition in the bond of a cashier or assistant cashier of a bank that he "will honestly, faithfully and efficiently discharge the duties of such position," not only guarantees his personal honesty, but also his competency, efficiency, and diligence in the discharge of his duties. (pp. 422, 423.)

BANKS AND BANKING—Liability of Assistant Cashier.—Within the scope of a bank cashier's authority, and so long as he is apparently acting on behalf of the corporation, his directions may control the assistant cashier and teller, and the latter may not be required to look beneath the surface of his superior's acts; but when the assistant cashier is led to believe that the cashier is violating his duty to the bank and is taking its funds for his own ends, irregularly and without authority from the directors, the former has no right to aid in, or connive at, such misappropriation than if it were being perpetrated by a stranger, and he is liable on his bond therefor. (p. 423.)

BOND—Delivery and Acceptance.—If the bond of an assistant bank cashier is delivered to the cashier of the bank, who is one of its directors, and such assistant enters upon the duties of his office under such bond, which is retained by one of the directors of the bank, the bond is sufficiently delivered and accepted, though no acceptance is shown by the minutes of the bank. (p. 424.)

BANKS AND BANKING—Liability of Cashier.—A bank cashier charged with the duty of carrying on its business cannot be held responsible for neglect of duty in not consulting its officers and committees who hold no meeting and systematically absent themselves from the performance of their duties. (p. 425.)

NEGLIGENCE—Damages for.—To recover for negligence the damages must be the natural and proximate result of the negligence complained of, and not a remote and conjectural one. (p. 426.)

J. W. Barsby, F. Dolezal and Cook & Cook, for the appellants.

F. I. Foss, J. D. Pope, C. H. Sloan, B. V. Kohout, and R. D. Brown, for the appellees.

² OLDHAM, C. This is a suit brought by the receiver of the State Bank of Milligan against the assistant cashier of said bank and the sureties on his bond. The material allegations of the petition are: That on the twenty-eighth day of February, 1894, Frank Fiala, a minor, was appointed assistant cashier of the State Bank of Milligan, and that he executed and delivered to the said bank a bond, in the penal sum of \$5,000, containing the following condition: "Whereas, on the first day of February, 1894, the aforesaid Frank Fiala was appointed assistant cashier of the State Bank of Milligan, at Milligan, Nebraska, and ³ by virtue thereof is authorized to do and perform the duties generally appertaining to the office and position of assistant cashier in such a bank, as well also as to do and perform any other clerical work and other business pertaining to the running, management, and conduct of the business of said bank which by the directions of the officers of the said bank may have heretofore been or may hereafter be intrusted to him, the said Frank Fiala, now, therefore, the condition of this obligation is such that if the said Frank Fiala honestly, faithfully and efficiently discharge the duties of such position under its present or subsequent appointment thereto, and true, just and accurate account make of all moneys property, papers, or assets of any kind or description which may come into his hands, possession, control or discharge as such as long as he may be connected with the said bank, then and in such event this obligation to be null and void, otherwise to be and remain in full force and effect"; that said bond was accepted by said bank, and that said Fiala commenced the duties of said assistant cashier of said bank. The petition then alleges that at the time that said Fiala was assistant cashier of the said bank, one W. J. Zirhut was the cashier of said bank; and that said Zirhut on October 25, 1894, took \$1,000 of the money of said bank, and on November 8, \$1,000, and on November 13, \$2,000, and on November 20, \$1,000, and on the — day of January, 1895, \$3,000, and appropriated the same to his own use with the full knowledge of the said Frank Fiala, and by an agreement with the said Fiala, that the said Fiala would keep quiet and say nothing about the transaction. The petition also alleges that the said Zirhut, cashier of the said bank, placed in the said bank certain fraudu-

lent and forged notes, all in the sum of \$6,915.65, and that certain moneys were withdrawn from the bank by the said Zirhut by discounting these forged and fictitious notes to the said bank, and that the said Frank Fiala assisted the said Zirhut in concealing and covering up such fraudulent transactions, to the damage of the bank. To this petition the defendants' ⁴ sureties answered separately, admitting that they had signed the bond sued on, but denying that said bond had ever been delivered to, or accepted or approved by, the State Bank of Milligan; denying that the conditions of the said bond had ever been broken by the said Frank Fiala, or that, under the conditions of his bond, he was in any manner liable for the conduct of W. J. Zirhut, cashier of said bank. The answer also charged that the loss to said bank, complained of in the petition, was caused by the gross negligence of the president and the board of directors of said bank in their dealings with the affairs of the said bank, and that they had full knowledge of the peculations and embezzlements of the cashier, W. J. Zirhut, long prior to the time that he absconded; and that, notwithstanding such knowledge, they negligently permitted him to remain in full charge of said bank. The defendant, Frank Fiala, filed a separate answer specifically denying any knowledge of the misconduct of W. J. Zirhut, except such as was communicated to the directors of the said bank and alleging substantially the same defenses as those contained in the answer of defendant's sureties. Plaintiff replied, denying the allegations in each of these answers. The jury found a verdict for the plaintiff against all the defendants in the sum of \$4,700, on which judgment was rendered, and defendants bring error to this court.

In the petition filed in this court by the defendants error is alleged against the sufficiency of the petition to sustain the judgment and against the sufficiency of the evidence to sustain the judgment, and against the action of the trial court in giving and refusing instructions. In determining the question of the sufficiency of the petition against the sureties on the bond, we must first examine the conditions of the bond on which the breach is alleged and ascertain what their liabilities are under these conditions. The conditions, briefly stated, are that the said Frank Fiala shall honestly, faithfully and efficiently discharge the duties of his position as assistant cashier in said bank. A condition ⁵ of this kind in the bond of a cashier or an assistant cashier of a bank has been held

not only to guarantee the personal honesty of such officer, but also to guarantee his competency, efficiency and diligence in the discharge of his duties: *American Bank v. Adams*, 12 Pick. 303; *Minor v. Mechanics' Bank of Alexandria*, 1 Pet. 46.

The next question to be determined is, What duty the assistant cashier owed to the directors of the bank with reference to furnishing them information of the misconduct of his superior officer, the cashier? Under the allegations of the petition, the assistant cashier performed the duties in the bank which generally appertain to the office of bookkeeper and teller; and, consequently, the question as to his liability for the fraudulent acts of his superior officer depends on whether he owes any duty to the bank beyond the ordinary duty of obeying the cashier. In the case of *Hobart v. Dovell*, 38 N. J. Eq. 553, 566, this question was before the court in a case in which the teller of the bank was sought to be held civilly liable for the embezzlements of the cashier. Dixon, J., in rendering the opinion, says: "For knowingly assisting in such an abstraction, the teller would be as responsible to the bank as if he had spent the money himself. He was an officer of the bank, having certain prescribed duties, for the faithful performance of which he was bound directly to the corporation. No orders of the cashier could exculpate him in the breach of those obligations. Within the scope of the cashier's authority, and so long as he was apparently acting on behalf of the corporation, the cashier's directions might control the teller, and the latter might not be required to look beneath the surface of his superior's acts. But when he was led to believe that the cashier was violating his own duty to the bank, and was taking the bank's funds for his own ends, irregularly, and without authority from the directors, the teller had no more right to aid in or connive at such misappropriation than if it were being perpetrated by a stranger. The same principle * would hold if the embezzler were a director or the president. Such misconduct on the part of Dovell we think the evidence tends to establish in more than one instance; and so far as it helped to effect a loss to the bank, he is answerable." We believe that the opinion just quoted from properly declares the law, and as the petition in the case at bar alleges that the assistant cashier assisted and aided in concealing fraudulent practices of the cashier, we think that it charges a good cause of action on the bond against these defendants.

The next question urged is that there was no delivery of the bond, nor any acceptance of it by the directors of the bank. The undisputed facts with reference to the delivery of the bond are that after the bond was prepared and signed, Fiala, the assistant cashier, delivered it to Zirhut, the cashier of the bank, and that Zirhut kept the bond and the bank officers found it among his papers after he had absconded. We think that the fact that the bond was delivered to the cashier of the bank, who was one of the directors, and that Fiala entered upon the duties of his office under such bond, and that such bond was retained by one of the directors of the bank, is sufficient to establish the acceptance of the bond, though no acceptance is shown by the minutes of the board: *Pryse v. Farmers' Bank*, 17 Ky. Law Rep. 1056, 33 S. W. 532; *Bank of United States v. Danbridge*, 12 Wheat. 64; *Dedham Bank v. Chickering*, 3 Pick. 335.

The evidence with reference to the taking of the \$1,000 from the bank by Zirhut on October 25, 1894, is that this money was procured by a draft signed by Zirhut as cashier of the bank and drawn on Tootle, Lemon & Co., of St. Joseph, Missouri, in favor of McLain Bros., of Chicago, Illinois. The evidence shows that Fiala had no notice whatever at the time of the drawing of this draft; that the draft stub was marked "spoiled" by Zirhut; and that the first intimation that Fiala received of this draft was when the monthly statement was sent to the bank by Tootle, Lemon & Co. As soon as this statement came, Fiala immediately notified the cashier, Zirhut, that the statement was not correct, and the cashier told him that he would make it all right, and marked the draft with a cross and laid it to one side. This was all the evidence of any wrongdoing, with reference to this transaction, that is charged against the assistant cashier, and we think that this is not sufficient to entail a liability, either on him or his bondsmen, for this transaction. Now, the only theory on which plaintiff seeks to fasten the liability for this draft on the assistant cashier, is that he, Fiala, should have gone to the board of directors and notified them of this mistake. The evidence shows that this board of directors had never held a meeting while Fiala was assistant cashier, and that none of them lived at Milligan, or were present there, except Zirhut, the cashier. The case of *Second Nat. Bank v. Burt*, 93 N. Y. 240, was an action against the cashier of a bank for discounting drafts without submitting them to the advisory committee of the bank,

as provided by a by-law of that institution. The facts show that this committee had been entirely neglecting their duty with reference to the business of the bank, and had been disregarding the by-law for the violation of which the cashier was sought to be held. Ruger, C. J., in delivering the opinion, says: "The undisputed evidence in the case shows that these by-laws were from the first uniformly disregarded in the practical management of this bank, with the knowledge and acquiescence of its officers. Such laws were equally as obligatory on the president and various committees therein referred to as upon the cashier, and impliedly required them either to attend at the bank at stated periods to perform the duties enjoined upon them, or at least to keep themselves accessible to the cashier and in a position to be conveniently consulted by him according to the requirements of the business. To impose on the cashier the duty of carrying on the business of a bank and yet hold him responsible for a neglect of duty in not consulting officers and committees who apparently held no meetings and systematically absented themselves^s from the performance of their duties is an imposition which the law will not tolerate. It would be quite impracticable for the managing officer of a bank required to keep it open daily to leave his place of business as each transaction requiring attention occurred to look up persons engaged in other employments and consult them in regard to such transactions."

The evidence with reference to the charge against the defendant for the \$1,000 taken by the cashier on November 8th, the \$2,000 on November 13th, and \$1,000 on November 20th, all in 1894, shows that the drafts, like the one just considered, were drawn by the cashier in favor of McLain Bros. on Tootle, Lemon & Co. and that the stubs of these drafts were marked "spoiled," and that Fiala had no notice of the drawing of them by the cashier. The evidence also shows that before the statement of charges for the drafts from Tootle, Lemon & Co. had been sent to the bank and before Fiala had any knowledge that any such drafts had been drawn, Zirhut, the cashier of the bank, himself notified the president and directors of the bank that he had been speculating on the board of trade in Chicago, and that he had lost \$5,000. Two directors of the bank denied that he had told them that he had lost the bank's money, but admitted that he said that he had lost \$5,000. Zirhut, his wife and Fiala all testified that these directors were informed that he, Zirhut, had lost the bank's

money. They all admit that after this notice the directors, Zirhut, and Fiala went down to Milligan and examined the condition of the bank. It also appears that Zirhut and wife gave a deed to the bank for some property that they owned in Milligan to secure his indebtedness, and that this deed was at the bank on December 1, 1894, the day that this examination was made. It also appears that after this examination the board of directors permitted Zirhut to remain in charge of the bank as cashier. We think, in view of this notice, the officers of the bank are not in shape to complain of the alleged default of Fiala in not notifying them further of the shortcomings of their cashier.

• The next item for which they seek to recover is \$3,000 taken from the bank about the eighteenth day of January, 1895. The evidence shows that this money was procured by the cashier, Zirhut, as a loan for the bank—\$1,000 of it from the First National Bank of Tobias and \$2,000 from the Harbine Bank of Fairbury, the correspondent of Tootle, Lemon & Co., of St. Joseph. The evidence is that this money was procured by telegrams sent to these banks by Zirhut; that Fiala knew nothing of the transaction whatever; that, when the money came to the express office, Zirhut took it out of the express office, and that he then went to the postoffice and got the statement of the accounts sent by the banks and destroyed them, put the money in his satchel, and absconded. There is no claim that Fiala had any knowledge of, or any connection whatever with, this transaction, and the only theory on which plaintiff claims that the defendants should be held for this loss is that if Fiala had notified the directors of the bank of all the other misconduct of their cashier they would have discharged him before he had an opportunity to steal this amount of money from the bank. It is an elementary principle that to recover for negligence the damage must be the natural and proximate result of the negligence complained of and not a remote and conjectural one. It would be going far into the realms of speculation to determine just how much more notice of Zirhut's shortcomings than that which the president and board of directors of the bank must have had at their meeting on the first day of December, 1894, would have induced that board to discharge him, and we don't believe that any vague theorizing on this question should be indulged in at the expense of Fiala's bondsmen. We therefore conclude that it was error for the trial court to submit this item of alleged damage to the jury.

On the charge for alleged damages to the bank by obtaining money from it by forged and fictitious notes, we think there is some evidence offered by the plaintiff tending to show the liability of the assistant cashier for knowingly ¹⁰ aiding the cashier in concealing these transactions from the directors; but the court, in its instructions, gave all the alleged items of damage in charge to the jury and it is impossible to tell which item or items their verdict was based upon.

It is therefore recommended that the judgment of the district court be reversed and the cause remanded.

Sedgwick and Pound, CC., concur.

By the Court. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded.

As to the Liability on the Bonds of cashiers and other employes, see Bank of Tarboro v. Fidelity etc. Co., 126 N. C. 320, 128 N. C. 366, 35 S. E. 588, 38 S. E. 908, 83 Am. St. Rep. 682, and cases cited in the cross-reference note thereto; American Employers' Ins. Co. v. Fordyce, 62 Ark. 562, 54 Am. St. Rep. 305, 36 S. W. 1051; Fidelity etc. Co. v. Eickhoff, 63 Minn. 170, 56 Am. St. Rep. 464, 65 N. W. 351; Garnett v. Farmers' Nat. Bank, 91 Ky. 614, 34 Am. St. Rep. 246, 16 S. W. 709.

Bonds of Public Officers.—The delivery and acceptance of bonds of public officers is considered in the monographic note to *Estate of Ramsay v. People*, 90 Am. St. Rep. 189-191. The acts for which sureties on official bonds are liable are considered in the monographic note to *Feller v. Gates*, 91 Am. St. Rep. 497-514.

BEALL v. McMENEMY.

[63 Neb. 70, 88 N. W. 134.]

DOWER—Limitations.—An action for the recovery of dower is within the statute of limitations. (p. 429.)

COTENANCY—Entry—Ouster.—The rule that the entry of one cotenant is the entry of all has no application when there has been an actual ouster of the cotenants, or some act equivalent thereto. (p. 430.)

OUSTER is a Question of Fact to be determined from the evidence. (p. 430.)

COTENANCY—Ouster.—A sale of land by one cotenant while in sole possession, followed by the exclusive possession of his grantee for fourteen years, constitutes an ouster of the other cotenant, and completes the bar of the statute of limitations against him. (p. 430.)

A. C. Wakeley and J. Lothrop, for the appellant.

Walton & Mummert and Osborn & Aye, for the appellee.

⁷¹ ALBERT, C. This action was brought by the appellant to recover dower in certain lands in Washington county. A trial to the court resulted in a finding and decree for the defendant, and the plaintiff brings the case here on appeal.

The determination of one question will dispose of this case, and that question is whether plaintiff's cause of action was barred by the statute of limitations when this case was commenced. If it was, the decree of the district court should be affirmed; if not, it should be reversed. This question involves two others, namely, whether an action in the district court for the recovery of dower is within the statute, and, if so, whether the statute had run in this case. We shall consider these two questions in their order.

1. Plaintiff cites many cases in support of the proposition that an action for the recovery of dower is not within the statute of limitations. But none of those cases, so far as we have been able to examine, are based on statutes worded like ours, and for that reason lose much of their force. While many of the earlier cases hold that actions for the recovery of dower are not within the statute, the trend of modern authority is in the other direction: *Proctor v. Bigelow*, 38 Mich. 282; *King v. Merritt*, 67 Mich. 194, 34 N. W. 689; *Beebe v. Lyle*, 73 Mich. 114, 40 N. W. 944; *Tuttle v. Willson*, 10 Ohio, 26; *Care v. Keller*, 77 Pa. St. 487; *Rice v. Nelson*, 27 Iowa, 148. A study of our own statute makes it difficult ⁷² to conceive of a case that does not fall within its limits. After specific provisions as to the time within which certain actions may be brought comes section 16 of the Code of Civil Procedure, which is as follows: "An action for relief not hereinbefore provided for can only be brought within four years after the cause of action shall have accrued." From the section quoted, it seems clear that the legislature intended to cover every form of action. Section 6 of the code, as it stood at the time of the trial of this case below, was as follows: "An action for the recovery of the title or possession of lands, tenements or hereditaments, can only be brought within ten years after the cause of such action shall have accrued. This section shall be construed to apply also to mortgages." In *Gatling v. Lane*, 17 Neb. 80, 22 N. W. 252, Judge Maxwell, construing this statute, says: "The statute is now held to be a statute of repose, which is available

against the enforcement of stale demands. . . . The effect of the statute is to quiet title to real estate. . . . If no action is commenced within the statutory period the occupier obtains an absolute right of exclusive possession of the premises, not only against the former owner but all the world." The language of the statute, as well as the construction placed upon it by this court, is sufficiently comprehensive to include claims for dower. In our opinion, an action for the recovery of dower is within the statute of limitations, and barred if not brought within ten years from the time it accrues.

2. It sufficiently appears from the evidence that the plaintiff was married to Robert T. Beall in 1862, and that he died in 1875; that from 1863 to the time of his death, he and the plaintiff resided together in this state as husband and wife; that at the time of the death of her husband he and one E. A. Allen were seised in fee of the land in controversy, each owning an undivided one-half. Some two years after the death of the said husband the whole of the land was sold for taxes to J. H. Hungate, who afterward, on December 22, 1881, conveyed the premises to the defendant. In June, 1882, the defendant procured a conveyance ⁷³ from E. A. Allen of his undivided one-half in the premises, and in July or August following entered upon the premises, made some improvements and continued in possession until the following December, when he conveyed to another party, who at once entered upon the land and continued in possession for about five years and then reconveyed to the defendant, who at once entered upon and continued in possession of the land until the trial of this suit in the lower court. Thus, it will be seen, that at the time the defendant went into possession he held two deeds—one from Hungate to the whole of the land, and one from Allen, the cotenant of plaintiff's husband, to an undivided one-half. Hungate had only a tax title, and could convey no greater title to the defendant than he had himself. But a tax deed, or a deed based thereon, is sufficient to give color of title: *Lantry v. Parker*, 37 Neb. 353, 55 N. W. 962; *Twohig v. Leamer*, 48 Neb. 247, 67 N. W. 152.

But plaintiff insists that the defendant must be presumed to have entered upon and held the land under his valid title to an undivided one-half of the land, and, therefore, his entry and possession was the entry and possession of all the cotenants and not adverse to the plaintiff. As a general rule, the entry and possession of one tenant in common

is the entry and possession of all, and therefore not adverse. But the rule has no application where there has been an actual ouster of the cotenant, or some act equivalent thereto: 1 Am. & Eng. Ency. of Law, 2d ed., 801, and cases there cited. Ouster is a question of fact, which involves, to some extent, the intentions and motives of the party in possession: *Highstone v. Burdette*, 54 Mich. 329, 20 N. W. 64; *Cummings v. Wyman*, 10 Mass. 464. The evidence shows that, some fourteen years before the commencement of this action, the defendant took possession of the land; that within six months he conveyed it to another, who at once entered upon and took possession and continued in possession for about five years, when it was reconveyed to the defendant, who again took possession and held the same until the trial of this case. During all these fourteen years the ⁷⁴ defendant, and those claiming under him, had the exclusive possession of the land and the exclusive enjoyment of the rents and profits. A sale of the land by one tenant in common has been held to amount to an ouster of his cotenants: *Culler v. Motzer*, 13 Serg. & R. 356, 15 Am. Dec. 604. It is not necessary to go to that length in this case. It is sufficient to say that, in our opinion, the sale of the land by the defendant fourteen years before the commencement of this action, coupled with the other facts and circumstances mentioned, is sufficient to warrant a finding of ouster or of acts equivalent thereto and that plaintiff's cause of action was barred by the statute of limitations.

It is recommended that the decree of the district court be affirmed.

Duffie and Ames, CC., concur.

By the Court. For the reasons stated in the foregoing opinion, the decree of the district court is affirmed.

Dower is not Within the Statute of Limitations, according to some authorities: *Barnard v. Edwards*, 4 N. H. 107, 17 Am. Dec. 403; *Sellman v. Bowen*, 8 Gill & J. 50, 29 Am. Dec. 524; note to *Hitchcock v. Harrington*, 5 Am. Dec. 237. But see *Thompson v. McCorkle*, 136 Ind. 484, 43 Am. St. Rep. 334, 34 N. E. 813, 36 N. E. 211.

The Entry of One Cotenant is ordinarily the entry of all: *Hudson v. Coe*, 79 Me. 83, 1 Am. St. Rep. 288, 8 Atl. 249. See, too, *Scotch Lumber Co. v. Sage*, 132 Ala. 598, 90 Am. St. Rep. 932, 32 South. 607. However, he may so enter and hold as to render his possession adverse and an ouster of the others: *Greenhill v. Biggs*, 85 Ky. 155, 7 Am. St. Rep. 579, 2 S. W. 774; *Casey v. Casey*, 107 Iowa, 192, 70 Am. St. Rep. 190, 77 N. W. 844.

REDELL v. MOORES.

[63 Neb. 219, 88 N. W. 243.]

CONSTITUTIONAL LAW—Statute Invalid in Part.—If portions of a statute are unconstitutional, and the valid and invalid portions are not so connected as to be incapable of separation, and the valid part is a complete act, not dependent on the part which is void, the latter alone will be disregarded, and the remainder upheld, except in cases where it is apparent that the rejected part was an inducement to the adoption of the remainder. (pp. 435, 436.)

CONSTITUTIONAL LAW—Construction of Statute—Judicial Notice.—In construing a statute courts are authorized to collect the intention of the legislature from the occasion and necessity of the law, from the mischief felt and the objects and remedy in view; and they may, with propriety, recur to the history of the times when the statute was passed to ascertain the reason, as well as the meaning, of particular provisions in it. (pp. 436, 437.)

CONSTITUTIONAL LAW—Construction of Statute—Judicial Knowledge.—In construing a statute courts may take notice of events which are generally known, and matters of common knowledge within the limits of their jurisdiction. (p. 437.)

MUNICIPAL CORPORATIONS—Power to Impose Limitations.—The power to create a municipal corporation implies power to create it with such limitations as the legislature may see fit to impose, and to impose such limitations at any stage of its existence. (p. 439.)

STATUTORY POWER may be Conferred upon the governor to appoint members of the board of fire and police commissioners of cities of the metropolitan class. (p. 440.)

W. J. Connell, for the appellants.

F. T. Ransom, W. F. Gurley, and Wright & Stout, for the appellees.

²²⁰ **ALBERT, C.** This action was brought in the district court of Douglas county by John Redell, chief of the fire department of the city of Omaha, against Frank E. Moores and others, constituting the board of fire and police commissioners of that city, to restrain the defendants from hearing and determining certain charges filed with said board against the plaintiff, and from removing or suspending him from his said office. The trial court found for the plaintiff, and entered a decree accordingly. The defendants bring the case here on appeal.

The sole question presented by the appeal is whether the board of fire and police commissioners have authority to hear and determine the charges filed against the plaintiff, and to remove or suspend him from the office of chief of the fire de-

partment in case its findings on said charges should be adverse to him. The determination of that question involves the constitutionality of section 169, chapter 12a, of the Compiled Statutes. That section is a part of an act passed by the legislature in 1897, entitled "An act incorporating metropolitan cities, and defining, prescribing and regulating their duties, powers and government and to repeal a similar act passed in 1887." The act is too long to set out at length, so it must suffice to say, taken as a whole, it provides a complete scheme for the government of cities of the metropolitan class. The sections most pertinent to the present inquiry are as follows:

"Sec. 166. In each city of the metropolitan class there shall be a board of fire and police commissioners, to consist of the mayor, who shall be ex-officio chairman of the board, ^{and} and four electors of the city, who shall be appointed by the governor.

"Sec. 167. Immediately on the taking effect of this act, the governor shall appoint for each city governed by this act four commissioners, not more than two of whom shall be of the same political faith or party allegiance, one of whom shall be designated to serve until the first Monday of April, 1898, and one to serve until the first Monday of April, 1899, and one to serve until the first Monday of April, 1900, and one to serve until the first Monday of April, 1901, and on the last Tuesday in March, in 1898, and on the same day in each year thereafter, the governor shall appoint one commissioner in each city governed by this act, to take the place of the commissioner whose term of office expires on the first Monday in April following such appointment, and those so appointed to succeed others shall serve for the term of four years, following the first Monday in April after their appointment, except where appointments are made to fill vacancies, in which cases those appointed shall serve the remainder of term of the persons whose vacancies they are appointed to fill. Whenever a vacancy shall occur in any board of fire and police commissioners either by death, resignation, removal from the city or any other cause, the governor shall appoint a commissioner to fill such vacancy.

"Sec. 168. No person shall be appointed a police commissioner who is engaged in the sale of malt, spirituous or vinous liquors, or who is engaged in the business of dealing in tobacco or articles manufactured therefrom, or who is agent for any fire insurance company or companies or interested therein, or in the business of soliciting fire insurance, or who shall have

been engaged in any such callings or business within one year previous to the date of appointment. No person shall be qualified to hold the office of police commissioner, while he holds any county, city or school district office. The governor may remove any of said commissioners for misconduct in office, or should they, or any of them, become disqualified to act as such commissioner.²²² Any citizen of the city may file with the governor written charges against any commissioner. he may deem guilty of misconduct in office, and the governor shall, within a reasonable time, investigate the same upon testimony to be produced before him and shall make such findings as to the truth or falsity of such charges as in his judgment such testimony warrants, and in case such charges are adjudged by him to be sustained by the evidence, he shall at once remove the commissioner so found guilty and appoint another qualified to fill the vacancy thus caused. The governor, when sitting to investigate charges preferred against a commissioner, shall have full power and authority to compel the attendance of witnesses and the production of books and papers, and he may hold such meeting at the most convenient place in the state for the purpose of such investigation. In making all appointments, either to fill vacancies or otherwise, he shall so appoint that not more than two members of the fire and police commissioners shall be of the same political faith or party allegiance.

"Sec. 169. All powers and duties connected with and incident to the appointment, removal, government and discipline of the officers and members of the fire and police departments of the city, under such rules and regulations as may be adopted by the board of fire and police commissioners, shall be vested in and exercised by said board. A majority of said board shall constitute a quorum for the transaction of business. Before entering upon their duties each of said officers shall take and subscribe an oath, to be filed with the city clerk, faithfully, impartially, honestly and to the best of his ability, to discharge his duties as a member of said board and that in making appointments or considering promotion, or removals, he will not be guided or actuated by political motives or influences, but will consider only the interest of the city, and the success and effectiveness of said department. The board of fire and police commissioners shall have power, and it shall be the duty of said board, to appoint a chief of the fire department, ²²³ and such other officers of the fire department as may be deemed necessary for its proper direction, management and regulation, all of

whom shall be electors of such city, and under such rules and regulations as may be adopted by said board. Said board may remove such officers, or any of them, whenever said board shall consider and declare such removal necessary for the proper management or discipline, or for the more effective working or service of said department. It shall be the duty of policemen to make a daily report to the chief of police of the time of lighting and extinguishing of all public lights and lamps upon their beats, and also any lamp that may be broken or out of repair. They shall also report to the same officer any defect in any sidewalk, street, alley or other public highway, or the existence of ice or dangerous obstructions on the walks or streets, or break in any sewer, or disagreeable odors emanating from inlets to sewers, or any violations of the health laws or ordinances of the city. Suitable blanks for making such reports shall be furnished to the chief of police by the chief electrician and health commissioner. Such reports shall be by the chief of police transmitted to the city electrician or health commissioner, as shall be proper, and in cases of violations of law or ordinance the policeman making report shall report the facts to the city prosecutor. The board of fire and police commissioners shall employ such firemen and assistants as may be proper and necessary for the effective service of this department to the extent and limit that the funds provided by the mayor and council for that purpose will allow. The board of fire and police commissioners shall have the power, and it shall be the duty of said board, to appoint a chief of police, and such other officers and policemen, all of whom shall be electors of such city, to the extent that funds may be provided by the mayor and council to pay their salaries, and as may be necessary for the proper protection and efficient policing of the city, and as may be necessary to protect citizens and property, and maintain peace and good order. The board may appoint ²²⁴ such number of police matrons, not to exceed two, whose duty shall be defined by the police board. The chief of police and all other police officers, policemen and police matron, shall be subject to removal by the board of fire and police commissioners, under such rules and regulations as may be adopted by said board, whenever said board shall consider and declare such removal necessary for the proper management or discipline, or for the more effective working or service of the police department. No member or officer of the police or fire department shall be discharged for political reasons, nor shall a person be employed or taken

into either of said departments for political reasons. Before a member of the police or fire department can be discharged, charges must be filed against him before the board of fire and police commissioners and a hearing had thereon, and an opportunity given such member to defend against such charges, but this provision shall not be construed to prevent peremptory suspension of such member by his superiors in case of misconduct or neglect of duty or disobedience of orders. Whenever any such suspension is made, charges shall be at once filed before the board of fire and police commissioners by the person ordering such suspension, and a trial had thereon at the second meeting of the board thereafter. It shall be the duty of said board of fire and police commissioners to adopt such rules and regulations for the guidance of the officers and men of said department, for the appointment, promotion, removal, trial or discipline of said officers, men and matron, as said board shall consider proper and necessary. The board shall have the power to enforce the attendance of witnesses, and the production of books and papers, and to administer oaths to them in the same manner and with like effect and under the same penalties, as the case of magistrates exercising civil and criminal jurisdiction under the statutes of the state of Nebraska. The board shall have such other powers and perform such other duties as may be authorized or defined by ordinance."

It is clear that the provisions cited are ample, if upheld, and confer upon the board of fire and police commissioners the power to do the acts sought to be restrained by this action. In the case of *State v. Moores*, 55 Neb. 480, 76 N. W. 175, the court held (Sullivan, J., dissenting) that, so far as the act in question assumes to confer authority upon the governor to appoint members of the board of fire and police commissioners, it is unconstitutional, on the ground that it is an unlawful attempt to deprive the people of cities of the metropolitan class the right of local self-government.

Assuming that the majority opinion in that case is the settled law of the state, the question arises whether section 169, quoted, must fall with those provisions placing the appointing power in the hands of the governor, which, we have seen, has been held unconstitutional. That a part of an act, or even part of the same section of an act, may, under some circumstances, be held unconstitutional, without invalidating the remainder, is elementary. This court has said that "Where an act contains provisions which are invalid or unconstitutional,"

tional, if the valid and invalid portions are not so connected as to be incapable of separation, and the valid part is a complete act and not dependent upon the part that is void, the latter alone will be disregarded and the remainder upheld, . . . except in cases where it is apparent that the rejected part was an inducement to the adoption of the remainder": *State v. Moore*, 48 Neb. 870, 67 N. W. 876; *Scott v. Flowers*, 61 Neb. 620, 85 N. W. 857; *State v. Lancaster County*, 6 Neb. 474; *State v. Hardy*, 7 Neb. 377; *State v. Lancaster County*, 17 Neb. 85, 22 N. W. 228; *State v. Hurds* 19 Neb. 316, 27 N. W. 139; *Trumble v. Trumble*, 37 Neb. 340, 55 N. W. 869; *Low v. Rees Printing Co.*, 41 Neb. 127, 43 Am. St. Rep. 670, 59 N. W. 362; *State v. Stuht*, 52 Neb. 209, 77 N. W. 941. In view of the doctrine announced in the cases just cited, we are not called upon to determine the effect of the decision in the case of *State v. Moores*, 55 Neb. 480, 76 N. W. 175, on the entire act, because it follows irresistibly that the section held invalid drags down with it only such other parts as are inseparably connected with, dependent upon, or incomplete without ²²⁸ it, or for the passage of which it served as an inducement. One question, then, that meets us at this point is whether that portion of the act held invalid, namely, that portion conferring the appointing power on the governor served as an inducement to the legislature for the passage of the other portions of the sections hereinbefore set forth. Counsel for the defendant insists that this question is to be determined solely by an inspection of the act itself. In this view we are disposed to concur, with this qualification, however: That the persons whose duty it may be to inspect the act with a view to the determination of that question are not required to divest themselves of all knowledge save that to be gleaned from the act alone. For, were it possible for them thus to divest themselves, the act would be unintelligible—a jumble of words without meaning. So, when we say that the question is to be determined by an inspection of the act itself, we imply that those under whose inspection it is brought will scan it in the light of that knowledge which they possess in common with other men. There is no presumption that courts are ignorant of all matters that transpire outside the courtroom. On the contrary, there are many matters outside the science of the law of which they are required to take judicial notice. Bishop, in his work on Statutory Crimes, third edition, section 77, says: "They [courts] do not close their eyes to what they know of the history of the country and of the

law, of the condition of the law at the particular time, of the public necessities felt, and other like things." The supreme court of Michigan, in *Sibley v. Smith*, 2 Mich. 486, say: "Courts are authorized to collect the intention of the legislature from the occasion and necessity of the law—from the mischief felt, and the objects and remedy in view." The supreme court of the United States, speaking through Davis, J., in the case of *United States v. Union Pac. Ry. Co.*, 91 U. S. 72, says: "Courts, in construing a statute, may with propriety recur to the history of the times when it was passed, and this is frequently necessary, in order to ascertain the reason, as well as the meaning ²²⁷ of particular provisions in it." In *Stout v. Board of Commissioners*, 107 Ind. 343, 8 N. E. 222, it is held that the history of a country, its topography and general conditions, are elements which enter into the construction of laws made to govern it, and are matters of which the courts will take judicial notice.

It has been held that the general state of opinion, public, judicial and legislative, at the time of an enactment of a measure may be considered by the courts in construing it: *Keyport Steamboat Co. v. Farmers' Transp. Co.*, 18 N. J. Eq. 13; *Delamune v. Crenshaw*, 15 Gratt. 457. In *State v. Boyd*, 34 Neb. 5, 51 N. W. 964, it was held that courts will take notice, without proof, of events which are generally known within the limits of their jurisdiction. The foregoing, we think, makes clear, were it ever doubtful, that in the determination of the question before us we are neither required nor permitted to act on ignorance of those things which are matters of common knowledge. The attempt to confer upon the governor the power to appoint members of the board of fire and police commissioners—and the reasons urged in support of such measure, are a part of the legislative history of the state. No other feature of the act under consideration, nor of those it was intended to supersede, attracted so much attention or invited so much discussion as that which placed the power of appointment in the hands of the governor, removing, as it was claimed at the time, the board of fire and police commissioners from the influence of local politics. It is a matter of common knowledge that this feature of the act, so far as the board of fire and police commissioners is concerned, was the chief inducement to its passage. Without that feature, its promoters would have regarded it as they would have regarded the play of Hamlet with Hamlet left out.

But, aside from those extrinsic facts, in our opinion it is clear that portion which has been held to be invalid served as an inducement for the passage of the other parts relating to the board of fire and police commissioners. ²²⁸ The sections quoted provide a complete scheme for the organization of such board. They provide for the appointment of the members, prescribe their qualifications and define the powers and duties of the board. The central thought in the whole scheme is to make the board answerable to the governor, and to remove it from local influences. Strike out those portions relating to the powers and duties of the governor in the premises, and the scheme is incomplete. With these parts stricken out, it is true, there remains a provision for the appointment of such board, and provisions relating to their qualification, and defining their powers and duties; but by whom would they be appointed? Counsel for the defendants claim that, with those provisions stricken out, the power of appointment would reside in the mayor, under the general power vested in him by virtue of the provisions of section 72 of the act, which is as follows: "The mayor shall have power, by and with the consent of a majority of the entire council, to appoint all officers that may be deemed necessary for the good government of the city, other than those otherwise provided for in this act": Sess. Laws 1897, c. 10. Nothing, to our minds, shows more clearly that the invalid portion was an inducement to the passage of the other parts of the sections quoted than the fact that, with such invalid portion omitted, resort must be had to section 72 to carry out the remainder. Section 72 shows clearly an intention on the part of the legislature to limit the appointing power of the mayor to such officers whose appointment has not been otherwise provided for by the act. Members of the board of fire and police commissioners are otherwise provided for by the act, because it provides for their appointment by the governor. To hold, under the circumstances, that it would be carrying out the intention of the legislature to permit the mayor to appoint the members of such board, would do violence to common sense, which, after all, is the final arbiter in matters of doubtful construction. In our opinion, whether the act be viewed in the light of the history ²²⁹ of its enactment or apart from such consideration, it shows clearly that that portion conferring the power of appointment on the governor was an inducement to the passage of the other provisions relative to the fire and police commissioners, and that the for-

mer must stand or fall with the latter; and the decree of the district court is right, and should stand, unless the views hereinafter expressed are adopted.

We are fully alive to the confusion in the municipal affairs of the city of Omaha that must result from the adoption of the foregoing views by this court. But for those results we are not responsible. The responsibility of this court ends when it has applied the law as it finds it. It has no constitutional warrant to add to a legislative enactment to meet the exigencies of a particular case. But, in view of those results, we have been led to re-examine the majority opinion in *State v. Moores*, 5 Neb. 480, 76 N. W. 175, which up to this point we have assumed to be the final expression of this court on the questions therein involved. After a careful examination of that opinion, and with a due appreciation of the learning and ability of the members of the court who concur therein, we beg to say it does not commend itself to our judgment. It holds that the provisions of the statute placing the power to appoint members of the board of fire and police commissioners in the hands of the governor are invalid, not because it is in conflict with any express provision of the state or federal constitution, but because it is repugnant to the inherent right of local self-government, which, it is claimed, was retained by the people at the time of adoption of the organic law. So far as the individual members of society are concerned, in the nature of things, there can be no such thing as an inherent right of local self-government. The right of local self-government is purely a political right, and all political rights, of necessity, have their foundation in human government. For an individual to predicate an inherent right—a right inborn and inbred—on a foundation of human nature involves a contradiction of ²³⁰ terms. So far as a city is concerned, considered in the character of an artificial being, it is a creature of the legislature. It can have no rights save such as are bestowed upon it by its creator. As it might have been created lacking some right bestowed upon it, it is in no position to complain should the power that bestowed such right see fit to take it away. In other words the power to create implies the power to impose upon the creature such limitations as the creator may will, and to modify or even destroy what has been created. The power to create a municipal corporation, which is vested in the legislature, implies the power to create it with such limitations as the legislature may see fit to impose, and to impose such limitations at any stage of its existence. That

such power may not always be exercised most wisely is among the possibilities, but that does not warrant this court in wresting it from the hands to which the people, by the fundamental law of the state, have confided it. We shall not attempt to review the authorities bearing on this question. The majority opinion leaves nothing to be said on one side, while the minority opinion is equally exhaustive on the other. To those opinions we must refer the court. The majority opinion, to our minds, introduces a new principle in our system of jurisprudence, and one pregnant with mischievous consequences. We have been taught to regard the state and federal constitutions as the sole tests by which the validity of the acts of the legislature are to be determined. If the majority opinion in that case is to stand as the settled law of the state, then in addition to such tests there is another—an elusive something, elastic and uncertain as an unwritten constitution, which may be invoked to defeat the legislative will. We cannot believe that such principle should receive the final sanction of this court.

The case of *City of Newport v. Horton*, 22 R. I. 196, 47 Atl. 312, adds strength to our convictions on this point. In that case, after a critical review of the authorities, the court arrives at the conclusion that the case of *State v. Moores*, 55 Neb. 480, 76 N. W. 175, is unsupported by a single authority.

²³¹ For these reasons, together with those so well expressed in the minority opinion, we believe the majority opinion should be overruled. It would follow, then, that the board of fire and police commissioners having been created by valid statutory enactment, and thereby clothed with full authority to do the acts sought to be restrained herein, and the defendants being at least *de facto* members thereof, the decree of the district court should be reversed and the cause remanded for further proceedings according to law, and we so recommend.

Duffie and Ames, CC., concur.

By the Court. For the reasons stated in the foregoing opinion, the decree of the district court is reversed and the cause remanded for further proceedings according to law.

Sullivan, J., concurring. I dissented from the judgment in *State v. Moores*, 55 Neb. 480, 76 N. W. 175; and in *State v. Kennedy*, 60 Neb. 300, 83 N. W. 87, which was controlled by the doctrine of *res adjudicata*, I said with respect to the decision in the *Moores* case: "The *Moores* case lays down the doctrine that whatever the court may conceive to be the spirit of

the constitution is to be regarded as part of the paramount law. While the decision, by recognizing and enforcing the asserted right of local self-government, is conceded to rest upon a sound political principle, it was rendered by a divided bench, and, as a judicial pronouncement, has been much criticised. If it is to be acquiesced in and accepted as a rule of construction, the constitution of the state is to be fully known only by studying the opinions of the judges who are chosen to expound it; it will expand or contract with every fluctuation of the popular will which produces a change in the personnel of the court, and the limitations upon legislative power will be as unknown and unstable as were the rules of equity in the days when the chancellor's conscience was the law of the land. It is the opinion of the writer that the decision is thoroughly vicious; it strikes a lethal blow at a co-ordinate branch of the government and ought to be repudiated and condemned." Still retaining these views—still believing that all the governmental powers of municipal corporations come from the legislature and are to be found only in living statutes—I could not, of course, do otherwise than give my approval to the conclusion reached by the department.

Concurrence, C. J., dissenting. I dissent for the reasons stated in the majority opinion in *State v. Moores*, 55 Neb. 480, 76 N. W.

Furthermore, the correctness of the decision in that case is questioned. or raised in the brief of counsel for either party, in this litigation, and this court has repeatedly ruled that questions not raised in the brief are waived: *Peaks v. Lord*, 42 Neb. 100 N. W. 349; *Madsen v. State*, 44 Neb. 631, 62 N. W. 1081; *Bank v. Omaha Nat. Bank*, 43 Neb. 613, 62 N. W. 67; *John Gulick*, 46 Neb. 817, 50 Am. St. Rep. 629, 65 N. W. 883; *Mowing etc. Machine Co. v. Gerhold*, 47 Neb. 397, 66 N. W. 538. The opinion of the majority establishes a bad precedent in deciding a question not raised or argued by counsel.

Statute Creating a Board of Police commissioners for a town, to be created by the governor, and authorizing them to appoint, remove and fix the pay of police officers, is held not unconstitutional in taking from the town the control of local affairs, nor as subjecting inhabitants to unjust and unequal taxation without representation: *Gooch v. Exeter*, 70 N. H. 413, 85 Am. St. Rep. 637, 48 N. H. 100. But see *State v. Barker*, 116 Iowa, 96, 89 N. W. 204, ante, and cases cited in the cross-reference note thereto.

Statute may be Void in Part and valid in part: *State v. Washburn*, 167 Mo. 680, 90 Am. St. Rep. 430, 67 S. W. 592; *State v. Davis*, 144 Ia. 148, 89 Am. St. Rep. 23, 30 South. 344; *Bostock v. Samuels*, 140 U. S. 400, ante, p. 394, 52 Atl. 665.

**PHILADELPHIA MORTGAGE AND TRUST COMPANY
v. CITY OF OMAHA.**

[68 Neb. 280, 88 N. W. 523.]

TAXATION—Special Assessments—Charge on Property.—Taxes levied on land for general revenue purposes, or by way of special assessment for benefits received by local improvements, are not debts, in the ordinary meaning of the word, against the owner of the property, to be enforced as a personal liability, but a charge against the real estate assessed, to be enforced and collected by a sale of the property liable for the taxes so levied and assessed. (p. 444.)

TAXATION—Injunction—Collection of Taxes.—An injunction does not lie to restrain the collection of taxes unless the assessment is void or levied for an illegal or unauthorized purpose. (p. 445.)

MUNICIPAL CORPORATIONS—Estoppel.—The doctrine of estoppel in pais cannot ordinarily be invoked to defeat a municipality in the prosecution of its public affairs because of an error or mistake of one of its agents or officers which has been relied upon by a third person to his detriment. Such doctrine can be appealed to effectively, as against a municipality, only when it is acting in its private, as contradistinguished from its public or governmental capacity. (p. 447.)

Wharton & Baird, for the appellant.

E. H. Scott, for the appellee.

²⁸⁰ **HOLCOMB, J.** Plaintiff and appellant instituted this action in the court below in the exercise of its equity jurisdiction, for the purpose ²⁸¹ of having the title to certain real estate quieted in it and to compel the defendant city treasurer of Omaha to note on his records the payment of certain taxes appearing against said real estate as being unpaid and an apparent lien thereon, and also to enjoin the defendant treasurer from changing the records after they were made to show and record the fact that the said taxes were paid. The relief sought was based substantially on the following facts, which were pleaded in the petition, and the truth of which sufficiently appears from the entire record before us: At the time of the transaction hereinafter narrated one Henry Bolln was city treasurer, and had applied to the plaintiff for a loan of money on the real estate involved in this action, of which he was the owner. The loan was negotiated on the faith of the security offered, and, default having been made in the payment of the loan so made, and the interest, according to the terms of the agreement, such proceedings were thereafter had as resulted in a sale of the

mortgaged property, and the purchase of the same by the plaintiff in satisfaction of its mortgage lien thereon, so that it became the owner of the property in fee simple. At the time the loan was negotiated the taxes for municipal purposes assessed and levied on the real estate offered for security for the years 1892 and 1893, and certain installments of special paving taxes in all amounting to two hundred and fifty-eight dollars and sixty-two cents, were marked "Paid" on the tax records of the city. The plaintiff negotiated the loan and advanced the money to the borrower, relying on the correctness of the tax records as they thus appeared. The taxes were in fact and fact never paid; and subsequent to the transaction relating to the loan and prior to the bringing of the present action, the records were altered by the erasure of the word "Paid," so that the taxes again appeared as unpaid, and an apparent lien on the property against which assessed and levied. On these facts the trial court found the plaintiff's bill was without equity, that it was not entitled to the relief sought, and dismissed the action. From the decree of dismissal the cause is brought to this court by appeal.

It is agreed by all the parties interested, as we understand the record, that the entry on the tax records showing payment of taxes was a mistake, and that the taxes so recorded as paid were never in fact paid into the city treasury, and the records ought not to have been so marked. At all events, there is no shadow of claim put forth by appellant to the effect that the taxes have ever been paid. The law provides that whenever taxes are paid the treasurer shall write on the tax record opposite the description of the real estate or personal property whereon the same were levied, the word "Paid," together with the date of such payment, and the name of the person paying the same: Comp. Stats. 1901, c. 77, art. 1, sec. 108. And it is the contention of appellant that the law presumes that a public officer does his duty, and, the record showing the taxes have been paid, it will be presumed the entry of payment was rightly made, and that, in any event, the city is estopped from enforcing the taxes so marked "Paid," as against the land which levied, and afterward purchased by plaintiff, because it having made the loan mentioned and parted with its money, relying on and in faith of the record as it then appeared, paying all of the taxes mentioned to have been paid. The question thus presented is an interesting one, and, were the facts such as to affect only private individuals, or cor-

porations acting in their corporate capacity as an individual, we would not regard it as difficult of solution. We are, however, constrained to the view that because of the nature and quality of the act relied on to operate as an estoppel, and a proper application of the statutes relating to the public revenues and the manner of their collection, an altogether different question is presented from that first suggested. The plaintiff asks, in effect, that the tax records be changed from their present condition so as to show all of the taxes mentioned in the petition to have been paid; that it be decreed that such taxes are not a lien on the real estate against which they were assessed; and that the defendant city and its treasurer be forever restrained from enforcing or attempting ²⁸³ to enforce the collection of such taxes as against the real estate, the title to which, free from any lien by reason of such taxes, it is sought to have quieted in the plaintiff. The relief demanded is shocking to a court whose conscience is appealed to, since it is obvious that the record thus made under compulsion would be a false one, and deprive the city of the collection of some of its revenues to which it is lawfully entitled. Let us see what the effect of a decree of the kind prayed for would be. The special assessments and the taxes assessed and levied for municipal general revenue purposes are a charge upon and against the particular tracts of land on which assessed, and, unless the real estate can be made to respond to the charges thus made, the taxes cannot be collected, although lawfully levied and justly due, and the city must lose all right thereto. It is suggested in brief of counsel for appellant that the collection of these taxes may be enforced against Bolln, the owner of the real estate at the time they were levied. But this cannot be, under the laws of this state. It will hardly be contended by any, we assume, that a special assessment levied solely on the ground of benefits to the property assessed, and on the theory that for the benefits received because of local improvements, special assessments to correspond to the benefits received may rightfully be made a charge against the property, can be converted into a just and legal demand in personam against the owner of the fee. The law authorizes the taxation of property specially benefited by reason of local improvements, but not the taxation of the owner of such property. On taxes levied on real estate for general revenue purposes this court has more than once held that the tax was not a debt, in the ordinary meaning of the word, against the owner of the property, to be enforced as a personal

liability, but is a charge upon the real estate against which assessed, to be enforced and collected by a sale of the property liable for the taxes so levied and assessed: *Grant v. Bartholomew*, 57 Neb. 673, 78 N. W. 314; *Carman v. Harris*, 61 Neb. 35, 85 N. W. 848.

If our conclusions in respect of the matter last discussed ²⁸⁴ be correct, then it must follow that the ultimate object and purpose to be accomplished by these proceedings are permanently to restrain the collection of the taxes assessed against the property involved in the controversy, although it is conceded that the taxes are in all respects valid, and legally due to the municipality which they are owing. By section 144, article 1, chapter 77 of the Compiled Statutes of 1901, it is provided that no injunction shall be granted by any court or judge in this state to restrain the collection of any tax, or any part thereof, except the tax enjoined be levied or assessed for an illegal or an unauthorized purpose. These provisions are to be given the effect the language used, expressive of the legislative intent, fairly warrants; and the uniform holdings of this court have been that as the assessment is void, or levied for an illegal or unauthorized purpose, injunction cannot be resorted to in order to prevent the enforcement of the collection of such taxes: *Platte Land Co. v. City of Crete*, 11 Neb. 344, 7 N. W.

Wilson v. Auburn, 27 Neb. 435, 43 N. W. 257; *Thatcher v. Adams County*, 19 Neb. 485, 27 N. W. 729; *Spargur v. Mine*, 38 Neb. 736, 57 N. W. 523; *Bellevue Improvement Co. v. Village of Bellevue*, 39 Neb. 876, 885, 58 N. W. 446; *Chicago Ry. Co. v. Cass County*, 51 Neb. 369, 70 N. W. 565. In *Bellevue Improvement Co. v. Village of Bellevue*, 39 Neb. 876, 58 N. W. 446, it is stated in the opinion of the court: "In many cases, courts of equity interfere to restrain the enforcement of taxes upon real estate upon the ground that they cast a cloud upon plaintiff's title, but an inspection of the decisions of our court shows that this principle has not been here recog-

This feature has existed in each of the cases where relief has been refused upon the general ground that no established principle of equity jurisprudence has been invoked to sustain the

The case at bar does not commend itself as coming within an established equitable principle justifying the relief asked, if it be on the ground of estoppel, which will be noticed hereafter. Counsel for appellant insists that it is not sought to prevent the collection of the taxes assessed against the property; it is desired to ²⁸⁵ have released from the lien thereof,

but only to have the apparent lien removed, and that the city is yet at liberty to proceed and collect the taxes in any manner it may adopt, except by proceedings against the real property on which assessed. It is obvious, from an inspection of the revenue laws and the decisions heretofore cited, that the assessments must be collected, if at all, from the property alone liable therefor, and that a suit against the person owning the land at the time of the assessment is unauthorized. It then appears that as to the equities in the case in favor of or against the respective parties, the question is whether the municipality shall lose the taxes lawfully assessed against the property described in the plaintiff's petition, or be permitted to enforce the collection of the amount due, notwithstanding the error made by one of its officers or agents, and leave the plaintiff to his remedy against those responsible for the mistake which led the plaintiff to take the action it did. The plaintiff answers the question by saying that the doctrine of estoppel in pais applies, and the city, because of the erroneous action of one of its agents, on the faith of which plaintiff acted, is prohibited from asserting or enforcing any lien it may have had for the payment of such taxes. Counsel for appellant, in their brief, say: "A municipal corporation may be estopped by the action of its proper officers when acting in its private as contradistinguished from its governmental capacity, and has lawful power to do the act." Conceding the proposition thus enunciated to be correct, can it be said that the act of the city treasurer in erroneously noting on the tax records of a municipality that certain taxes were paid, when, as a matter of fact, they were not, is the act of the corporation in its private or individual capacity and not one pertaining to the government of its affairs? It is frequently said that a municipality has a double character—one governmental, legislative or public; and the other, proprietary or private: Dillon on Municipal Corporations, 4th ed., sec. 66. The authority to assess property, collect taxes, and make disbursements thereof is founded solely and exclusively on the theory that ²⁹⁸ it is essentially a part of the machinery of government, necessary to maintain its existence for the benefit of the public; and it would seem to follow as a natural deduction that the agencies employed in respect of such matters, including the agency authorized to collect the taxes levied for public purposes, is an exercise of powers of a public or governmental character. If correct in the statement just made, then it follows, according to the rule advanced by plaintiff, that the action taken

by one of the public officers of the corporation, which is relied on to operate as an estoppel, was not an act of the corporation in its private or proprietary character, and hence the doctrine invoked is not applicable. The reasons for the distinction have been recognized and applied by this court in an action wherein it was sought to establish the liability of a city for the negligent acts of one of its servants or employes, committed while in the performance of his duties, as an agent or servant of the municipality: *Gillespie v. City of Lincoln*, 35 Neb. 34, 52 N. W. 811. It is there held, in substance, that the exception to the general rule as to liability is based upon a public policy which subordinates private interests only to the welfare of the public generally, and we apprehend that this is the underlying and distinguishing principle as to the law of estoppel when it is invoked against a city for the erroneous acts of one of its officers engaged in the management of some branch of the governmental affairs of the municipality. For reasons as potent as those regarding a city from liability because of the negligent acts of its officers, it would seem estoppel cannot be predicated on or arise from acts of negligence or mistake by an agent of the corporation while in the discharge of the governmental affairs of the municipality. If the rule can be invoked by reason of such errors or mistakes, then, indeed, would the public welfare be seriously menaced, and the ability of the corporation to perform public functions, in many instances, dangerously crippled.

The correct rule, therefore, is, and should be, that the doctrine be appealed to effectively, as against a municipal corporation, only when it is acting ^{as} in its private, as contradistinguished from its public or governmental, capacity. There may well and probably are exceptions to the rule stated, as when a municipality has gained a clear and decided advantage by the reliance on to operate as an estoppel, when equity will prevent it from retaining the advantage, and, at the same time, deny it binding force. In the present case, it is to be borne in mind, that no advantage has been gained by the city by the erroneous and mistaken action of its city treasurer, and that the loss of the plaintiff can result only in a corresponding loss to it.

The authorities are, we think, quite uniform in support of the proposition that the doctrine cannot ordinarily be invoked against a municipality in the prosecution of its public affairs on account of an error or mistake of one of its agents or officers who has been relied upon by a third party to his detriment.

In the case of *People v. Brown*, 67 Ill. 435, it is stated in the head-notes: "Public policy, to prevent loss to the state through the negligence of public officers, forbids the application of the doctrine of estoppel to the state, growing out of the conduct and representations of its officers. On the same ground that the government is excused from the consequence of laches, it should not be affected by the negligence or even willfulness of any one of its officers." Says Mr. Justice Breese, who delivered the opinion of the court: "It is a familiar doctrine, that the state is not embraced within the statute of limitations, unless specially named, and, by analogy, would not fall within the doctrine of estoppel. Its rights, revenues and property would be at fearful hazard, should this doctrine be applicable to a state. A great and overshadowing public policy of preserving these rights, revenues and property from injury and loss by the negligence of public officers, forbids the application of the doctrine. If it can be applied in this case, where a comparatively small amount is involved, it must be applied where millions are involved, thus threatening the very existence of the government. The doctrine is well settled that no laches can be imputed to the government, and ²⁸⁸ by the same reasoning which excuses it from laches, and on the same grounds, it should not be affected by the negligence or even willfulness of any one of its officials." In *City of Chicago v. Sexton*, 115 Ill. 230, 2 N. E. 263, upon the subject of estoppel as to a municipal corporation, the rule is stated in the opinion as follows: "We hold, simply, that a municipal corporation may be estopped by the action of its proper officers, when the corporation is acting in its private, as contradistinguished from its governmental, capacity, and has lawful power to do the act." See, also, authorities bearing generally on the proposition: *Martel v. City of East St. Louis*, 94 Ill. 67; *Axt v. Jackson School*, 90 Ind. 101; *Berry v. Bickford*, 63 N. H. 328; *Sievers v. San Francisco*, 115 Cal. 648, 56 Am. St. Rep. 153, 47 Pac. 687. A case somewhat related to the one at bar is reported in 23 N. J. Eq. 84 (*Kuhl v. Mayor*), wherein a party purchased land relying on the fact of payment of the taxes levied on the same, to evidence which the proper officer had issued a receipt for the taxes, which it appeared afterward had not been actually paid; and, on an application for an injunction, it was held that the doctrine of estoppel did not apply and the injunction was therefore denied. While the reasoning employed does not commend itself to us, the result reached is in

harmony with the general trend of authority. Counsel for appellant cite us some authorities holding that by an injunction a municipality will be restrained from enforcing tax liens on the ground of estoppel, but in each of the two cases cited the sole question considered was that of enforcement of the lien, and not the collection of the taxes, as must be the result in the case at bar if the relief prayed for is granted. The equities of the appellant in the present case are not such as to entitle it to an injunction restraining the collection of the taxes lawfully assessed against the property it now owns, nor can the doctrine of estoppel in pais be successfully invoked to accomplish that result.

It follows that the decree of the district court should be affirmed, which is accordingly done.

The Recovery of Personal Judgments for Taxes is considered in the monographic note to *Richards v. Commissioners of Clay County*, 42 N. St. Rep. 655-661. Unless expressly authorized by statute, it is held that no action can be maintained for the collection of taxes where there is a special and adequate method of their collection, as distress and sale: *Hanson County v. Gray*, 12 S. Dak. 124, 76 Am. Rep. 591, 80 N. W. 175. A special tax or assessment is not a personal charge, and cannot be recovered in a personal action: *Village of Mont v. Jenks*, 197 Ill. 363, 90 Am. St. Rep. 172, 64 N. E. 362. The *Doctrine of Equitable Estoppel* does not apply to a city in its police capacity. See the monographic note to *Schneider v. Hutchinson*, 76 Am. St. Rep. 494, 495; *Mobile Transportation Co. v. Mobile*, Ala. 335, 86 Am. St. Rep. 143, 30 South. 645. Compare *Davenport v. Davenport*, 109 Iowa, 248, 77 Am. St. Rep. 536, 80 N. W. 314.

McCORMICK HARVESTING MACHINE COMPANY v. WILLAN.

[63 Neb. 391, 88 N. W. 497.]

MALICIOUS PROSECUTION of Civil Action.—Damages may be recovered for the prosecution of a civil action maliciously and without probable cause, without the restraint of person or seizure of property. (p. 452.)

TRIAL.—Instructions submitting to the jury an inquiry of fact concerning which there is no evidence, constitute reversible error. (p. 453.)

Ricketts & Wilson, for the appellant.

Morning & Berge, for the appellee.

³⁹¹ AMES, C. This is an action to recover damages for malicious prosecution. The facts, to the extent that a recital of them is deemed requisite for the purpose of this opinion, are disclosed, practically without dispute, in the record, as follows: The plaintiff in error had in its possession certain notes executed to it by the defendant in error and another, and from which it was contended by the defendant in error that he had, for a valuable consideration, been released by an agreement between the parties, and upon which, otherwise, an action was barred by the statute of limitations. Well knowing that upon either or both grounds no right of action existed upon the instruments, the plaintiff, after having, through its agents, demanded and been refused payment, maliciously and for the purpose of injuring and annoying the defendant, at successive times prosecuted suits upon them before justices of the peace in out-of-the-way places in counties far distant from the county of the defendant's residence, which suits were, however abandoned ³⁹² and dismissed after the defendant had been put to great inconvenience, labor and expense in preparing to defend against them. For the purpose of giving colorable jurisdiction to the justices, the plaintiff procured irresponsible persons residing in the counties in which the suits were being brought to become apparently bound upon the notes by indorsement of them. The defendant in error, plaintiff below, recovered a verdict and judgment in the district court, which it is sought to reverse by this proceeding. A large number of alleged errors are assigned, two only of which do we think it necessary to decide upon.

The plaintiff contends that an action for damages for malicious prosecution will not lie when the proceeding complained of is a civil suit in which there has been no restraint of the person or seizure of the property of defendant. In support of this contention he cites a paragraph from the opinion of the late Chief Justice Maxwell, in *Rice v. Day*, 34 Neb. 100, 51 N. W. 464, as follows: "At common law, prior to the statute of Marlbridge (52 Henry III), which gave costs to a defendant where the action against him failed, a defendant who had defeated the party bringing the action might bring an action against him for malicious prosecution. The fact that an ac-

tion was not well founded—had been brought against a party and failed—was sufficient to justify a suit for malicious prosecution, although neither his person nor property had been taken into the custody of the court. After the statute of Marlbridge above referred to took effect, the general rule has been that in a civil action, to justify an action for malicious prosecution, there must have been an arrest of the person or seizure of his property.” We do not think, however, that this paragraph was intended to commit the court, or even the writer of the opinion, to the general rule therein stated. It does not do so explicitly, and the matter under consideration was an action for the malicious seizure of property upon a writ of attachment, or the decision of which, or at any rate, for the reaching of the conclusion arrived at, an invocation of the rule was not requisite. ²⁹³ We therefore regard the question as an open one in this state. As is said by Chief Justice Corliss, speaking for the supreme court of North Dakota, in *Kolka v. Jones*, N. Dak. 461, 71 N. W. 558, 66 Am. St. Rep. 615, the decisions upon the question in this country are in hopeless conflict. But inasmuch as the rule is not a part of the common law, strictly so called, but was introduced in England by statute, the statute may properly be said to be the reason for it, and those states, like this, where the statute or the principle it is not in force, the case may with propriety be said to fall under the operation of the maxim that when the reason for a law fails the law itself ceases to exist. We quote from the opinion in the case last cited: “Before the statute of Marlbridge

(Henry III) an action for the malicious prosecution without probable cause of a mere civil action would lie: *Closson v. Phelps*, 42 Vt. 209-214, 1 Am. Rep. 316; *Lockenour v. Sides*, Ind. 360, 364, 26 Am. Rep. 58; *Lipscomb v. Shofner*, 96 N. 112, 33 S. W. 818; *Pope v. Pollock*, 46 Ohio St. 367, 14 Am. St. Rep. 608, 21 N. E. 356, 14 Am. & Eng. Ency. of L. & L., 32. Why this rule should have been departed from after the act of 52 Henry III had been passed is apparent from the language of that act. It gave to the defendant who had failed in the cause, not merely his costs, but also his damages; and, to make apparent the purpose of parliament to substitute this remedy for the action for malicious prosecution, costs and damages were given only in actions which were malicious, and not in all actions generally: *Lehigh Valley Ry. v. McFarland*, 44 N. J. L. 674-676. Subsequent legislation

in England shows that the statute of Marlbridge was enacted, not as a general law regulating costs, but to afford a summary remedy to the successful defendant in place of the existing right of action to recover his damages on account of the malicious prosecution of a civil action against him. The statute of Gloucester (6 Edward I, chapter 1) gave the defendant costs where he recovered damages, and finally, by the act of 23 Henry VIII, chapter 15, the defendant was given costs in all cases in which he was successful, whether he recovered damages or not, provided the case ³⁹⁴ was one in which the plaintiff could have recovered costs had he been the prevailing party: *Lehigh Valley Ry. Co. v. McFarland*, 44 N. J. L. 674-676. The act of the British parliament which was held to take away the existing cause of action for damages for the malicious prosecution of a civil suit was an act which in terms was limited to cases of that kind; and when it is remembered that it gave the defendant, not merely his costs, but also his damages, it is obvious that the statute was framed to give the successful defendant his remedy in the very case in which he was maliciously prosecuted, instead of compelling him to seek redress in an independent action." Not only are the majority of the later decisions in this country in accord with *Kolka v. Jones*, 6 N. Dak. 461, 66 Am. St. Rep. 615, 71 N. W. 558, but, in our opinion, they rest upon the more weighty and satisfactory reasons. We have not the time nor space at our command for undertaking an extended criticism of the conflicting opinions upon the subject, and, if we had both, such a course would perhaps prove unprofitable. Certainly nothing would be gained by tabulating their names and places of publication, which, however, is done to a considerable extent in the cases above mentioned. It must suffice for us to say that the statute 52 Henry III, above referred to, did not take away the right of recovery for malicious prosecution in cases like the suit at bar, but provided a specific and exclusive remedy therefor. That remedy has not been adopted in this state, and the reasonable consequence is that the right of action continues to exist, so that this case does not present an instance of a wrong without a remedy, contrary to a time honored maxim.

We think, however, that a new trial must be granted, because of an inadvertent error committed by the learned judge who presided at the trial in giving an instruction. The jury were told that one of the elements of damages for which the plaintiff below would be entitled to be compensated, in case he should receive a verdict at their hands would be for the in-

jury to his reputation and credit, if any was shown. It cannot be presumed that by this phrase the ³⁹⁶ jury were intended to be given to understand that the plaintiff might be awarded a sum of money, as under former rules of practice might have been permitted in an action for slander or libel, on account of injury to his standing in the community for integrity, honor and good citizenship, independent of any actual pecuniary loss resulting therefrom. The instruction, so construed, certainly could not be upheld, especially in connection with and as supplemental to the correct instruction that he plaintiff, in the event of his success in the suit, might be compensated for his mental worry and distress. This last item covered all of the elements of the former that could properly be taken into consideration, and the former, coupled with it, implied that something additional might be allowed. What, in this connection, the phrase in question means, and what the judge, had his attention been especially challenged to it, could doubtless have construed it as meaning, is such reputation and credit as affected the business or financial standing and ability of the plaintiff to his actual injury. So construed, the instruction, considered as an abstract proposition of law, is not, we think, objectionable; but, unfortunately, we are unable to find any evidence to which it is applicable; and so the jury were told, in effect, that it was permissible for them to find as a fact a material matter whose existence was not shown by any evidence, or, what perhaps is more likely, the jury, in the absence of such evidence, adopted the former interpretation, and understood themselves to be authorized to make an award of practically exemplary or punitive damages, or, at any rate, something in addition to compensatory damages, which is not allowable in this state. The rule is too well settled in this state to require the citation of authorities in its support that the giving of an instruction, faulty in the respect that it submits to the jury an inquiry of fact concerning which there is no evidence, is reversible error.

It is recommended that the judgment of the district court be reversed, and a new trial granted.

Duffie and Albert, CC., concur.

³⁹⁶ By the Court. For reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and a new trial awarded.

LIABILITY FOR MALICIOUS PROSECUTION OF CIVIL ACTION.*

- I. Foundation of.
- II. Nature of Cases in Which Action Will Lie.
- III. Probable Cause.
 - a. Generally.
 - b. Effect of Judgment.
 - c. Advice of Counsel.
 - d. Dismissal of Action.
- IV. Malice.
- V. Malicious Attachment.
- VI. Damages.
 - a. Generally.
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- VII. Seizure of Person or Property.
- VIII. Form of Action.
- IX. Joint or Several Action.
- X. Termination of Action.
- XI. Statute of Limitations.
- XII. Evidence.
- XIII. Pleadings.

I. Foundation of.

The institution of a civil action by one in his own right for the purpose of enforcing a claim, whether such claim is real or unfounded, affords no cause for an action for malicious prosecution against the person suing, unless by the abuse of process the person or property of the defendant therein is seized or in some manner injuriously affected beyond the mere pretense of defending the action: *Johnson v. King*, 64 Tex. 226. Everyone is liable to be harassed and injured in his property and feelings by unfounded suits, but this is not an injury for which he can have legal redress. To give a right to such redress there must not only be a loss, but it must have been caused by the violation of some legal right. And no one can claim a legal exemption from suit by another who fancies he has a cause of action against him, however unfounded the claim may be in justice or law. The mere bringing of an unfounded suit against one is not actionable: *Haldeman v. Chambers*, 19 Tex. 53, 54; *Smith v. Adams*, 27 Tex. 30; *Parker v. Frambes*, 2 N. J. L. 156.

The essential grounds to support a recovery for a malicious prosecution of a civil action are that there has been an abuse of process therein and that such suit was instituted by the plaintiff therein with malice, without probable cause, and has resulted in damage and injury to the defendant. To maintain such action it is generally necessary that want of probable cause and malice on the part of the defendant combine, with damage to the plaintiff: *Wood v. Weir*, 5 B. Mon. 544; *Slater v. Kimbro*, 91 Ga. 217, 44 Am. St. Rep.

*REFERENCES TO MONOGRAPHIC NOTES.

Malicious prosecution of criminal charges: 26 Am. St. Rep. 127-164.
 Damages for malicious attachment: 68 Am. St. Rep. 266-280.

19, 18 S. E. 296; *Dickinson v. Maynard*, 20 La. Ann. 66, 96 Am. Dec. 379; *Jones v. Fruin*, 26 Neb. 76, 42 N. W. 283; *Hall v. Leaming*, 31 N. J. L. 321, 86 Am. Dec. 213; *Preston v. Cooper*, 1 Dill. 589, Fed. Cas. No. 11,395. To authorize a recovery in an action for a malicious prosecution in bringing a civil action, the fundamental facts of want of probable cause, malice, and damage constituting plaintiff's cause of action must clearly and satisfactorily appear. Unless the facts appear, the costs awarded to a successful defendant in a civil action are the indemnity which the law gives him for a groundless suit, and actions for malicious prosecution based thereon are not to be encouraged: *Ferguson v. Arnow*, 142 N. Y. 580, 37 N. E. 626. * A person is not liable for prosecuting a civil action if he instituted it in good faith without malice, and with no other motive than to recover a debt honestly believed to be due him: *Ronzales v. Colliner*, 68 Cal. 151, 8 Pac. 697. If a creditor has probable cause for believing himself wronged by his debtor's transfer of his property, he is not liable to an action for damages for a malicious attachment: *Witascheck v. Glass*, 46 Mo. App. 209. Unless there is some special damage, no cause of action exists because of a malicious civil suit: *Mitchell v. Southwestern R. R.*, 75 Ia. 298. It is no ground of action that the former suit was maliciously commenced unless it was also commenced without probable cause: *Penny v. Taylor*, 5 La. Ann. 713; *Besson v. Southard*, 10 N. Y. 36; *Stacey v. Emery*, 97 U. S. 642. If one prosecutes a suit against another in the name of a third person without authority and without probable cause, he is liable to the person sued, though he was not actuated by malice in commencing and prosecuting such suit: *Bond Chapin*, 8 Met. 31. Neither the institution nor prosecution of a civil suit in a court which has no jurisdiction thereof affords grounds for the bringing by the defendant of an action against the plaintiff: *Itz v. Meyer*, 40 N. J. L. 252, 29 Am. Rep. 233. In *Antcliffe v. June*, 81 Mich. 477, 21 Am. St. Rep. 533, 45 N. W. 1019, it was held, however, that where wrong and injury are done by a malicious suit, it is immaterial, upon principle, whether the court had jurisdiction to entertain such suit, in order that a recovery may be had for the malicious prosecution. An action for the malicious prosecution of a civil suit is governed by the rules of law applicable to actions for malicious prosecution for causing plaintiff's arrest on a criminal charge: *Collins v. Hayte*, 50 Ill. 353.

An action for damages is proper and will lie whenever one maliciously and without probable cause prosecutes a civil suit against another which results in actual damage to the latter: *Bennet v. Black*, Stew. 39; *Pierce v. Thompson*, 6 Pick. 193; *Lindsay v. Larned*, 17 Mass. 189; *O'Neill v. Johnson*, 53 Minn. 439, 39 Am. St. Rep. 615, 45 N. W. 601; *Antcliffe v. June*, 81 Mich. 477, 21 Am. St. Rep. 533, 45 N. W. 1019; *Brush v. Burt*, 3 N. J. L. 533 (*979); *Lipscomb v. Hofner*, 96 Tenn. 112, 33 S. W. 818. Where a civil suit is commenced and prosecuted maliciously and without probable cause, and is ter-

minated in favor of the defendant, the plaintiff in such suit is liable to the defendant in an action for the damages sustained by him in the defense of such original suit, in excess of taxable costs obtained by him, and to maintain an action to recover such damages it is not material whether the malicious suit was commenced by process of attachment or summons only: *Eastin v. Bank of Stockton*, 66 Cal. 123, 56 Am. Rep. 77, 4 Pac. 1106; *Glosson v. Staples*, 42 Vt. 209, 1 Am. Rep. 316. An action will lie for falsely, maliciously, and without probable cause, making affidavit that plaintiff was about to convert his property into money to place it beyond the reach of creditors, when such affidavit is made in aid of a civil suit: *Fortman v. Rotter*, 8 Ohio St. 548, 70 Am. Dec. 606.

II. Nature of Cases in Which Action Will Lie.

An action to recover for the malicious prosecution of a civil suit without probable cause, to the injury of the defendant therein, will lie in a great variety of cases, and among them may be mentioned that if a landlord maliciously and without probable cause sues out process to dispossess his tenant to his injury, the former is liable to an action for malicious prosecution: *Slater v. Kimbro*, 91 Ga. 217, 44 Am. St. Rep. 19, 18 S. E. 296. If a writ of ne exeat is thus sued out, the defendant in such writ may maintain such action: *Burnap v. Wight*, 14 Ill. 301. The action will lie against one who, with malice and without probable cause, institutes a succession of suits against another, and, upon his appearance to defend, allows such suits to be dismissed, and commences another for the same cause: *Payne v. Donegan*, 9 Ill. App. 566. Such action will lie against one who maliciously and without probable cause, garnishes exempt wages of his judgment debtor, knowing them to be exempt, for the purpose of harassing the latter's employers: *Nix v. Goodhill*, 95 Iowa, 282, 58 Am. St. Rep. 434, 63 N. W. 701. The action will also lie for maliciously and without probable cause suing out an injunction, though it is subsequently dissolved: *Crate v. Kohlsaat*, 44 Ill. App. 460. If a creditor sues for a much larger sum than is actually due, knowing the suit to be excessive, and follows it with an attachment, he is liable in damages for a malicious civil prosecution: *Savage v. Brewer*, 16 Pick. 453, 28 Am. Dec. 255; *Brown v. McIntyre*, 43 Barb. 344. But taking out execution for a larger sum than is due as a balance on a judgment, if not done willfully or through malice, is not ground for an action: *Hall v. Leaming*, 31 N. J. L. 321, 86 Am. Dec. 213. An action for malicious prosecution lies against the plaintiff in a civil suit for the malicious use of legal process by procuring the arrest of the defendant without probable cause, although there was good cause for instituting the suit in which such arrest was made: *Lauzon v. Charroux*, 18 R. I. 467, 28 Atl. 975. An action for malicious prosecution is maintainable for bringing a civil action in replevin and taking goods therein, if the necessary elements of malice and want of probable cause are present: *Brounstein v.*

Sahlein, 63 Hun. 365, 20 N. Y. Supp. 213. And this although the defendant therein recovered his damages for the taking and detention of the property: *McPherson v. Runyon*, 41 Minn. 524, 16 Am. St. Rep. 727, 43 N. W. 392. The prosecution, maliciously and without probable cause, of a suit in forcible entry and detainer, resulting in a verdict for the defendant, affords ground for an action in the nature of a suit for malicious prosecution: *Pope v. Pollock*, 46 Ohio St. 367, 15 Am. St. Rep. 608, 21 N. E. 356. If a writ of attachment is sued out maliciously and without probable cause, to the damage of a defendant in a civil suit, he has a remedy by an action to recover for such malicious abuse of process, aside from the remedy on the attachment bond: *Maskell v. Barker*, 99 Cal. 642, 34 Pac. 340; *Pierce v. Thompson*, 6 Pick. 193; *Brand v. Hinchman*, 68 Mich. 590, 13 Am. St. Rep. 362, 36 N. W. 664; *Preston v. Cooper*, 1 Dill. 589, Fed. Cas. No. 11,395. It seems that, to authorize a recovery, there must be an actual levy of the writ: *Maskell v. Barker*, 99 Cal. 642, 34 Pac. 40. An action will lie for procuring the issuance of a search-warrant maliciously, without probable cause: *Miller v. Brown*, 3 Mo. 27, 23 Am. Dec. 693; *Boeger v. Langenberg*, 97 Mo. 390, 10 Am. St. Rep. 322, 11 S. W. 223. An action may be maintained to recover for the obtaining by another of a judgment maliciously, and through fraud and perjury: *Antcliffe v. June*, 81 Mich. 447, 21 Am. St. Rep. 13, 45 N. W. 1019. An action for damages will lie in favor of one against whom another, maliciously and without probable cause, has instituted or instigated proceedings to have him declared insane, and after his discharge such plaintiff may recover all damages in excess of the taxable costs of such proceedings: *Lockenour v. Sides*, 57 Ind. 10, 26 Am. Rep. 58. But such action cannot be maintained against one for conspiring with another to maintain a bastardy proceeding against the plaintiff, even though actuated by malice, if he had probable cause for believing the truth of his charge: *Green v. Cochran*, Iowa, 544. An action for malicious prosecution of a civil suit will lie against a savings bank: *Reed v. Home Sav. Bank*, 130 Mass. 1, 39 Am. Rep. 468.

An action is not maintainable for a false and malicious prosecution of an ordinary ejectment suit wherein the plaintiff failed to recover all that he claimed: *McNamee v. Minke*, 49 Md. 122. But seems that such action may be maintained upon clear proof of malice and want of probable cause in maintaining the ejectment action: *Johnson v. Meyer*, 36 La. Ann. 333. An action for malicious prosecution will not lie where the alleged malicious suit is founded on a just claim, though less in amount than that sued for: *Grant v. Gore*, 29 Cal. 644. An executor cannot maintain an action for a malicious prosecution of a groundless suit against his testator: *Dennis v. Taylor*, 1 Day, 285. An action for malicious prosecution will not lie against persons who, without probable cause, make application to a chancery court for the appointment of a receiver: *Liddell etc. Mfg. Co. v. Convert*, 82 Ill. App. 39. No one can maintain

an action for the malicious prosecution of a civil suit to which he was not a party: *Duncan v. Griswold*, 92 Ky. 546, 18 S. W. 354.

III. Probable Cause.

a. *Generally.*—For the malicious prosecution of a civil action the plaintiff is not liable if he had probable cause for believing that it could be brought and maintained, and in such case the question of probable cause is a question of law if the facts are not disputed; but if the facts are contradicted, they must be passed upon by the jury before the court can determine the issue of probable cause, but in either contingency, the question is still one of law to be determined by the court from the facts established in the case: *Hall v. Rawles*, 93 Cal. 222, 27 Am. St. Rep. 174, 28 Pac. 937; *Kolka v. Jones*, 6 N. Dak. 461, 66 Am. St. Rep. 615, 71 N. W. 558; *Burk v. Howley*, 179 Pa. St. 539, 57 Am. St. Rep. 607, 36 Atl. 327; *Stewart v. Sonnenborn*, 98 U. S. 187; *Bucki etc. Lumber Co. v. Atlantic Lumber Co.*, 121 Fed. 233.

Where proof of want of probable cause is required, it must be shown by plaintiff affirmatively, and it will not be inferred from mere neglect to prosecute a suit commenced: *Gorton v. De Angelis*, 6 Wend. 418. Plaintiff is required to prove the determination of the former suit in his favor, in order to establish a want of probable cause, only when he has had an opportunity to make a defense in the former action: *Bump v. Betts*, 19 Wend. 421. It is sufficient to establish probable cause that the conduct of the debtor was such as to render the suit a measure of reasonable precaution: *McCullough v. Grishobber*, 4 Watts & S. 201. Facts and circumstances which lead to the inference that a person instituting a suit was actuated by an honest and reasonable conviction of its justice are sufficient to establish probable cause: *Besson v. Southard*, 10 N. Y. 236. Probable cause in such action is such reason supported by facts and circumstances as will warrant a cautious man in the belief that his action and the means taken in prosecuting it are legally just and proper: *Foster v. Pitts*, 63 Ark. 387, 38 S. W. 1114; *Burton v. St. Paul etc. Ry. Co.*, 33 Minn. 189, 22 N. W. 300. To sustain an action for the malicious prosecution of a former civil action, the circumstances must appear to have been such that no reasonable man could have been influenced thereby to the belief that the former action was maintainable, otherwise he had reasonable cause, and cannot be held liable: *Willard v. Booth*, 142 N. Y. 492, 37 N. E. 480. The removal of plaintiff from one state to another for the purpose of bringing an action cannot be regarded by itself as showing want of probable cause: *Woods v. Fennell*, 13 Bush, 628. A mere enticement of the defendant into another state for the purpose of service of process, without detention of either person or property, does not show either want of probable cause or malice: *Smith v. Michigan Buggy Co.*, 66 Ill. App. 516. The fact that an administrator has an execution issued on a judgment in favor of his intestate after being told by the judgment debtor that the judgment was paid, there being no

other evidence of payment, is not sufficient to show that the administrator acted without probable cause: *Mell v. Barner*, 135 Pa. St. 151, 19 Atl. 940. An action for the malicious prosecution of a revocatory action in which plaintiff makes allegations of fraud and impecuniosity on the part of the defendant cannot be sustained, where it appears that prior to the bringing of the first action other creditors had attacked the sales to defendant as fraudulent, and had recovered judgments: *Livingstone v. Hardie*, 41 La. Ann. 311, 6 South. 29. An action for maliciously suing out a *capias ad respondendum* cannot be supported, where, in the original action, the defendant was obliged to set up some collateral matter by way of defense which did not appear from the declaration or the face of the instrument declared on, as that was an admission of want of probable cause: *Wengert v. Beachore*, 1 Penr. & W. 232. If, however, a person with full knowledge of the circumstances, pays a sum of money, and afterward maliciously begins an action to recover part of it back on the ground of over-payment, although the defendant may have received more than he was entitled to, such fact does not support the defense of probable cause: *Pangburn v. Bull*, 1 Wend. 346. If a person brings several suits, some of which have a good foundation and some are groundless, the good suits are not probable cause for bringing the others, and he may be liable for the malicious prosecution of those which are groundless: *Pierce v. Thompson*, 6 Pick. 193. The prosecution of a suit without foundation except in the assumption that the judgment of the highest state court is not law, is without probable cause: *Butchers' etc. Co. v. Crescent City etc. Co.*, 37 La. Ann. 4. If a civil action is brought by a person knowing that the claim sued on has been paid, he cannot justify his conduct, and is answerable for malicious prosecution: *Kolka v. Jones*, 6 N. Dak. 1, 66 Am. St. Rep. 615, 71 N. W. 558.

In civil, as in criminal, prosecutions, the defendant therein, in order to recover on the ground that the action was malicious, must prove want of probable cause and malice; and although the jury may infer malice from proof of want of probable cause, proof even of express malice will not justify the inference that probable cause did not exist. This proposition seems so well settled as to scarcely need the citation of authority: *Smith v. Michigan Buggy Co.*, 66 Mich. App. 516; *Stewart v. Sonneborn*, 98 U. S. 187.

b. *Effect of Judgment.*—Usually the fact that an injunction was issued in the former suit is conclusive evidence of probable cause and a good defense to an action for malicious prosecution of such suit, although the injunction was afterward dissolved before final judgment: *Short v. Spragins*, 104 Ga. 628, 30 S. E. 810. A judgment of any nature by a court of competent jurisdiction in favor of the plaintiff therein is conclusive proof of probable cause for the prosecution of the suit alleged to have been malicious, notwithstanding subsequent reversal by an appellate court, unless it is shown to have been obtained by means of fraud: *Kaye v. Kean*, 18 B. Mon.

839; *Clements v. Odorless etc. Co.*, 67 Md. 461, 605, 1 Am. St. Rep. 409, 10 Atl. 442, 13 Atl. 632; *Welch v. Boston etc. Corp.*, 14 R. L. 609; *Hathaway v. Allen*, Brayt. 152; *Crescent City Livestock Co. v. Butchers' Union etc. Co.*, 120 U. S. 141, 7 Sup. Ct. Rep. 472. A judgment in favor of plaintiff, although afterward reversed, especially if the parties have appeared, and evidence has been taken on both sides, is conclusive of the question of probable cause: *Spring v. Besore*, 12 B. Mon. 551. The judgment until impeached is conclusive of probable cause: *Jones v. Kirksey*, 10 Ala. 839. In *Moffatt v. Fisher*, 47 Iowa, 473, it was held that in an action for a malicious prosecution of a civil suit, the record of the judgment in favor of the plaintiff therein is prima facie, but not conclusive, evidence of probable cause. Judgment in favor of plaintiff in a suit complained of as malicious, it has been held, is not conclusive evidence of probable cause, but may be rebutted by positive evidence: *Burt v. Place*, 4 Wend. 591. In the same state it has also been held that the recovery of a judgment on the merits before a justice of the peace is sufficient evidence of probable cause, for a suit complained of as malicious: *Palmer v. Avery*, 41 Barb. 290. The mere failure of the plaintiff to recover judgment in the original action is not of itself proof of want of probable cause: *Campbell v. Thelkeld*, 2 Dana, 425; *Stewart v. Sonneborn*, 98 U. S. 187. The production of the record of a judgment of nolle prosequi is not of itself even prima facie evidence of want of probable cause for the suit: *Roberts v. Bayles*, 1 Sand. 47. But it has been held in a suit for the malicious prosecution of a civil suit and for a wrongful provisional seizure, the judgment dissolving the writ of seizure is res judicata as to a wrongful seizure and want of probable cause, and establishes a liability for actual damages: *Cretin v. Levy*, 37 La. Ann. 182. If, after judgment for defendant in replevin, another replevin suit against the same defendant, involving the same issues, is discontinued pursuant to an agreement that it shall abide the first, such discontinuance is not prima facie evidence that that suit was without probable cause: *Brownstein v. Sahlein*, 65 Hun, 365, 20 N. Y. Supp. 213. But the termination of the suit by a judgment for the defendant therein is sometimes deemed sufficient to raise a presumption of want of probable cause for commencing the action: *Leyser v. Field*, 5 N. Mex. 357, 23 Pac. 173. If several actions are submitted to referees, who award a balance to one of the parties in some of the suits, the award is conclusive of probable cause as to such of the actions as were groundless: *Pierce v. Thompson*, 6 Pick. 193.

c. *Advice of Counsel*.—The general rule in reference to the advice of counsel in prosecuting a civil suit as showing probable cause as a defense in actions for malicious prosecutions is that where the party has communicated all the facts bearing on the case of which he has knowledge, or could have ascertained by reasonable diligence and inquiry, to a reputable lawyer, and has acted upon the advice

ceived, honestly and in good faith, the want of probable cause is negatived, and the action for malicious prosecution will not lie. The fact that the plaintiff in the original suit has thus acted is conclusive evidence of probable cause for commencing and prosecuting: *Sandell v. Sherman*, 107 Cal. 391, 40 Pac. 493; *Gould v. Gardner*, 8 La. Ann. 11; *Phillips v. Bonham*, 16 La. Ann. 387; *Stone v. Gift*, 4 Pick. 389, 16 Am. Dec. 349; *Le Clear v. Perkins*, 103 Mich. 1, 61 N. W. 357; *Wiesinger v. First Nat. Bank*, 106 Mich. 291, N. W. 59; *Alexander v. Harrison*, 38 Mo. 258, 90 Am. Dec. 431; *Les v. Rathburn*, 55 Barb. 194; *Newton v. Weaver*, 13 B. I. 616; *Agnew v. Bohn*, 43 Fed. 411.

The bona fide acts of a person on advice given by counsel are always evidence of probable cause for bringing the suit, however erroneous such advice may be: *Richardson v. Virtue*, 4 Thomp. & 441. It has also been held that the fact that defendant acted on the advice of counsel, though not of itself a complete defense, is a circumstance to be considered by the jury: *Hogg v. Pinckney*, S. C. 387. The advice of counsel to constitute probable cause as a defense must be based upon a full disclosure of the facts in defendant's knowledge: *Cooper v. Utterbach*, 37 Md. 282; *Wright v. Saidel*, 71 N. H. 558, 53 Atl. 800; *Forbes v. Hagman*, 75 Va. 300; *Blunt v. Little*, 3 Mason, 102, Fed. Cas. No. 1578. And the fact that he acted upon the advice of counsel is no defense if it appears that he kept back important facts from such counsel: *Willard v. Holmes*, 142 N. Y. 492, 37 N. E. 480; *Cuthbert v. Gallon*, 35 Fed. 466. The advice of counsel will not protect the prosecutor unless he acted in good faith in taking and following the advice in instituting the suit: *Wetmore v. Mellinger* (Iowa), N. W. 722; *Kingsbury v. Garden*, 13 Jones & S. 224; *Chambers v. Jpton*, 34 Fed. 473. The defendant cannot justify his action by advice of an attorney who was personally interested in the subject-matter of the suit: *White v. Carr*, 71 Mo. 555, 36 Am. Rep. 533. The court can see that notwithstanding the advice of counsel, it is unreasonable for an ordinary man to believe that a ground for the suit existed, the fact of such advice does not of itself constitute probable cause: *Brewer v. Jacobs*, 22 Fed. 217.

Dismissal of Action.—An action for the malicious prosecution of a civil suit is *prima facie* sustained by proof that the suit was instituted and prosecuted as maliciously prosecuted was voluntarily discontinued. Such proof throws upon the defendant the burden of showing probable cause: *Wetmore v. Mellinger* (Iowa), 14 N. W. 722; *Wright v. Brewer*, 16 Pick. 453, 28 Am. Dec. 255; *Kolka v. Jones*, 10 Dak. 461, 66 Am. St. Rep. 615, 71 N. W. 558; *Burhans v. Sanborn*, 19 Wend. 417; *Newark Coal Co. v. Upson*, 40 Ohio St. 17; *Emerald v. Cochran*, 111 Pa. St. 619, 4 Atl. 498. This rule is denied in *Thompson v. Burns*, 106 Mo. 94, 27 Am. St. Rep. 329, 16 S. W. 881, where it is held that the voluntary dismissal of the action is not *prima facie* evidence of want of probable cause. A person who terminates

a suit against him and has it dismissed by paying what is demanded in it, is estopped to complain that such action was commenced without probable cause: *Sartwell v. Parker*, 141 Mass. 405, 5 N. E. 807. The mere fact that a plaintiff became voluntarily nonsuited does not warrant a finding of want of probable cause in a subsequent action against him for malicious prosecution: *Cohn v. Saidel*, 17 N. H. 558, 53 Atl. 800. Nor does the fact that his action was dismissed for want of jurisdiction after proof on the issue of jurisdiction: *Bitz v. Meyer*, 40 N. J. L. 252, 29 Am. Rep. 233.

IV. Malice.

To maintain an action for the malicious prosecution of a civil suit the plaintiff must prove both malice and want of probable cause, the same as is required in an action for a malicious prosecution of a criminal charge. In either case malice is one of the principal elements in the wrongful act, and its proof in some manner is indispensable as a prerequisite to recovery: *Carey v. Sheets*, 57 Ind. 375; *Forbes v. Geddes*, 6 La. Ann. 402; *Gould v. Gardner*, 8 La. Ann. 11; *Blass v. Gregor*, 15 La. Ann. 421; *White v. Dingley*, 4 Mass. 433; *Stone v. Swift*, 4 Pick. 389, 16 Am. Dec. 349; *Vanduzor v. Lindeman*, 10 Johns. 106; *Emerson v. Cochran*, 111 Pa. St. 619, 4 Atl. 498.

The proof of malice need not be direct, but may be inferred from circumstances: *Lemay v. Williams*, 32 Ark. 166; *Blass v. Gregor*, 15 La. Ann. 421. Want of probable cause in itself always raises a presumption of malice: *Brand v. Hinchman*, 68 Mich. 590, 13 Am. St. Rep. 362, 36 N. W. 664. And malice may always be inferred either by court or jury as a matter of fact from a showing of a want of probable cause: *Bozeman v. Shaw*, 37 Ark. 160; *Southwestern R. Co. v. Mitchell*, 80 Ga. 438, 5 S. E. 490; *Wood v. Weir*, 44 Ky. (5 B. Mon.) 544; *Fullenwider v. McWilliams*, 70 Ky. (7 Bush) 389; *Holliday v. Sterling*, 62 Mo. 321.

Malice is not an inference of law to be drawn from proof of want of probable cause, but it is a mere inference of fact which the jury may or may not draw according to the facts and circumstances of the case: *Willis v. McNeill*, 57 Tex. 465; and the question in such cases whether malice has been thus proven is always for the jury to determine under appropriate instructions: *Holliday v. Sterling*, 62 Mo. 321; *Cohn v. Saidel*, 17 N. H. 558, 53 Atl. 800.

Legal malice is made out by showing that an action was instituted from any wrongful or improper motive, and it is not necessary that actual malevolence or corrupt design be shown. What is done willfully and purposely, if it be known to the doer to be wrong and unlawful, is in legal contemplation malicious: *Southwestern R. Co. v. Mitchell*, 80 Ga. 438, 5 S. E. 490; *Kolka v. Jones*, 6 N. Dak. 461, 66 Am. St. Rep. 615, 71 N. W. 558. The voluntary dismissal of a civil suit by the plaintiff therein will not, in a subsequent suit against him for malicious prosecution, constitute *prima facie* evi-

dence of malice: *Smith v. Burrus*, 106 Mo. 94, 27 Am. St. Rep. 329, 16 S. W. 881. But where the plaintiff dismisses his action without trial, and then begins another suit against the same defendant on the same grounds, the bringing of the latter suit is evidence of malice: *Severns v. Brainard*, 61 Minn. 265, 63 N. W. 477. If a landlord, after suing to have his tenant ejected, recovers judgment, then consents not to execute it, and accepts part of the rent due, subsequent issue to him of a writ of ejectment at his request, without a further default, justifies an inference of malice: *Deslonde v. O'Hern*, 39 La. Ann. 14, 1 South. 286. If an administrator has execution issued on a judgment of his intestate, after being told by the debtor that such judgment is paid, this, in the absence of other evidence of payment, is not sufficient to show that he acted maliciously: *Mell v. Barner*, 135 Pa. St. 151, 19 Atl. 490. Creditors who intervene in insolvency proceedings, and bona fide recommend the appointment of a receiver, are not liable in damages without proof of malice: *Louque v. Drez*, 37 La. Ann. 84.

If a person makes a full statement of the facts to his counsel and acts under his advice in the prosecution of his action, this is evidence, but not conclusive, of a want of malice: *Lemay v. Williams*, 32 Ark. 166. Such professional advice is only evidence to rebut the imputation of or to negative the presumption of malice: *Wells v. Wright*, 44 Iowa, 38; *Soule v. Winslow*, 66 Me. 447. And malice has been expressly proved, evidence of acting on professional advice does not palliate it at all: *Davenport v. Lynch*, 6 Tex. 545. But it is sufficient to rebut the inference of malice, arising from want of probable cause, that an honest statement of the facts were submitted to an attorney at law, who advised that they were sufficient to sustain an action, and that the action was brought upon such advice: *Emerson v. Cochran*, 111 Pa. St. 619, 11 Atl. 498. If the jury can see from the facts that the suit was mainly malicious, notwithstanding the advice of counsel, such advice affords no protection to the plaintiff in the suit complained of as malicious: *Brewer v. Jacobs*, 22 Fed. 217. And if an attorney commences a civil suit for his client, knowing that there is no cause of action, and dishonestly, with some sinister view, and for some purpose of his own, or some other ill purpose known to the attorney as malicious, he is liable to respond in damages therefor: *Liquid Mfg. Co. v. Convert*, 82 Ill. App. 39.

V. Malicious Attachment.

A civil action may be maintained for maliciously and without probable cause suing out an attachment and seizing the goods of the debtor as auxiliary to a civil action, even though there was at the time some indebtedness, and the person injured in such case is not limited to a suit on the attachment bond: *Spaids v. Barrett*, 57 N. H. 39, 11 Am. Rep. 10; *Tomlinson v. Warner*, 9 Or. 103; *Fortman v. Attier*, 8 Ohio St. 548, 70 Am. Dec. 606. If the action is brought

on allegations of damage arising from a wrongful attachment, special injury must be alleged and shown: *Spinger v. Wise*, 2 Dism. (Ohio) 391. To maintain an action for a malicious attachment, the plaintiff must plead and prove that the attachment suit was malicious and without probable cause. Upon proof of want of probable cause malice may be inferred, but from proof of malice no inference arises of want of probable cause: *Anderson v. Columbia etc. Co.*, 20 Ky. Law Rep. 1790, 50 S. W. 40; *Grant v. Reinhart*, 33 Mo. App. 74; *Kelley v. Osborn*, 86 Mo. App. 239; *Talbott v. Great Western etc. Co.*, 86 Mo. App. 558. Probable cause for suing out an attachment may have existed though the attachment was unauthorized: *Gimbel v. Gomprecht* (Tex. Civ. App.), 36 S. W. 781.

To constitute probable ground for suing out an attachment, it must appear not only that there were reasonable grounds for belief by the plaintiff therein, but also that he actually believed that there were such grounds for the attachment. Such belief must be founded upon such circumstances as in a man of ordinary prudence, caution, and judgment are sufficient to produce such belief: *Foster v. Pitts*, 63 Ark. 387, 38 S. W. 1114; *Brand v. Hinchman*, 68 Mich. 590, 13 Am. St. Rep. 362, 36 N. W. 664; *Spengler v. Davy*, 15 Gratt. 381. In such case malice is any improper motive or sinister design for suing out the attachment. It need not spring from any spirit of malevolence, nor be prompted by any malignant passion: *Foster v. Pitts*, 63 Ark. 387, 38 S. W. 1114; *Spengler v. Davy*, 15 Gratt. 381.

It is no bar to an action for maliciously attaching property that the defendant in attachment settled the suit by paying the debt and costs if such suit was prosecuted with malice and without probable cause: *Brand v. Hinchman*, 68 Mich. 590, 13 Am. St. Rep. 362, 36 N. W. 664. An action on the attachment bond does not bar another suit for a malicious prosecution: *Bruce v. Coleman*, 1 Handy, 515.

In an action for maliciously suing out an attachment the defendant therein cannot shield himself from liability by raising the objection that the affidavit on which the writ was issued was insufficient to authorize the attachment: *Forrest v. Collier*, 20 Ala. 175, 56 Am. Dec. 190. Nor is it any answer to such action for defendant to prove that he believed, and had good reason to believe, that plaintiff was about to make a disposition of property so as to hinder and delay creditors: *Donnell v. Jones*, 13 Ala. 490, 48 Am. Dec. 59.

A person who libels a ship in good faith and without malice, but fails in his suit, is not liable to a suit for malicious prosecution: *Kemp v. Brown*, 43 Fed. 391. An action for malicious prosecution does not lie for seizing property lawfully liable to attachment, even though the attaching creditor acted maliciously if he had probable cause: *Batchelder v. Frank*, 49 Vt. 90. An action for a malicious attachment cannot be maintained when the attachment was sued out on grounds the existence of which was previously admitted by the attachment defendant. Such admission constitutes probable cause:

Wise v. McNichols, 63 Mo. App. 141. An action for the malicious prosecution of an attachment will not lie where the debtor submitted to the attachment and paid the debt: **Hibbard v. Ryan**, 46 Ill. App. 313. In such action plaintiff cannot recover as for a conversion of the goods attached: **Burton v. St. Paul etc. Ry. Co.**, 33 Minn. 189, 22 N. W. 300. Such action will not lie by a stockholder in a corporation against a person for fraudulently and maliciously attaching his stock. The action must be brought by the corporation: **Eldred v. Ripley**, 97 Ill. App. 503. The subject of damages for malicious attachment is fully treated in a note to **Tisdale v. Major**, 38 Am. St. Rep. 266-280.

VI. Damages.

a. Generally.—If a civil suit is commenced and prosecuted maliciously and without probable cause, and is terminated in favor of the defendant, the plaintiff in such suit is liable to the defendant in an action for the damages sustained by him in the defense of the original suit in excess of the taxable costs obtained by him: **Whiting v. Johnson**, 6 Gray, 246; **Closson v. Staples**, 42 Vt. 209, 1 Am. Rep. 16. Compensatory damages only can be recovered in the absence of actual malice: **Goodbar v. Lindsley**, 51 Ark. 380, 14 Am. St. Rep. 1, 11 S. W. 577; **Barnett v. Reed**, 51 Pa. St. 190, 88 Am. Dec. 574; **Synberg v. Cohen**, 76 Tex. 409, 13 S. W. 315. But vindictive or exemplary damages may be given to punish the defendant when actual malice is shown: **Stewart v. Cole**, 46 Ala. 646; **Spaids v. Barrett**, 111 Ill. 289, 11 Am. Rep. 10; **Hurlbut v. Hardenbrook**, 85 Iowa, 606, 13 N. W. 510; **Barnett v. Reed**, 51 Pa. St. 190, 88 Am. Dec. 574. While it is clear that exemplary damages may be recovered for maliciously suing out a writ of attachment without probable cause: note to **Tisdale v. Major**, 68 Am. St. Rep. 277; it seems that such damages cannot be recovered for suing out an injunction maliciously and without probable cause: **Galveston etc. Ry. Co. v. Ware**, 74 Tex. 1, 11 S. W. 918; **Shackelford Co. v. Hermsfield** (Tex. Civ. App.), 24 W. 358.

Plaintiff in an action for the malicious prosecution of a civil suit under any circumstances, entitled to recover only so much of his expenditures as were reasonably expended: **Eastin v. Bank of Jackson**, 66 Cal. 123, 56 Am. Rep. 77, 4 Pac. 1106. Injuries to reputation, credit and business caused by the malicious prosecution of a civil action without probable cause are elements of damage which may be recovered: **Goldsmith v. Picard**, 27 Ala. 142; **Zinn v. Rice**, 111 Mass. 571, 37 N. E. 747; **Lord v. Guyot** (Colo.), 70 Pac. 683; **Schindermann v. Buschner**, 73 Ill. App. 180; **State v. Thomas**, 19 Mo. 1, 61 Am. Dec. 580; **Kaufman v. Armstrong**, 74 Tex. 65, 11 S. W. 18; **Wade v. National Bank**, 114 Fed. 377. In an action for malicious attachment against a partnership, the jury can consider the injury to the partnership business in estimating damages: **Connell v. Jones**, 13 Ala. 490, 48 Am. Dec. 59. In such action recovery

may be had for loss arising from inability to sell the attached property: *Lord v. Guyot* (Colo.), 70 Pac. 683.

The damages recoverable for the malicious prosecution of a civil suit include all the loss which the plaintiff sustained in his business as the direct and natural result of that suit, and all the expenses incurred in the defense, including counsel fees: *Magner v. Renk*, 65 Wis. 364, 27 N. W. 26. The measure of damages for maliciously instituting an action of forcible entry and detainer against the lessee of a coal mine is the reasonable value of the use of the premises for the time he was kept out of possession, together with the permanent injury, if any, to his leasehold interest: *Moffatt v. Fisher*, 47 Iowa, 473. The measure of damage against one who has maliciously kept another out of the possession of certain coal mines for a year is the value of the use of the property for business purposes: *Newark Coal Co. v. Upson*, 40 Ohio St. 17.

b. **Counsel Fees.**—To recover counsel fees as an element of damage in an action for the malicious prosecution of a civil suit, malice and want of probable cause must be shown: *Stewart v. Sonneborn*, 98 U. S. 187. But if malice and want of probable cause are shown, attorney's fees, to the extent that they are reasonable and necessary, may be recovered: *Marshall v. Betner*, 17 Ala. 832; *Kolka v. Jones*, 6 N. Dak. 461, 66 Am. St. Rep. 615, 71 N. W. 558; *Hughes v. Brooks*, 36 Tex. 379. It has been determined that counsel fees are recoverable in such cases only when they are part of the damages resulting as the natural and proximate consequence of the suit complained of: *Landa v. Obert*, 45 Tex. 539. And then the value of the attorney's services must be shown: *Mitchell v. Davies*, 51 Minn. 168, 53 N. W. 363. In an action to recover for a malicious attachment, the counsel fees recoverable do not include those incurred in the defense of the suit, but only such as are incurred exclusively in relation to the writ: *Cretin v. Levy*, 37 La. Ann. 182.

VII. Seizure of Person or Property.

Upon the subject as to whether an action for malicious prosecution of a civil action will lie, when there has been no seizure of the person or the property of the defendant therein, we find the cases in America in hopeless and irreconcilable conflict, and about balanced in numbers. Perhaps it may be safe to state that the weight of authority sustains the rule, that for a malicious prosecution of a civil action without probable cause, to the injury of the defendant therein, the plaintiff is answerable to him, though the latter was not arrested nor his property or rights therein interfered with in any manner. In the states in which this question has been already decided, the rule established will be adhered to regardless of the weight of authority, but in those states where the question may be regarded as open or as one of first impression, and hence in the late cases we find the courts almost without exception establishing the rule above announced. This is so of the principal case. So many cases involv-

ing this question are found reported in this series, and both sides of the topic are so ably discussed therein that it would be a mere waste of the reader's time to attempt to add anything to what has already been said in the cases cited below. We shall content ourselves with the citation of the cases pro and con, and here follow those which sustain the doctrine above announced and that maintained in the principal case, which we believe to be the better rule, and the one which ought to maintain in this country: *Easton v. Bank of Stockton*, 66 Cal. 123, 56 Am. Rep. 77, 4 Pac. 1106; *Hoyt v. Macon*, 2 Colo. 113; *Woods v. Finnell*, 13 Bush, 628; *McCardle v. McGinley*, 36 Ind. 538, 44 Am. Rep. 343; *Brand v. Hinchman*, 68 Mich. 590, 13 Am. St. Rep. 362, 36 N. W. 664; *Antcliffe v. June*, 81 Mich. 477, 11 Am. St. Rep. 533, 45 N. W. 1019; *McPherson v. Runyon*, 41 Minn. 24, 16 Am. St. Rep. 727, 43 N. W. 392; *O'Neill v. Johnson*, 53 Minn. 139, 39 Am. St. Rep. 615, 55 N. W. 601; *Eickhoff v. Fidelity etc. Co.*, 4 Minn. 139, 76 N. W. 1030; *Brady v. Ervin*, 48 Mo. 533; *Smith v. Burrus*, 106 Mo. 94, 27 Am. St. Rep. 329, 16 S. W. 881; *Kolka v. Jones*, 6 N. Dak. 461, 66 Am. St. Rep. 615, 71 N. W. 558; *Pangburn v. Hull*, 1 Wend. 345; *Pope v. Pollock*, 46 Ohio St. 367, 15 Am. St. Rep. 98, 21 N. E. 356; *Lipscomb v. Shofner*, 96 Tenn. 112, 33 S. W. 818; *Losson v. Staples*, 42 Vt. 209, 1 Am. Rep. 316. The cases above cited hold that an action for malicious prosecution may be maintained, although the original action was begun by civil summons, and the defendant in that action was not arrested nor his property seized: *Smith v. Burrus*, 106 Mo. 94, 27 Am. St. Rep. 329, 16 S. W. 881; *Losson v. Staples*, 42 Vt. 209, 1 Am. Rep. 316. "It is difficult to see by the right of a plaintiff, who, as defendant, has been sued in a civil action maliciously and without probable cause, and who has been put to great expense in consequence thereof, should be altered at all affected merely by the incident of his property having been attached or his person seized, for in either case the damage, the expense and costs of defending the suit, whether instituted by *repleas satisfaciendum*, or attachment, or by civil summons would be the same, and it is clear that the recovery of costs would not, under the present practice, reimburse him for his attorney's fees, something which, together with other incidental expenses, he does recover under the English practice": *Smith v. Burrus*, 106 Mo. 94, 27 Am. St. Rep. 329, 16 S. W. 881. In *Brand v. Hinchman*, 68 Mich. 590, 13 Am. St. Rep. 362, 36 N. W. 664, Judge Morse, after citing a large number of cases in support of the rule above mentioned, said: "The reason for the rule laid down by these last-mentioned authorities seems to me to be satisfactory and in accordance with right and justice. The common law declares that for every wrong there is a remedy. Especially is this so where the injury is malicious. If a man is injured in his credit and reputation, and his business lessened or broken, it can make no difference in his right to recover for such injury, whether his person or property has not been manually seized or disturbed." As showing the trend of modern authority in this country,

the remarks of Chief Justice Corliss in *Kolka v. Jones*, 6 N. Dak. 461, 66 Am. St. Rep. 616, 71 N. W. 558, may be used as follows: "On this very interesting question we find the decisions in hopeless conflict. In this jurisdiction it is an open question, and we shall therefore settle it upon principle and in accordance with the weight of argument, without reference to the number of authorities which can be arrayed upon the opposite sides respectively of this controversy. It may not be amiss, however, to remark that in our opinion the scales in which are balanced the relative weight of authority on this point have turned, and that now it is no longer true, as erstwhile it was, that the adjudications preponderate in favor of the English rule, that in the absence of the arrest of the person or of the seizure of property, or of other special circumstances, the successful defendant has no remedy, despite the fact that his antagonist proceeded against him maliciously and without probable cause." This is followed by a lengthy citation of authorities pro and con, and the final adoption of what may now be designated as the American rule—namely, that an action for malicious prosecution of a civil action will lie, although the original action was begun by civil summons alone, and the defendant therein was not arrested nor his property seized.

The contrary, or English, rule is supported by a large number of authorities, and as announced in this country is that an action cannot be maintained for maliciously prosecuting a civil suit, by the party himself in interest unless the defendant has, upon such prosecution, been arrested without cause and deprived of his liberty, or his property has been seized or he has been made to suffer other special grievance different from, and superadded to, the ordinary expenses of a defense. In the absence of such special grievance an action will not lie for maliciously prosecuting a civil suit by summons in a court having jurisdiction to impose costs on the unsuccessful party. In other words, this rule is that an action for damages for the alleged malicious prosecution of a civil suit without probable cause will not lie where the process or the suit so prosecuted was by summons only, not accompanied by arrest of the person or seizure of property or other special injury not common to all similar suits: *Mitchell v. Southwestern R. R.*, 75 Ga. 398; *Smith v. Michigan Buggy Co.*, 175 Ill. 619, 87 Am. St. Rep. 242, 51 N. E. 569; *Bonney v. King*, 201 Ill. 47, 66 N. E. 377; *Dooley v. Meisenbach*, 83 Ill. App. 75; *Wetmore v. Mellinger*, 64 Iowa, 741, 52 Am. Rep. 465, 18 N. W. 870; *Supreme Lodge A. P. L. v. Unverzagt*, 76 Md. 140, 24 Atl. 323; *Potts v. Imlay*, 4 N. J. L. 330, 7 Am. Dec. 603; *Bitp v. Meyer*, 40 N. J. L. 252, 29 Am. Rep. 233; *Terry v. Davis*, 114 N. C. 31, 18 S. E. 943; *Cincinnati Daily Tribune Co. v. Brueck*, 61 Ohio St. 489, 76 Am. St. Rep. 433, 56 N. E. 198; *Muldoon v. Rickey*, 103 Pa. St. 110, 49 Am. Rep. 117; *Norcross v. Otis*, 152 Pa. St. 481, 34 Am. St. Rep. 669, 25 Atl. 575; *Johnson v. King*, 64 Tex. 226; *Luby v. Bennett*, 111 Wis. 613, 87 Am. St. Rep. 897, 87 N. W. 804. The reason for this rule which runs

through all of the cases sustaining it is well stated in *Wetmore v. Mellinger*, 64 Iowa, 741, 52 Am. Rep. 465, 18 N. W. 870, where it is said:

"The doctrine is supported by the following considerations: The courts are open and free to all who have grievances and seek remedies therefor, and there should be no restraint upon a suitor, through fear of liability resulting from failure in his action, which would keep him from the courts. He ought not, in ordinary cases, to be subject to a suit for bringing an action, and be required to defend against the charge of malice and the want of probable cause. If an action may be maintained against a plaintiff for the malicious prosecution of a suit without probable cause, why should not a right of action accrue against a defendant who defends without probable cause and with malice? The doctrine surely tends to discourage vexatious litigation rather than to promote it.

"It will be observed that the statement of the doctrine we have made extends it no further than to cases prosecuted in the usual manner where defendants suffer no special damages or grievance other than is induced by all defendants in suits brought upon like causes of action. If the bringing of the action operates to disturb the peace, to impose care and expense, or even to cast discredit and suspicion upon the defendant, the same results follow all actions of like character, whether they be meritorious or prosecuted maliciously and without probable cause. They are incidents of litigation. But if an action is so prosecuted as to entail unusual hardship upon the defendant, and subject him to special loss of property or of reputation, he ought to be compensated."

VIII. Form of Action.

In bringing an action to recover for the malicious prosecution of a civil suit, an action on the case or trespass on the case is the proper form of remedy and not an action of trespass *vi et armis*. As case

is always the appropriate form of remedy for the abuse of legal process in civil actions, regularly issued from a court of competent jurisdiction: *Sheppard v. Furniss*, 19 Ala. 760; *Riley v. Johnston*, 3 Ga. 260; *Owens v. Starr*, 2 Litt. 230; *Warfield v. Walter*, 11 Gill J. 80; *Zachary v. Holden*, 2 Jones, 453; *Hobbs v. Ray*, 18 B. 1. 84, 25 Ill. 694; *McHugh v. Pundt*, 1 Bail. 441. Case is always the proper form of action for an abuse of legal process in maliciously and without probable cause suing out a writ of attachment, replevin or execution and the like: *Barnett v. Reed*, 51 Pa. St. 190, 88 Am. Dec. 4; *Shaver v. White*, 6 Munf. 110, 8 Am. Dec. 730; *Olinger v. McLesney*, 7 Leigh, 660.

IX. Joint or Several Action.

As a general rule, the right to maintain an action for the malicious prosecution of a civil suit is several, and not joint, and the reason given is that the injury to each of the defendants in the suit com-

plained of is separate and personal: *McLeod v. McLeod*, 73 Ala. 42; *Ainsworth v. Allen*, Kirby, 145; *Grimes v. Bowerman*, 92 Mich. 258, 52 N. W. 751. Two or more persons who have been maliciously prosecuted civilly may join in an action for damages for expenses jointly incurred in defending such suit, as for attorney's fees, but as a rule such action cannot be jointly maintained, because in such case there is separate injury inflicted for which only a separate action can be maintained. Thus, loss of time, hotel and livery bills are not joint expenses in such a case: *Swales v. Grubbs*, 6 Ind. App. 477, 33 N. E. 1124. But it has been held that if several persons have suffered a joint injury from the issuance of an attachment sued out maliciously and without probable cause in a civil suit, they may unite in an action to recover their joint damages for injury to their credit, business and property: *Cochrane v. Quackenbush*, 29 Minn. 376, 13 N. W. 154.

X. Termination of Action.

An action for the malicious prosecution of a civil suit may be maintained in any case where such suit has been commenced or prosecuted with malice and without probable cause, and has been terminated in favor of the defendant therein who has sustained damage thereby over and above his taxable costs: *Marbourg v. Smith*, 11 Kan. 554; *McCardle v. McGinley*, 86 Ind. 438, 44 Am. Rep. 343; *Closson v. Staples*, 42 Vt. 209, 1 Am. Rep. 316. Although there is some conflict of authority, the better rule undoubtedly as established by a great majority of the cases is, that a plaintiff cannot maintain an action for the malicious prosecution of a civil suit until after the legal termination in his favor of the suit complained of. These cases hold that before such action will lie there must be a judgment on the merits in defendant's favor in the suit complained of, as such judgment is an essential element of the evidence of want of probable cause: *Hurgren v. Mutual Life Ins. Co. (Cal.)*, 69 Pac. 615; *Bonney v. King*, 201 Ill. 47, 66 N. E. 377; *West v. Hayes*, 104 Ind. 251, 3 N. E. 932; *Brooks v. Westover*, 65 Iowa, 369, 21 N. W. 682; *Cawker City Bank v. Jennings*, 89 Iowa, 230, 56 N. W. 494; *Davis v. Stuart*, 47 La. Ann. 378, 16 South. 871; *Wood v. Laycock*, 3 Met. (Ky.) 192; *O'Brien v. Barry*, 106 Mass. 300, 8 Am. Rep. 329; *Cardinal v. Smith*, 109 Mass. 158, 12 Am. Rep. 682; *Hamilburgh v. Shepard*, 119 Mass. 30; *Kelley v. Osborn*, 86 Mo. App. 239; *Swepson v. Davis (Tenn.)*, 70 S. W. 65; *Luby v. Bennett*, 111 Wis. 613, 87 Am. St. Rep. 897, 87 N. W. 804. A judgment of dismissal is a sufficient termination of the suit in favor of defendant to authorize him to commence an action for malicious prosecution: *Asevado v. Orr*, 100 Cal. 293, 34 Pac. 777; *Marbourg v. Smith*, 11 Kan. 554. The rule requiring the plaintiff to show that the suit was finally decided in his favor is complied with by showing a judgment in his favor on appeal from a judgment against him in the lower court: *Burt v. Place*, 4 Wend. 591. While generally a right of action for

malicious prosecution does not accrue until the wrongful proceeding has been brought to a final determination in favor of the defendant, yet it is not, however, necessary that all proceedings required in the action to finally enforce the rights of the parties end before such right of action accrues, but only that the issues material to the question of bona fides of the action shall have been tried and closed by final judgment. Hence the right of appeal in the original action does not prevent judgment therein in favor of defendant from being such a final judgment and determination of the action as is necessary to support an action for malicious prosecution: *Luby v. Bennett*, 111 Wis. 613, 87 Am. St. Rep. 897, 87 N. W. 804. But the termination of the suit must be such as does not admit a reasonable cause for prosecution thereof. Hence a termination by compromise or settlement between the parties is such an admission of probable cause by the defendant therein as will estop him from its subsequent denial or the right to recover on the ground that the suit was malicious: *Emery v. Ginnan*, 24 Ill. App. 65; *Rosenburg v. Hart*, 33 Ill. App. 62.

A number of cases hold that if a civil suit is maliciously prosecuted, especially the swearing out of a false attachment without probable cause, it is not necessary in order to maintain an action to recover therefor that the suit should have ended, or that the attachment must have been discharged or otherwise terminated in favor of the defendant in the original suit: *Alsop v. Lidden*, 130 Ia. 548, 30 South. 401; *Zinn v. Rice*, 154 Mass. 1, 27 N. E. 772; *Brand v. Hinchman*, 68 Mich. 590, 13 Am. St. Rep. 362, 36 N. W. 664; *Maldwell v. Corey*, 91 Mich. 335, 51 N. W. 888; *Rossiter v. Minnesota etc. Paper Co.*, 37 Minn. 296, 33 N. W. 855; *Fortman v. Kottier*, Ohio St. 548, 72 Am. Dec. 606.

XI. Statute of Limitations.

Under the California decisions the statute of limitations begins to run on a cause of action for the malicious prosecution of a civil suit from the time of the commission of the wrongful act complained of: *Wood v. Currey*, 57 Cal. 208; *Sharp v. Miller*, 57 Cal. 431; *McCusker v. Walker*, 77 Cal. 208, 19 Pac. 382. But in other jurisdictions the statute begins to run against such cause of action only from the time that the litigation complained of is terminated: *Printup v. Smith*, 74 Ga. 157. The latter rule is probably the correct one under the best considered cases and weight of authority holding that in order to enable a person to maintain an action, for the malicious prosecution of a civil suit, the litigation complained of must have terminated and been ended: See subdivision X of this note.

XII. Evidence.

The burden of proof is on the plaintiff to show that the suit of which he complains was instituted maliciously and without probable

cause, and that he was damaged thereby: *Eslava v. Jones*, 83 Ala. 139, 3 Am. St. Rep. 699, 3 South. 317; *Grant v. Moore*, 29 Cal. 644; *Coleman v. Allen*, 79 Ga. 637, 11 Am. St. Rep. 449, 5 S. E. 204; *Richards v. Jewett* (Iowa), 92 N. W. 689; *Clements v. Odorless etc. Co.*, 67 Md. 461, 605, 1 Am. St. Rep. 409, 10 Atl. 442, 13 Atl. 632; *Le Clear v. Perkins*, 103 Mich. 131, 61 N. W. 357; *Jones v. Fruin*, 26 Neb. 76, 42 N. W. 283; *Preston v. Cooper*, 1 Dill. 589, Fed. Cas. No. 11,395.

The voluntary dismissal of the first suit casts upon the defendant in an action for the malicious prosecution thereof the burden of showing probable cause: *Wetmore v. Mellinger*, 64 Iowa, 741, 52 Am. Rep. 465, 18 N. W. 870. As an action for malicious prosecution is one in which exemplary damages are allowable, evidence of defendant's pecuniary circumstances may be received: *Weaver v. Page*, 6 Cal. 681; *Sexson v. Hoover*, 1 Ind. App. 65, 27 N. E. 105. In an action to recover for a vexatious suit, the plaintiff may show as special damage his peculiar situation and circumstances at the time such suit was brought: *Nichols v. Bronson*, 2 Day, 211. If the action is for maliciously suing out an attachment, plaintiff may show that when the writ was issued he owed no one but the defendant, to show the malice and bad faith of the latter: *Tykeson v. Bowman*, 60 Minn. 108, 61 N. W. 909. And in such action evidence of other attachments immediately following is admissible to show damages: *Grimes v. Bowerman*, 92 Mich. 258, 52 N. W. 751. But under a claim for damages plaintiff cannot prove what was the usual profit made by an establishment in the neighborhood in the same kind of business: *O'Grady v. Julian*, 34 Ala. 88. On the part of the defendant a creditor's false affidavit that his resident debtor intends to abscond is not evidence of probable cause for issuing an attachment against his effects: *Tomlinson v. Warner*, 9 Ohio, 103. Evidence that a firm was insolvent at the time of the attachment is admissible only on the question of damages: *Donnell v. Jones*, 13 Ala. 490, 48 Am. Dec. 59. Other proceedings against the maker of a note are admissible in evidence in mitigation of damages: *White v. Wyley*, 17 Ala. 167. But it has been held that evidence of the condition of the attached firm, its assets and credits, is admissible to show want of probable cause for taking out the writ: *Grimes v. Bowerman*, 92 Mich. 258, 52 N. W. 751. Defendant may show in mitigation of damages that he was plaintiff's surety on a bond to stay execution in the suit in which the alleged malicious attachment was issued: *Forrest v. Collier*, 20 Ala. 175, 56 Am. Dec. 190. A judgment for the defendant in the first suit does not estop the plaintiff therein from showing that the debt for which attachment issued was actually due, and that he therefore had probable cause: *Marshall v. Betner*, 17 Ala. 832. That a deed of trust was made by plaintiff prior to the suit is admissible in favor of defendant to show probable cause: *Yarbrough v. Hudson*, 19 Ala. 853.

XIII. Pleadings.

The complaint must allege that such suit was commenced and prosecuted without probable cause: *King v. Montgomery*, 50 Cal. 115; *Mitchell v. Mattingly*, 1 Met. (Ky.) 237; *Duncan v. Griswold*, 92 Ky. 546, 18 S. W. 354; *Lohrfink v. Still*, 10 Md. 530; *Moody v. Deutsch*, 85 Mo. 237; *Witascheck v. Glass*, 46 Mo. App. 209; *Davis v. Clough*, 8 N. H. 157; *Thompson v. Gatlin*, 58 Fed. 534. A want of probable cause is sufficiently averred by the statement of facts necessarily showing it: *Wall v. Toomey*, 52 Conn. 35. But a complaint which fails to allege want of probable cause, or of facts which, if proved, would establish it, is properly dismissed: *Ely v. Davis*, 111 N. C. 24, 15 S. E. 878.

The complaint must contain allegations of malice as well as of want of probable cause, and should set forth the malicious conduct of the defendant: *Phillips v. Lehman*, 39 La. Ann. 630, 2 South. 409; *Jones v. Fruin*, 26 Neb. 76, 42 N. W. 283; *Burkhardt v. Jennings*, W. Va. 242; *Preston v. Cooper*, 1 Dill. 589, Fed. Cas. No. 11,395; *McCracken v. Covington City Bank*, 4 Fed. 602. An averment that the suit was begun wrongfully, fraudulently, and in order to injure and oppress the plaintiff, is equivalent to an averment that it was commenced maliciously: *Forrest v. Collier*, 20 Ala. 175, 56 Am. Dec. 10.

A defect in the complaint in not alleging malice and want of probable cause, it has been held, is cured by verdict: *Levey v. Fargo*, Neb. 415. But the omission of such allegations is not cured by verdict if the sufficiency of the pleadings is challenged at the trial. Each omission makes the complaint demurrable: *Mitchell v. Silver Lake Lodge*, 29 Or. 294, 45 Pac. 798. The complaint is also demurrable if it fails to aver that plaintiff has suffered any loss, annoyance or inconvenience: *Smith v. Hintrager*, 67 Iowa, 109, 24 N. W. 4.

Although the plaintiff must in his declaration set out the particular grievance of which he complains: *Pangburn v. Bull*, 1 Wend. 5; he need not set out in full the particulars of the malicious suit, it only the substance thereof: *Closson v. Staples*, 42 Vt. 209, 1 Am. Rep. 316. Hence the rule that plaintiff must set out the facts which constitute his cause of action is complied with where he sets out the several suits brought by the defendant and the other proceedings connected therewith: *Pangburn v. Bull*, 1 Wend. 345. A complaint is not prima facie insufficient because it contains averments showing that a cause of action existed, if it also contains other averments showing that such cause did not exist when the suit complained of was brought: *Closson v. Staples*, 42 Vt. 209, 1 Am. Rep. 316. In an action for malicious attachment a complaint negating the existence of the ground of complaint set up in the attachment affidavit is sufficient: *Brown v. Master*, 104 Ala. 451, 16 N. W. 443. And a complaint which alleges that the attachment

affidavit was false in every particular, and so known to be by affiant at the time, is sufficient as against a general objection to the admission of any evidence under it: *Beyersdorf v. Sump*, 39 Minn. 495, 13 Am. St. Rep. 678, 41 N. W. 101. The complaint need not state that the attachment affidavit was in writing: *Forrest v. Collier*, 20 Ala. 175, 56 Am. Dec. 190.

In an action for malicious prosecution whereby plaintiff's credit and business were injured, defendant cannot demand a bill of particulars, stating who refused to give plaintiff credit, etc.: *Lane v. Williams*, 37 Hun, 388. If defendant specially pleads the facts relied upon to constitute probable cause, and also pleads the general issue, the special plea may be struck out on motion: *Brown v. Connelly*, 5 Blackf. 390. A plea that defendant did the acts complained of in good faith and without malice is a sufficient justification if proved: *Andrews v. Mitchell*, 92 Ga. 629, 18 S. E. 1017.

Plaintiff must aver in his complaint that the suit complained of has been legally terminated in his favor, otherwise his pleading is fatally defective on demurrer: *Rothchild v. Mayer*, 18 Ill. App. 284; *Wood v. Laycock*, 8 Met. (Ky.) 192; *Sutton v. Van Akin*, 51 Mich. 463, 16 N. W. 814; *Tisdale v. Kingman*, 34 S. C. 326, 13 S. E. 547; *McCracken v. Covington City Bank*, 4 Fed. 602. A complaint in an action for maliciously filing a *lis pendens* which fails to aver that the action in which the *lis pendens* was filed has terminated in favor of plaintiff, is bad on demurrer: *Smith v. Smith*, 26 Hun, 573. But it has been held that in an action to recover for a malicious attachment plaintiff need not aver the termination of the suit in which such attachment was made, unless the question of probable cause is involved in the trial and judgment: *Fortman v. Rottier*, 8 Ohio St. 548, 72 Am. Dec. 606. It has been held that a failure to aver the termination of the suit complained of in the complaint is cured by verdict: *Wall v. Toomey*, 52 Conn. 35; but the contrary has also been held that the omission of such averment is not cured by verdict: *Freymark v. McKinney Bread Co.*, 55 Mo. App. 435.

DUNN v. BUSHNELL.

[63 Neb. 568, 88 N. W. 693.]

TRIAL—Instructions.—If the principles announced in refused instructions are fairly and fully embodied in the instructions given, no error is committed. (p. 476.)

SALES OF SEED—Warranty—Measure of Damage.—If seed sold with a warranty that it is of a certain kind and quality proves inferior to the warranty, and is planted by the buyer without knowledge of its inferiority, the value of a crop such as would have been produced by seed as warranted, deducting the expense of raising such crop and the value of the one in fact raised, is the proper measure of the damage for the breach of the warranty. (p. 477.)

SALES OF SEED—Warranty—Damages.—If seed is sold with a warranty that it is of a certain kind and quality, and the buyer discovers its inferiority before planting it, he may retain it and recover as damages the difference between the purchase price of the seed as warranted and the market price of the seed actually received. (p. 478.)

Tibbetts Brothers and Morey & Anderson, for the appellant.

Doyle & Berge, for the appellee.

569 OLDHAM, C. The plaintiff in the lower court sued the defendant on a promissory note. The defendant answered, admitting the execution and delivery of the note, and alleging that it was given in part payment of the purchase price of a quantity of hemp seed purchased from the plaintiff. He alleged that the hemp seed was warranted by the plaintiff to be first-class hemp seed, equal in quality to first-class Kentucky hemp seed, and seed which, would under proper conditions, raise a first-class crop of hemp. He also alleges that he relied solely on the warranty of the plaintiff in the purchase of the seed; that the seed was of an inferior quality; that it was sowed and the crop was cultivated in a good and husbandlike manner, and that, because of the inferior quality of the seed, he raised less than a half crop of hemp from the land sowed with the seed purchased from the plaintiff, and prayed damages on his counterclaim for the difference in the price of the crop raised from the seed sold him by plaintiff, and the price of a crop which would have been raised from seed of the quality which he alleged was warranted to him by the plaintiff. Plaintiff replied to this answer by a general denial. A trial was had to a jury. Plaintiff recovered judgment for his note and interest, and defendant brings error to this court.

Plaintiff in error, who will be herein designated as the defendant, alleges error in the trial of the cause in the court below in the exclusion of evidence and in the refusing and giving of instructions. An examination of the record leads us to the conclusion that there was no prejudicial error committed by the trial court in the exclusion of evidence, and although some of the instructions requested by the defendant and refused by the court contained correct propositions of law, we do not think that 570 the trial court erred in their refusal, for the reasons that the principles announced in each one of the refused instructions were fairly and fully embodied in the instructions given by the court on its own motion.

The objection urged against the sixth paragraph of instructions given by the court on its own motion presents a more serious question and one which requires a careful perusal of the evidence and pleadings in determining whether or not it was warranted under the issues in this case. The instruction is as follows: "6. If, on the other hand, you find, and believe from the evidence that the defendant had knowledge of the inferior character of the seed before the same was sown, in event you believe the same was inferior, but notwithstanding such knowledge retained the same and used it for the purpose for which it was purchased, then and in that event he could not recover on his counterclaim in this case, but would be deemed in law to have waived his right to rely upon the representations of the plaintiff, in event you find any were so made, and the plaintiff would be entitled to recover the full amount of the note sued on together with interest from the date thereof." The first question to be determined with reference to this instruction is as to whether it is supported by the evidence offered and the pleadings filed in this case. The next question is as to whether this instruction is a correct abstract declaration of the law as applicable to the issues involved herein.

The evidence offered by the defendant all tended to show that he had no knowledge of the alleged inferior quality of the seed until after the maturity of the crop grown from it, and that he bought it relying solely on the representations of the plaintiff that it was first-class seed in all respects and equal to first-class Kentucky hemp seed. All defendant's witnesses that claimed to be experts in the raising of hemp testified that the inferior quality of this hemp seed could not be detected by an inspection of it, and that there was no way to determine its kind and quality except by the crop produced from it. Plaintiff by its evidence made no effort to show that defendant had any ⁵⁷¹ knowledge of the inferior quality of the seed before he planted it, but, on the contrary, its evidence tended to show that the crop raised from the seed purchased from the plaintiff was equal to the crop raised from Kentucky hemp seed on adjoining land; and it also tended to show that the seed was of the exact quality and kind as that shown to the defendant at the time he made the purchase, and that the seed was sold to the defendant without any warranty. We are therefore impressed with the conviction that this instruction is unsupported by the testimony offered in this case.

The next question to be determined is as to whether this

instruction is correct as an abstract proposition of law. We are impressed with the idea that in giving this instruction the learned trial judge was influenced by the doctrine set forth in the syllabus of the case of *Oliver v. Hawley*, 5 Neb. 439, but a careful examination of the issues determined in that case leads to the view that it is easily distinguishable in principle from the issues presented in the case at bar. In the case of *Oliver v. Hawley*, 5 Neb. 439, the issues arose on a contract for the purchase of flaxseed sold by sample, and no question of warranty was involved in the controversy. The answer contained a counterclaim for damages to the farm and crops on account of the growth of mustard from seed intermixed with the flaxseed. The evidence showed that the defendant knew that the mustard seed was mixed with the flaxseed at the time he sowed it. In determining the question in this case the court quoted with approval the rule announced in *Passinger v. Thorburn*, 34 N. Y. 634, 90 Am. Dec. 753, in which the defendant had sold cabbage seed under an express warranty that it was a seed of a variety known as "Bristol cabbage," which it proved not to be, and in which the damages were held to be the value of a crop such as should have been produced by the seed if it had conformed to the warranty, deducting the expense of raising the crop and the value of the one in fact raised. The court then says: "But I think that no case can be found in which consequential damages have been recovered where a party, as in this case, had knowledge ⁵⁷² of the inferior character of the seed before sowing the same; in such case, the party furnishing the seed is not liable for damages resulting to either the crop or the land in consequence of the use of such inferior seed." While we think that the conclusion reached in the case just quoted from was sound and logical and fully supported by the facts then in issue, yet we think the issues in the case at bar, as tendered by the defendant's answer and his evidence, bring it within the rule of *Passinger v. Thorburn*, 34 N. Y. 634, 90 Am. Dec. 753; and as there was no claim for consequential damages to the crop or the land of the defendant in the case at bar on account of noxious seeds, and because there was no evidence tending to show that the defendant had knowledge of the alleged inferior quality of the seed before he planted it, we think that the court erred in attempting to apply the doctrine in the case of *Oliver v. Hawley*, 5 Neb. 439, to the case at bar. Even granting that there had been testimony tending to show that the defendant discovered

the inferior quality of the seed before planting it, yet, if the seed had been warranted, as defendant claims it was, he would still have had the right to have retained the seed, and to have recovered in damages the difference between the market price of the seed he received and the purchase price of such seed as he alleges was warranted to him.

As this case will have to be tried again, we think it will be well to suggest that the eighth paragraph of instructions given by the court on its own motion tenders an issue which is not supported by the pleadings, and that it should not be given on a retrial of this case.

It is therefore recommended that the judgment of the district court be reversed, and that this cause be remanded for further proceedings.

Sedgwick and Pound, CC., concur.

By the Court. For the reasons set forth in the foregoing opinion, the judgment of the district court is reversed and the cause remanded.

If Seed is Warranted as to quality, and the vendor knows the use to be made of it, he is answerable for the difference between the value of the product of the seed sold and the value of the product that would have resulted had the seed corresponded to the warranty: *Wolcott v. Mount*, 38 N. J. L. 496, 20 Am. Rep. 425, 36 N. J. L. 262, 13 Am. Rep. 438; *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13, 78 N. Y. 393, 34 Am. Rep. 544. See, also, *Beiger v. Worth*, 127 N. C. 230, 80 Am. St. Rep. 798, 37 S. E. 217; *Long v. Pruyn*, 128 Mich. 57, 87 N. W. 88, 92 Am. St. Rep. 443, and cases cited in the cross-reference note thereto.

CITY OF LINCOLN v. JANESCH.

[63 Neb. 707, 89 N. W. 280.]

MUNICIPAL CORPORATIONS—Repair of Sidewalk—Liability of Lot Owner.—The duty of repairing sidewalks may be lawfully imposed on adjacent lot owners, and they may be held liable according to the intention of the legislature for all the consequences of their defaults in that respect. (p. 480.)

MUNICIPAL CORPORATIONS—Repair of Sidewalks—Snow and Ice—Liability of Lot Owners.—A statute imposing upon owners and occupants of city lots the duty of keeping the sidewalks adjacent to their premises in repair and free from snow and ice is constitutional and a legitimate exercise of the state police power. (p. 480.)

MUNICIPAL CORPORATIONS—Sidewalks—Liability of Abutting Owners.—A statute conferring upon city authorities complete jurisdiction and control over streets and sidewalks, requiring adjacent owners or occupiers of lots to build and repair sidewalks in compliance with notice from the city authorities, and making such owners or occupiers liable for all damages resulting from defective sidewalks, does not impose upon them an absolute duty to repair upon their own motion, but only the duty to repair after notice from the city authorities. (p. 483.)

J. R. Webster, J. P. Maule and E. C. Strode, for the appellant.

S. B. Pound and R. Pound, for the appellee.

⁷⁰⁸ SULLIVAN, C. J. The action was brought by the city of Lincoln against Edward Janesch in the district court of Lancaster county and was grounded upon the alleged failure of defendant to repair a sidewalk on a public street adjoining his lot. The petition in substance avers that the sidewalk contiguous to defendant's property had become defective and that it was defendant's duty to repair it; that this duty was neglected; that, by reason of the defect in the walk, one Solomon Greenstone sustained an injury, on account of which he sued the city and recovered judgment. The court held, on demurrer, that these facts were not sufficient to constitute a cause of action and gave judgment on the merits in favor of defendant. It is not claimed that the facts pleaded show that Janesch was guilty of affirmative negligence, such as would, according to the principles of the common law, make him liable to Greenstone, or liable over to the city; but it is insisted that a right of action for passive negligence is expressly given by the following provision of the city charter: "It is hereby made the duty ⁷⁰⁹ of all real estate owners and occupants to keep the sidewalk alongside, or in front of, the same in good repair and free from snow and ice, and other obstructions, and they shall be liable for all damages or injuries occasioned by reason of the defective condition of any such sidewalk." The validity of this provision, in so far as it undertakes to make the lot owner liable for all damages occasioned by reason of the defective condition of an adjacent sidewalk, is the first question discussed by counsel. It seems to be quite evident that the statute is referable to the police power of the state, and should be sustained as an exercise of that power by which both persons and property are subjected to all kinds of restraints and burdens for the convenience, comfort and safety of society. Statutes requiring owners and occupants of lots

bordering on public streets to remove snow and ice from their respective sidewalks have been upheld in Massachusetts and New York: *In re Goddard*, 16 Pick. 504, 28 Am. Dec. 259; *Village of Carthage v. Frederick*, 122 N. Y. 268, 19 Am. St. Rep. 490, 25 N. E. 480. A contrary conclusion, however, was reached in *Gridley v. City of Bloomington*, 88 Ill. 554, 30 Am. Rep. 566, and this conclusion was, by an almost evenly divided court, adhered to in *City of Chicago v. O'Brien*, 111 Ill. 532, 53 Am. Rep. 640. In *Reinken v. Fuehring*, 130 Ind. 382, 30 Am. St. Rep. 247, 30 N. E. 414, it was held that a statute charging upon property owners the expense of sweeping adjacent streets was valid; and in *Mayor etc. v. Maberry*, 6 Humph. 368, 44 Am. Dec. 315, an abutter was held personally liable for the cost of laying a new sidewalk. In Wisconsin and Michigan it has been assumed, without discussion, that the duty of repairing sidewalks may be imposed on lot owners and that such owners may be held liable, according to the intention of the legislature, for all the consequences of their defaults: *Hiner v. City of Fond du Lac*, 71 Wis. 74, 36 N. W. 632; *Morton v. Smith*, 48 Wis. 265, 33 Am. Rep. 811, 4 N. W. 330; *Henker v. City of Fond du Lac*, 71 Wis. 616, 38 N. W. 187; *Woodward v. City of Boscobel*, 84 Wis. 226, 54 N. W. 332; *Toutloff v. City of Green Bay*, 91 Wis. 490, 65 N. W. 168; *Selleck v. Tallman*, 93 Wis. 246, 67 N. W. 36; *City of Detroit v. Chaffee*, 70 Mich. 80, 37 N. W. 882; *Lynch v. Hubbard*, 101 Mich. 43, 59 N. W. 443. If lot owners may be required by the legislature ⁷¹⁰ in the exercise of the police power of the state, to remove snow and ice from the adjacent streets, there would seem to be no very good reason why they may not be also required to remedy defects in adjacent sidewalks. The demands of public interest are no stronger in one case than in the other, and, as was said by Mr. Justice Brown in *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. Rep. 499, the legislature is vested with a large discretion, not only to determine what the interests of the public require, but what measures are necessary to protect such interests. Our conclusion upon this branch of the case, based upon the decisions cited and many other authorities which we have resulted, among them being *Town of Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451, *Sands v. City of Richmond*, 31 Gratt. 571, 31 Am. Rep. 742, *Cooley on Taxation*, 2d ed., 588, *Burroughs on Taxation*, 494, is that the provision of the Lincoln charter

above set out was enacted for the convenience and safety of the public, and is unaffected by constitutional limitations upon the power of taxation.

But while we are convinced that the provision is valid, and that it imposes a duty primarily for the benefit of the public, but ultimately for the advantage of the city, we are not persuaded that the petition states a cause of action, or that the judgment in favor of the defendant is wrong. The clause upon which the city relies must be read in the light of other provisions of the charter. Standing alone, and considered by itself, the clause in question would seem to impose on the lot owner the duty of determining for himself and at his peril, when and how and with what materials a sidewalk should be repaired; it would seem to confer upon him authority to take possession of the walk and turn travelers into the street whenever in his judgment repairs are needed. It is almost inconceivable, and we cannot believe, that the legislature intended to commit any of these matters to the discretion of the property owner. Sections 31 and 34 of the charter (Comp. Stata. 1895, c. 13a, art. 1), are as follows:

"Sec. 31. The street commissioner shall be subject to the orders of the mayor and council, have general charge, direction and control of all work in the streets, sidewalks, culverts and bridges of the city except matters in charge of the board of public works, and shall perform such other duties as the council may require."

"Sec. 34. The mayor and council shall have the care, supervision, and control of all public highways, bridges, streets, alleys, public squares, and commons within the city, and shall cause the same to be kept open and in repair and free from nuisances."

Section 67 provides that the city authorities may require and regulate the construction of sidewalks, and that such walks shall be constructed of such width and materials as the council may determine; that the authorities may take up and remove all walks not laid in conformity to the rules and regulations which the council may adopt. It is further provided that, "in case any property owner shall refuse or neglect to repair the sidewalk adjacent to his property within two days after being notified so to do in the manner prescribed by ordinance, the proper officer may cause said walk to be repaired, and shall report the cost thereof to the council, when the

same may be assessed against such property." Considering statutory provisions quite similar to these, the supreme court of New York, in *City of Rochester v. Campbell*, 123 N. Y. 415, 20 Am. St. Rep. 760, 25 N. E. 939, speaking by Ruger, J., said: "It cannot be supposed that the legislature intended to impose an absolute duty to repair upon an individual who could not exercise it except under the control of another. That the primary duty rests upon the municipality, notwithstanding a duty has also been imposed upon property owners, has been decided in this court, and it is inconsistent with this duty and the control which the municipality has of the streets to suppose that it was intended to impose a primary duty also upon the property owners. The two obligations are inconsistent with each other and can lead only to confusion and delay in the performance of a public service. The existence of an absolute power of control in one party, and an imperative obligation to repair in another is impossible. The obligation to repair is necessarily subservient to the other, and must be performed or neglected at the will and pleasure of the party having the right of control. There is no divided duty here. The obligation to keep the streets and highways in repair rested on the towns. They could always perform this duty through the agency of others, and for the purpose of enabling them to do so they could, in specific cases, impose its performance on the lot owners, or compel them to pay the expense the town was subjected to in case it performed the duty, but the paramount obligation always rested upon the corporation." The same question was before the supreme court of Wisconsin in *Toutloff v. City of Green Bay*, 91 Wis. 490, 65 N. W. 168. In the course of the opinion, written by Winslow, J., it is said: "Again, the lot owner has no choice as to the kind of repairs. It is very evident that the kind of repairs to be made, and the material to be used, are under the control of the street superintendent. If a lot owner proceeds of his own motion to repair, the street superintendent may stop him, compel him to change or remove what he has done, and require him to repair differently. Surely, if the lot owner must repair of his own motion, and owes that duty to every passer-by, on pain of damages for injuries, he ought to know definitely what he is to do. He can hardly owe a definite duty when he has no means of knowing how to discharge it."

The cases from which we have quoted do not, it is true, expressly decide the question we are now considering, but they

give strong and convincing reasons why it should be resolved in favor of the defendant; and the Wisconsin case discredits previous decisions (*Hiner v. City of Fond du Lac*, 71 Wis. 74, 36 N. W. 632, and *Woodward v. City of Boscobel*, 84 Wis. 226, 54 N. W. 332) in which it was held, or intimated, that a charter provision, like that upon which the plaintiff relies, imposed on the lot owner a duty to repair without any action on the part of the city. It must, of course, be presumed in construing the statute, that the legislature did not act blindly or arbitrarily, ⁷¹³ but rather that it had a reasonable and practical plan for the accomplishment of its purpose—a scheme which, in view of the paramount authority of the city over its streets and sidewalks at all times, would be capable of producing harmony of action and logical results. Municipal corporations in this state owe to the public the duty of keeping their streets and sidewalks safe and fit for use (*Davis v. City of Omaha*, 47 Neb. 836, 66 N. W. 859; *City of Lincoln v. O'Brien*, 56 Neb. 761, 77 N. W. 76); and, if they would take advantage of a statute enacted for the purpose of enabling them to transfer this burden to individual property owners, it is but just and right that they should be required to exercise their superior authority in determining the necessity for making repairs and to give notice of their determination. It would be strange legislation, indeed, which would not permit a city to charge the owner of property abutting on the street with the trifling expense of repairing a sidewalk, unless due notice to repair had been first given, but which would, without such notice, permit it to recover all the damages which it had suffered in consequence of the failure to repair.

The district court, in our opinion, reached a right conclusion and its judgment is therefore affirmed.

Holcomb, J. I concur in the judgment of affirmance.

An Abutting Property Owner is not under any common-law duty to keep the sidewalk in front of his premises in repair and safe for the public: *Baustian v. Young*, 152 Mo. 317, 75 Am. St. Rep. 462, 53 S. W. 921. And although a city may by ordinance impose upon him the duty of constructing and keeping the sidewalk in repair and free from ice and snow, and the ordinance declares a penalty for its violation, or declares that the repairing or construction may be done by the city at his expense if he fails to act, still the city remains liable to third persons for injuries suffered from the unsafe condition of the sidewalks. The lot owner is not liable to such persons, nor can the city recover from him damages which it has been compelled to pay to them. See the monographic note to *Browning v.*

Springfield, 63 Am. Dec. 355-357; Wilhelm v. Defiance, 58 Ohio St. 56, 65 Am. St. Rep. 745, 50 N. E. 18; Betz v. Limingi, 46 La. Ann. 1113, 49 Am. St. Rep. 344, 15 South. 385; St. Louis v. Connecticut etc. Ins. Co., 107 Mo. 92, 20 Am. St. Rep. 402, 17 S. W. 637; Rochester v. Campbell, 123 N. Y. 405, 20 Am. St. Rep. 760, 25 N. E. 937.

BAKER v. UNION STOCKYARDS NATIONAL BANK.

[63 Neb. 801, 89 N. W. 269.]

JURISDICTION—Special Appearance—Waiver.—If a defendant claims that the court has acquired no jurisdiction over his person, by reason of defects or irregularities in the process or service thereof, his remedy is by special appearance and objection to the jurisdiction, and if he goes further, and enters a general appearance, or invokes the powers of the court for any purpose other than quashing the pretended process, or service thereof, the defects are waived. (p. 485.)

JURISDICTION—Special Appearance—Answer—Privilege.—If the defendant is privileged from suit in the county where, or at the time when, he is sued, he may set up want of jurisdiction by answer along with any other defenses he may have without first making special appearance to object to the jurisdiction, but in such case he must plead want of jurisdiction as soon as called upon to answer, and if he answers without so doing he waives want of jurisdiction and cannot afterward make that defense in an amended answer. (p. 486.)

NEGOTIABLE INSTRUMENTS—Accommodation Paper—Defenses—Indorsee.—The fact that a note was executed by way of accommodation is a good defense against the payee, but not as against the indorsee, from whom the money was obtained by virtue thereof, even though he had notice of the relations of the parties to each other. (p. 487.)

NEGOTIABLE INSTRUMENTS—Consideration.—If money is advanced upon the representation and in the expectation that a person named will sign a note given therefor, and he afterward signs it, there is sufficient consideration for the note. (p. 487.)

EVIDENCE—Joint Enterprise—Statement of One Party.—Statements of one of the parties to a joint enterprise made while borrowing money to be used and which is used therein, and as part of the transaction, are admissible against the other parties to the enterprise. (p. 487.)

Hall & McCulloch, for the appellant.

Kennedy & Learned, for the appellee.

502 POUND, C. The Union Stockyards National Bank of South Omaha sued Baker and one Frazier upon a note made by Baker to Frazier, and by the latter indorsed and delivered

to the bank. Service was had upon Frazier by leaving a copy at his usual place of residence in Douglas county and an alias summons issued thereupon to Buffalo county and was served upon Baker. The latter appeared and answered to the merits, and afterward, by amended answer, set up as a further defense that the court had acquired no jurisdiction of his co-defendant, Frazier, for the reason that the latter was a resident of Illinois, and had no residence in Douglas county at the time of the service of summons. At the trial the court directed a verdict for the ^{sos} bank, and the judgment rendered thereon has come before us on error.

A succession of well-considered cases has settled the law in this state as to the proper practice where want of jurisdiction over the person of a defendant is asserted. If a defendant claims that the court has acquired no jurisdiction over his person, by reason of defects or irregularities in the process, or service thereof, his course is by special appearance and objections to the jurisdiction; and if he goes further, and enters a general appearance, or invokes the powers of the court for any other purpose than quashing the pretended process, or service thereof, the defects are waived: *Omaha Loan etc. Sav. Bank v. Knight*, 50 Neb. 342, 69 N. W. 933; *Ley v. Pilger*, 59 Neb. 561, 81 N. W. 507. But where, for some reason, the defendant is privileged from suit in the county where or at the time when he is sued, he may set up want of jurisdiction by answer, along with any other defenses he may have: *Hurlburt v. Palmer*, 39 Neb. 158, 57 N. W. 1019; *Anheuser-Busch Brewing Assn. v. Peterson*, 41 Neb. 897, 60 N. W. 375; *Herbert v. Wortendyke*, 49 Neb. 182, 68 N. W. 350; *Barry v. Wachosky*, 57 Neb. 534, 535, 77 N. W. 1080; *Goldstein v. Fred Krug Brewing Co.*, 62 Neb. 728, 87 N. W. 958. While in several of these cases the defendant first made a special appearance and objections to the court's jurisdiction over him, and, after these were overruled, set up the defense in his answer, we do not think such course is required in cases of this character. No special appearance or preliminary objections were made in *Hurlburt v. Palmer*, 39 Neb. 158, 59 N. W. 1019, or *Herbert v. Wortendyke*, 49 Neb. 182, 68 N. W. 350, and the provisions of sections 94 and 96 of the Code of Civil Procedure, taken together, would seem to make it clear that they were not required: See, also, *Kyd v. Exchange Bank of Portland*, 56 Neb. 557, 76 N. W. 1058. If such a defense is waived if not set up in the answer, it follows that the defense is not waived when set up

by answer, and therefore that it is not waived by any preliminary steps required before raising it in the prescribed way. That such is the proper construction of the code is apparent upon consideration of the practice prior to the code, and ⁸⁰⁴ a comparison with the holdings of other courts: *Reinstadler v. Reeves*, 33 Fed. 308; *Ward v. George*, 1 Bush, 357; *Wabash W. R. Co. v. Brow*, 164 U. S. 271, 17 Sup. Ct. Rep. 126; *National Acc. Soc. v. Spiro*, 164 U. S. 281, 17 Sup. Ct. Rep. 996. But while the defense set up in the amended answer was one that might properly be raised by answer in conjunction with other defenses, and while no preliminary objections were necessary to enable it to be so raised, we think it is the duty of a defendant in such cases to plead the want of jurisdiction as soon as called upon to answer. If he answers without so doing, we think he cannot afterward make the defense in an amended answer. Section 96 of the Code of Civil Procedure provides that, if the objection is not taken by answer, "the defendant shall be deemed to have waived the same." Answering without taking this objection, then, was a waiver, and a waiver of such an objection must operate once for all. Having waived the objection, and by his answer acquiesced in the suit in a county other than that where he was amenable to service of process, he could not raise it at any subsequent stage of the proceedings.

As the court directed a verdict for the bank, we must take Baker's version of the transaction in question as the measure of his liability. His claim, in substance, is that he, with Frazier and one McPherson, cashier of the bank, entered into an arrangement for buying, feeding and shipping cattle, whereby Baker was to furnish one-half of the moneys required, and Frazier and McPherson the other half; that in order to raise their share of the money Frazier and McPherson borrowed it of the bank upon a note signed "J. K. Baker & Co.," by Frazier, and sent a blank note to Baker for his signature; that this note was filled in as payable to Frazier, and by him indorsed, and put in the bank in lieu of the one first given. This note Baker afterward renewed. He contends that it was a mere accommodation to enable Frazier and McPherson to raise the money they had agreed to contribute, and that, as McPherson was its cashier, the bank is chargeable with his ⁸⁰⁵ knowledge of the relation of the parties thereto. But McPherson is not the bank. Whatever might be the rule applicable to a suit in which he

claimed as indorsee, in this case the bank has parted with its money for this accommodation note; and the defense is urged, not against the payee for whose accommodation it was made, or an indorsee also accommodated thereby, but against an indorsee from whom money was obtained thereon. That a promissory note was executed by way of accommodation is a good defense as against the payee, but not as against the indorsee, from whom money was obtained by virtue thereof, even though he had notice of the relation of the parties to each other: *Penn Safe Deposit etc. Co. v. Kennedy*, 175 Pa. St. 160, 34 Atl. 659; *Cole v. Cushing*, 8 Pick. (Mass.) 47, 48. That McPherson was cashier could, at most, but charge the bank with what he knew. It does not identify one with the other. The corporation is a person distinct from its officers: *Humphreys v. McKissock*, 140 U. S. 304, 11 Sup. Ct. Rep. 1022. Hence, while, as far as Frazier or McPherson are concerned, there would be no consideration for the note, yet, as it was given to be used by them in raising money, and they so used it, the furnishing of the money to Frazier, or to Frazier and McPherson, by an indorsee, is a consideration, and the note is enforceable by such indorsee, though it knew the purpose for which the note was given. Nor do we think it matters that in this case the money was loaned before Baker signed the note, so long as it appears that the loan was made on the representation and in the expectation that he would sign the note given and he did afterward sign a note which was used to take it up. A case of this kind was presented in *Steers v. Holmes*, 79 Mich. 430, 44 N. W. 922.

There are several assignments of error in rulings upon evidence. These are based on the admission of testimony as to the circumstances surrounding the execution of the note signed by J. K. Baker & Co., which was taken up by the accommodation note of which the one in suit is a ⁸⁰⁶ renewal, and as to Frazier's statements while procuring the loan and executing the note. The circumstances testified to are material to show the relation of the indorsee to the paper here in suit. The statements of Frazier were to the effect that Baker was absent, that Frazier would make a note temporarily, and that such note would be taken by one signed by Baker, secured by a mortgage on some cattle, as soon as the papers could be executed by the latter. The money was sent to Baker, and was used in the purchase of cattle, and he signed the papers as Frazier had represented he would. Taking Baker's own ver-

sion, the statements of Frazier, one of the parties to the admitted joint enterprise, made while borrowing money to be used in, and which was used in, such enterprise, and as a part of the transaction, were admissible.

We recommend that the judgment be affirmed.

Sedgwick and Oldham, CC., concur.

By the Court. For the reasons stated in the foregoing opinion the judgment of the district court is affirmed.

A Party may Appear Specially in an action for the purpose of having the service of summons upon him vacated, without giving the court jurisdiction to render judgment against him: *White v. Johnson*, 27 Or. 282, 50 Am. St. Rep. 726, 40 Pac. 511. Appearance by answer, which simply protests against the exercise of jurisdiction, is not such an appearance as waives the objection: *Chubbuck v. Cleveland*, 87 Minn. 466, 5 Am. St. Rep. 864, 35 N. W. 362. But though the defendant attempts first by motion and then by plea to quash the service of summons, if on such motion and plea being determined against him he subsequently answers to the merits, such answer waives any defects in the service: *Union Pac. Co. v. De Busk*, 12 Colo. 294, 13 Am. St. Rep. 221, 20 Pac. 752. Filing a demurrer to a complaint is a full personal appearance: *Hollinger v. Reeme*, 138 Ind. 363, 46 Am. St. Rep. 402, 36 N. E. 1114. So an agreement for a continuance is equivalent to a general appearance: *Baisley v. Baisley*, 113 Mo. 544, 35 Am. St. Rep. 726, 21 S. W. 29. And a defendant in a cross-petition who files exceptions in open court to the commissioner's report thereon thereby makes an appearance: *Newman v. Moore*, 94 Ky. 147, 42 Am. St. Rep. 343, 21 S. W. 759.

Accommodation Paper is discussed in the monographic note to *Altoona Second Nat. Bank v. Dunn*, 81 Am. St. Rep. 745-757; *Klein v. German Nat. Bank*, 69 Ark. 140, 86 Am. St. Rep. 183, 61 S. W. 572; *Delaware County etc. Ins. Co. v. Haser*, 199 Pa. St. 17, 85 Am. St. Rep. 763, 48 Atl. 694.

CASES
IN THE
SUPREME COURT
OF
NEW HAMPSHIRE.

LIMERICK NATIONAL BANK v. HOWARD.

[71 N. H. 13, 51 Atl. 641.]

NEGOTIABLE INSTRUMENTS—**Conflict of Laws.**—The question whether an indorsee's knowledge of the payee's fraud in obtaining an indorsed note was of such character as to constitute him a holder with notice of such fraud is governed by the construction of the contract in the state where the note is made payable. (p. 490.)

Eastman & Hollis and B. Chellis, for the plaintiffs.

H. W. Parker, I. Colby & Son, and R. M. Harvey, for the defendants.

14 WALKER, J. Assuming that the notes were obtained by Reynolds, the payee, through fraud practiced upon the defendants, the court at the trial, in effect, ruled that there was no competent evidence that the plaintiff had knowledge of the fraud at the time it took the notes, or that it was not a bona fide holder. This result was reached presumably by applying the doctrine of this state: that mere suspicion of facts, which would be a defense to a note in the hands of the payee, is not notice of, and does not put the indorsee upon inquiry as to, such facts: *Green v. Bickford*, 60 N. H. 159. On the other hand, if the law of Vermont, where the notes were payable, had been applied it is conceded that the opposite result would have been reached, and the jury would have been instructed that upon the evidence it was material for them to find whether the plaintiff took the notes "without knowledge of facts and circumstances that would lead a careful and prudent

man to suspect that the paper was invalid as between antecedent parties" (*Limerick Nat. Bank v. Adams*, 70 Vt. 132, 142, 40 Atl. 166, 168), on account of the fraud practiced by the payee upon the defendants. It is admitted by both parties that this is a correct statement of the law of that state upon this subject. The good faith universally required of an indorsee when the maker raises the defense of fraud is a question for the jury in Vermont, in case there is evidence tending to show that reasonably prudent men, in the same situation with reference to the facts and circumstances, would have suspected the existence of the prior fraud. The knowledge of such suspicious facts and circumstances puts him upon inquiry, and he is chargeable with the knowledge of such fraud by the payee as careful inquiry would have disclosed. It is quite immaterial whether this proposition of law is or is not sustained by authorities in other jurisdictions, or whether it is, or is not, founded upon correct principle. It is also unnecessary to institute an inquiry into the relative merits of the conflicting decisions upon this subject in this state and in Vermont.

The material question is whether the law of the place of the contract—the place where the contract was to be performed—or the law of the forum shall determine the validity of the ruling ordering a verdict for the plaintiff. Does the question whether the plaintiff was a bona fide holder of the notes relate solely to the remedy and the procedure employed for the enforcement of the contract? If it does, the law of this state upon that subject must prevail. But if the contractual rights and obligations of the parties are substantially involved, whether they are made to appear on the pleadings or in the evidence adduced, it is equally clear that the question must be determined by the law of Vermont. A citation of authorities in support of these general propositions is ¹⁵ unnecessary. They are elementary: *New York Life Ins. Co. v. McKellar*, 68 N. H. 326, 44 Atl. 516.

The principal issue in the case was whether the plaintiff was a bona fide holder of the notes. If it was not such a holder, evidence of fraud which would be a defense in an action in favor of the payee would be admissible in an action of this character in both jurisdictions. This proposition, which is not controverted, states with sufficient exactness the principal ground of defense relied upon by the defendants; and while it is not inaccurate to say that, upon the plaintiff's evidence and the evidence offered by the defendants, the question is whether a finding that the

plaintiff was not a bona fide holder could be supported—that is, whether all the evidence is sufficient for that purpose—that method of stating the question is liable to be misleading, and to suggest, in the first instance, that nothing is involved but matters relating solely to the remedy. If the expression “bona fide holder” had exactly the same legal meaning in New Hampshire as in Vermont, it is not unlikely that this case might present nothing but a question of the sufficiency of evidence, which the law of the forum would ordinarily determine: Wharton on Conflict of Laws, sec. 752. The assumption that that expression has the same meaning in all common-law jurisdictions is contrary to the fact: Tiedeman on Commercial Paper, sec. 289. It is apparent, therefore, that before any question of the sufficiency of the evidence or the nature of the remedy can arise, the terms of the contract offered in evidence must be determined and fully understood. What are the contractual rights and obligations of the parties, is a fundamental inquiry which “must generally be settled before any question of remedy arises”: *Carnegie v. Morrison* 2 Met. 381, 397.

This inquiry may properly be made upon the pleadings, if sufficiently specific, or, as in this case, upon the evidence. The plaintiff, as an indorsee of the notes, seeks to recover the amount due from the makers. The defendants, admitting the execution of the notes so far as this particular defense is concerned, say that the notes were obtained by the fraud of the payee; the plaintiff replies that it gave full value for the notes without actual knowledge of the fraud claimed by the defendants, and is therefore a bona fide holder; the defendants rejoin that the plaintiff had knowledge at the time it took the notes of such facts as would lead a prudent man to suspect that they were obtained by fraud, and therefore it is not a bona fide holder. This formal manner of stating the respective claims of the parties shows plainly that they are at issue over the definition of a term necessarily involved in the contract; and until this issue is determined the rights of the parties under their contract must remain obscure and doubtful. ¹⁶ The solution of this question depends primarily upon the legitimate ascertainment of the intention of the parties; and, as it is plain, as a legal proposition, that the contract was made in view of the law of Vermont, it follows that the parties in effect embodied the law of that state in their contract, and thereby furnished the evidence from which their understanding of the meaning of “bona fide holder” must be ascertained.

If the defendants had expressly stipulated in the notes that they were not payable to any indorsee, even for value and before maturity, who at the time of the indorsement should have a reasonable suspicion of the fact that the payee obtained them by fraud, the defendant's intention in this respect would not be more clearly expressed than it is by the payee's blank indorsement of the notes to the plaintiff. The defendants intended to subject themselves to such contractual liabilities, and such only, and the plaintiff intended to assume as indorsee such contractual duties, and such only, as are involved in the construction of a blank indorsement of a negotiable promissory note by the law, not of New Hampshire, but of Vermont. It is the law of the latter state that defines and interprets the contract which is imperfectly evidenced by the payee's blank indorsement; and the good faith of the indorsee, admittedly an essential condition of the defendants' liability in case the payee fraudulently induced them to sign the notes, is such a degree of good faith as the parties intended, and their intention in this respect is ascertained by the decisions and law of the state in view of which the abbreviated form of contract was made: *Howard v. Fletcher*, 59 N. H. 151; *Emery v. Clough*, 63 N. H. 552, 56 Am. Rep. 543, 4 Atl. 796.

"But, whenever any question, apparently pertaining to the remedy, raises an inquiry into the nature and validity of the substantive rights of the parties to the contract, then it is to be determined by the law of the place where the contract was made or to be performed, and not by the law of the forum": *Tiedeman on Commercial Paper*, sec. 506. "So the effect of the transaction in fixing the relations of the parties is, as between them determined by the *lex loci contractus*. Thus, if by the *lex loci contractus* the purchaser acquires the note as a bona fide holder not subject to the defense of a prior payment, such payment cannot be pleaded, although the *lex fori* would permit it. And whether or not the proprietor of the bill or note is a bona fide holder is to be determined by the *lex loci contractus*": *Daniel on Negotiable Instruments*, sec. 889. "Again, the *lex loci contractus*, and not the *lex fori*, determines whether a bona fide holder before maturity should be subject to a defence available against a prior holder": *Randolph on Commercial Paper*, sec. 50. "So, if by the law of the place of the contract, even although negotiable, equitable defenses ¹⁷ are allowed in favor of the maker, any subsequent indorsement will not change his

right in regard to the holder. The latter must take it cum onere": Story on Conflict of Laws, sec. 332. See, also, Pritchard v. Norton, 106 U. S. 124, 129, 1 Sup. Ct. Rep. 102; Allen v. Bratton, 47 Miss. 119; Woodruff v. Hill, 116 Mass. 310; Baxter Nat. Bank v. Talbot, 154 Mass. 213, 28 N. E. 163; Harrison v. Edwards, 12 Vt. 648, 36 Am. Dec. 364.

When it is ascertained what the contract was, by applying the construction adopted at the place where the contract was made, or where it was to be performed, an inquiry may arise as to the sufficiency or the competency of the evidence offered in its support, or as to the form of the remedy adopted. Such a question is ordinarily decided according to the law of the forum. Public policy and the due and uniform administration of justice require that local methods of procedure shall not be suspended in actions for the enforcement and vindication, by comity, of obligations incurred in foreign jurisdictions. An agreement that the contractual rights of the parties should be enforced by the form of procedure and proved by evidence permitted only in some foreign country, could not be enforced in this state. If by the common law an action of covenant could only be sustained upon a contract executed with an adhesive seal, parties could not adopt a scroll or other mark, call it a seal, and sustain covenant upon their contract: Douglas v. Oldham, 6 N. H. 150; Steele v. Curle, 4 Dana, 381. In *Le Roy v. Beard*, 8 How. 451, 465, the court say: "We hold this, too, without impairing at all the principle that in deciding on the obligation of the instrument as a contract, and not the remedy on it elsewhere, the law of Wisconsin, as the *lex loci contractus*, must govern."

It is insisted that decisions relating to the effect of the statute of limitations upon the rights of parties furnish by analogy a strong argument in support of the plaintiff's contention. But the fallacy of the argument consists in overlooking the apparent fact that the statute of limitations presupposes a valid, subsisting contract. The construction of the terms of the contract does not depend upon the statute and is not affected thereby; and a holding that the statute relates to the remedy furnishes no reason for holding that the duties of an indorsee of a note are not an essential part of the contract between him and the maker.

In *Downer v. Cheseborough*, 36 Conn. 39, 4 Am. Rep. 29, the plaintiff was an indorsee of a note, indorsed in New York, where parol evidence is not admissible for the purpose of show-

ing a different contract than that implied by law. In Connecticut such evidence is admissible for that purpose. The court held that, as the law of New York did not declare the oral contract void, but merely refused to afford the parties a remedy for its enforcement, having an effect ¹⁸ similar to that of the statute of frauds in most cases (Wood's Statute of Frauds, sec. 166), the plaintiff was entitled to the advantage of the Connecticut rule. Whether this decision is in all respects a correct application of legal principles, it is unnecessary to inquire. It is sufficient to note that it does not sustain the plaintiff's contention in this case. It did not attempt to change the contract, but afforded a liberal means for its enforcement. It did not permit the defendant, while admitting the contract, to say in effect that there was an implied agreement that it should not be enforced. It did not allow the defendant to prescribe the rules of evidence by which his undertaking should be avoided. In analogy to the statute of frauds, the court merely held that the question presented related to the remedy and not to the construction, interpretation, or effect of the contract. In this case the question is, not whether the evidence adduced is competent to prove the alleged contract, but what was the contract. In other words, what duties under the contract rested upon the plaintiff in reference to antecedent fraud when it purchased the note? And no question of the competency or sufficiency of the evidence is presented.

Whether the defendants, at the time of signing the note, or the plaintiff, at the time of the indorsement, actually had in mind the exact conditions attached to their contract by the decisions in Vermont, or whether they ever had such knowledge, is unimportant. As a matter of well-settled law, it is conclusively presumed that they intended to make a contract which should be construed in accordance with the commercial law of that state. When that law is ascertained in some legitimate way, as by the admission of the parties, as in this case, their contractual rights and duties are as apparent as though they had been explicitly specified in the note. The promise of the makers to pay the amount of the note to the payee or order is not an unconditional obligation. If the note was given for the accommodation of the payee and remains in his hands, it is of no effect. If it was obtained by the payee's fraud, the latter cannot enforce the maker's promise; or if, in such a case, the note has been transferred for value to an indorsee, who is not a bona fide holder, because he took the note after maturity, or because

he knew of the antecedent fraud, the maker may avoid the apparent effect of his promise. That is, the law, seeking to carry out the intention of the parties, by construction renders the maker's promise conditional, which literally is unconditional and absolute. One condition of the note in suit was that in case it should be shown that the payee obtained the note by fraud, an indorsee, even for value and before maturity, should not be regarded as an innocent holder if he had knowledge of such facts as would lead a reasonably prudent man to suspect that the payee¹⁹ had been guilty of the fraud charged. To adopt some other construction, and attach to the contract some other conditions in the place of this one, would be to thwart the intention of the parties and to abrogate the well-established principle that the *lex loci contractus* determines the nature and effect of contracts.

If it is held by the federal courts that the doctrine of *lex loci contractus* does not apply to the contract evidenced by the indorsement of a negotiable promissory note, but that it is to be interpreted by the principles of a general commercial law, as contradistinguished from the principles of the law of contracts as established in the state where the note was made and was to be paid (*Swift v. Tyson*, 16 Pet. 1; *Oates v. National Bank*, 100 U. S. 239; *Railroad Co. v. National Bank*, 102 U. S. 14; *Bank of Edgefield v. Farmers' etc. Mfg. Co.*, 52 Fed. 98, 2 U. S. App. 282), the exceptional doctrine thus indicated cannot be adopted in this case. While it is doubtless competent for the supreme court of the United States, in a case before it, to determine the law governing the interpretation of Vermont contracts without regard to the decisions applicable in that state, it would be little less than usurpation for this court to decide in this case what, in its opinion, ought to be the commercial law of Vermont. The general doctrine of comity between the states, which is universally recognized, does not lead to a result so inconsistent and contradictory. There is no evidence that the parties intended to incorporate into their contract any other law than the general commercial law applicable thereto, as established in the state of Vermont and proved here by the admission of the parties.

The result reached renders it unnecessary to consider other questions argued by counsel.

Motion for rehearing denied.

Chase, J., did not sit; the others concurred.

The Law of the Place where a note by its terms is to be paid determines its validity: *Bigelow v. Burnham*, 83 Iowa, 120, 32 Am. St. Rep. 224, 49 N. W. 104. If no particular place of payment is specified, the law of the place where the note is made determines its construction and the obligation and duty of the maker. And he may, therefore, avail himself of any equitable defense given him by the law of the place where the note was made: *Barrett v. Dodge*, 16 R. I. 740, 27 Am. St. Rep. 777, 19 Atl. 530. Whether or not a bill or note is negotiable is governed by the *lex loci contractus*, although the remedy is governed by the *lex loci*: *Corbin v. Planters' Nat. Bank*, 87 Va. 661, 24 Am. St. Rep. 673, 13 S. E. 98. The liability of an indorser is determined by the law of the place of indorsement: *Alabama Nat. Bank v. Rivers*, 116 Ala. 1, 67 Am. St. Rep. 95, 22 South. 580.

CONCORD COAL COMPANY v. FERRIN.

[71 N. H. 33, 51 Atl. 283.]

SALES—Misunderstanding as to Mode of Payment—Duty of Payment.—If goods are sold and delivered upon a mutual misunderstanding as to the mode of payment, the fact of a benefit received from such purchase is insufficient to establish the legal duty to pay in cash in the absence of a showing of a contract in fact, express or implied, or by estoppel. (p. 497.)

SALES—Misunderstanding as to Mode of Payment—Estoppel. If goods are sold and delivered upon a mutual misunderstanding as to the mode of payment, the question as to whether the purchaser is estopped to set up his understanding of the contract, by the facts attending the delivery of the goods, is one of fact, and a general verdict in his favor is a finding of his freedom from fault and the absence of an estoppel against him. (pp. 497, 498.)

Sargent, Niles & Morrill, for the plaintiffs.

D. F. Dudley, for the defendants.

³⁴ PARSONS, J. Both parties understood that upon the delivery of the coal the title passed to the defendants. Their misunderstanding related solely to the mode of payment. The plaintiffs understood the defendants were to pay them the customary price, and charged the coal to them. The defendants understood the coal was delivered as a payment upon Bean's indebtedness to them, and credited it upon his account. The plaintiffs understood ³⁵ their delivery was of coal to be paid for in cash in the ordinary course of business. The defendants understood their acceptance was of coal for which they had already paid. To this branch of a contract of sale the parties did not agree in fact, either in terms or by inference. Hence

there was no contract in fact, express or tacit (*Sceva v. True*, 53 N. H. 627, 632), because of the mutual mistake as to payment. As there was no contract of sale, in the absence of any estoppel, upon discovery of the mistake the plaintiffs might have retaken their coal if it remained distinguishable from other coal of the defendants, or the defendants might have required the plaintiffs to remove it. As the plaintiffs had no right of action by virtue of the mistaken acceptance of the coal, they cannot now recover except by virtue of some further facts. The additional facts stated are that the defendants used the coal in their business, and the plaintiffs within six months and subsequently made sundry demands for payment. It does not appear that the plaintiffs ever demanded the return of the coal, but, on the contrary, they appear to have uniformly insisted upon the contract as they understood it. In the original transaction both parties acted in entire good faith, but were deceived by Bean. Upon these facts the trial court found a verdict for the defendants. This verdict must stand unless the specific facts found are inconsistent therewith as matter of law.

The plaintiff's claim is that the defendants, by their use of the coal, charged themselves with the legal duty of paying for it, in accordance with the plaintiffs' understanding of the contract rather than their own, or at least of paying anew in money the usual price or value of the coal. The question is, How ought the coal to be paid for—in accord with the understanding of the plaintiffs, or with that of the defendants? It is manifest that if the plaintiffs had accompanied the delivery of the coal with an invoice charging the defendants with the price, or had informed them it was delivered on their credit, or if, before delivery, the plaintiffs had inquired of the defendants as to Bean's authority, or if the defendants, before accepting the coal, had informed the plaintiffs that they accepted it only for application on Bean's debt, the controversy would have been avoided. Whether, under all the circumstances, the defendants accepted or the plaintiffs delivered the coal under such circumstances that either of them are now estopped to set up their understanding of the transaction; is mainly a question of fact. If it were found that the defendants were thus in default they would be bound in contract by estoppel (*Sceva v. True*, 53 N. H. 627); while if the plaintiffs were considered to be similarly estopped, the case ³⁶ would also be determined upon that ground. As the general verdict is found for the defendants, it must be understood at least to embrace a finding that no es-

toppel exists against the defendants: *Strafford Sav. Bank v. Church*, 69 N. H. 582, 44 Atl. 105.

The facts disclose no contract in fact, express, tacit, by estoppel, or implied in fact; and the sole remaining question is whether the facts establish a contract implied in law, or a contract of legal duty, sometimes called a quasi contract: *Sceva v. True*, 53 N. H. 627. A promise to pay what it is one's legal duty to pay is implied by law: *Bixby v. Moore*, 51 N. H. 402, 403, 404; *Eastman v. Clark*, 53 N. H. 276, 280, 16 Am. Rep. 192; *Sceva v. True*, 53 N. H. 627, 631-633; *North Haverhill Water Co. v. Metcalf*, 63 N. H. 427; *Gage v. Gage*, 66 N. H. 282, 283, 29 Atl. 543; *Clark v. Sanborn*, 68 N. H. 411, 36 Atl. 14. In this case the legal duty is wanting, unless it can be predicated upon the mere possession and use of property.

The mere fact of benefit received is insufficient to establish the legal duty of payment. *Clark v. Sanborn*, 68 N. H. 411, 36 Atl. 14, is precisely in point. There the plaintiff was unable to recover for services valuable to the defendants, rendered under the expectation that they would be paid for, for the reason that the defendants did not accept the services with the understanding that they were to make payment. In the absence of privity of contract, the mere possession and use of property will not imply a promise to pay for it: *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9; *Hills v. Snell*, 104 Mass. 173, 177, 6 Am. Rep. 216; *Boulton v. Jones*, 2 Hurl. & N. 564; *Benjamin on Sales*, secs. 59, 416.

It is contended that the plaintiffs can recover because otherwise the defendants would be unjustly enriched at the plaintiff's expense. But that fact is not found. Both parties trusted and were deceived by Bean. If the plaintiffs cannot recover of the defendants for the coal, they have a claim against Bean for its value; while if the defendants were obliged to pay for the coal, they would also have a claim against Bean for the same amount. It may be assumed that Bean is worthless. But there is no equitable reason why the plaintiffs rather than the defendants should be released from the consequences of their trust in Bean. In view of the inference of freedom from fault which the general verdict finds for the defendants, the defendants' equity is at least equal with that of the plaintiffs. As no facts are found inconsistent with the general verdict found for the defendants, the verdict cannot be disturbed.

Exception overruled.

Blodgett, C. J., did not sit; the others concurred.

The Effect of a Mutual Mistake by the parties to a contract is considered in the monographic notes to *Miles v. Stevens*, 45 Am. Dec. 631-634; *Alabama etc. Ry. Co. v. Jones*, 55 Am. St. Rep. 494-520. If a contract for services fails by reason of a mutual misunderstanding as to material terms of payment, the party who has partially performed the contract as he understands it may recover reasonable compensation for his services: *Russell v. Clough*, 71 N. H. 177, post, p. 507, 51 Atl. 632.

O'HARE v. COCHECO MANUFACTURING COMPANY.

[71 N. H. 104, 51 Atl. 257.]

MASTER AND SERVANT—Negligence—Risks Assumed by Servant.—A master is under no obligation to give warning of dangers incident to the service of which the servant knows or ought to know, and the servant assumes the risk of injury from dangers incident to the service which are obvious, or of which he knows, or which ordinary care would disclose to him. (p. 500.)

MASTER AND SERVANT.—Obligation of the Servant to Exercise Care is not satisfied by an unexplained absence of action and thought in a situation of known danger. (p. 501.)

MASTER AND SERVANT—Negligence—Warning of Danger. If a servant is chargeable with knowledge which he could have acquired with ordinary care, and such care would have disclosed to him the danger of which he complains he was not warned, failure to warn him thereof is not ground of action against his master. (p. 502.)

MASTER AND SERVANT—Dangerous Employment—Obeying Order of Superior.—If a servant is directed to perform an act undoubtedly dangerous, but with the dangers of which he could have informed himself by the exercise of ordinary care, the fact that he is injured while acting under the direct order of his superior does not give him a right of action. (p. 503.)

A. S. Hayes, for the plaintiff.

J. Kivel and G. T. Hughes, for the defendants.

¹⁰⁰ PARSONS, J. It is not contended that there was any defect in the machine upon which the plaintiff was injured, or that the obligation of the master to provide reasonably safe machinery was not fully performed. Neither is it claimed that the holes in the cloth, charged as the cause of the plaintiff's injury, were due to any carelessness or unskillfulness of the master in the process of manufacture adopted. So far as appears, such defects are liable to arise in the prevailing methods of making cloth. At least, there is no attempt to prove the contrary. The only ground of negligence alleged against the de-

fendants is that the plaintiff was not informed of the possible or probable occasional existence of holes in the cloth.

"There are limits to the obligation of an employer to point out the dangers of proper machinery. The obligation is imposed mainly for the sake of the young, who have not the experience or power to look out for themselves which are to be expected in adults, or, in the case of adults, where there are concealed defects": *Robinska v. Mills*, 174 Mass. 432, 433, 75 Am. St. Rep. 364, 54 N. E. 873; *Collins v. Laconia Car Co.*, 68 H. 196, 197, 38 Atl. 1047. The master is under no obligation to give warning of dangers incident to the service of which the servant knows, or ought to know. The servant assumes the risk of injury from dangers incident to the service which are obvious, or of which he knows, or which ordinary care would disclose to him: *Henderson v. Williams*, 66 N. H. 405, 413, 23 Atl. 365. It is the duty of the servant "to use ordinary care to avoid injuries to himself. He is under as great obligation to provide for his own safety from such dangers as are known to him, or discoverable by the exercise of ordinary care on his part, as the master is to provide it for him. . . . 'It is the duty of the employ   to go about his work with his eyes open. He cannot wait to be told, but must act affirmatively. He must take ordinary care to learn the dangers that are likely to beset him in the service. He must not go blindly to his work when there is danger. He must inform himself. This is the law everywhere'": *Wormell v. Maine Cent. R. R. Co.*, 79 Me. 397, 405, 406, 1 Am. St. Rep. 321, 10 Atl. 49.

From the plaintiff's testimony it appears that the taking out of the double edges upon the expander—the operation in which the plaintiff was engaged when injured—was necessary and proper. This being so the risk of injury in the operation was incident to the plaintiff's employment. That there was danger that a person's hand placed upon the expander for any purpose might be carried ¹⁰⁷ along upon the cloth, or caught in a double edge, hole, or tear in the band of cloth at the seams or elsewhere, and drawn in between the expander and hot roll, producing serious injury, must be obvious to any person of ordinary understanding. But the case does not stand upon this ground, for the plaintiff admits that he fully understood the danger. He knew that if his finger was caught in the cloth he might be injured precisely as he was injured. He testified he knew that if his finger was caught in a double edge such as he was trying to straighten, he would be injured. With such knowledge, due

care required him to endeavor to learn whether any imperfections were likely to occur in the cloth by which his hand would be caught, and the method of avoiding such danger. He testified that he did not know there were holes in the cloth except at the seams, where the pieces coming from the looms were sewed into a continuous band for passage through his machine. It is not necessary to consider the question whether it can reasonably be found, in the face of all the other evidence in the case, that this statement is true; for a determining question is whether, upon the evidence considering only that furnished by the plaintiff, it can with reason be said that the plaintiff would not, with ordinary care, have learned prior to the accident of the possible existence of such imperfections in the cloth coming to his machine.

There is no evidence that he made any effort in this direction. If the obligation to exercise care could have been satisfied by inquiry of workmen of experience (*Burnham v. Concord R. R. Co.*, 69 N. H. 280, 45 Atl. 563), or by looking without seeing or discovering holes, it is not claimed that he took either precaution. The obligation to exercise care is not satisfied by unexplained absence of action and thought in a situation of known danger: *Gahagen v. Boston etc. R. R. Co.*, 70 N. H. 441, 50 Atl. 146. The plaintiff had abundant opportunity to learn whether there was anything about the cloth liable to catch his hand upon the expander. He started and stopped his machine, had been engaged upon this work for six months, and for a year previously had been employed in the same mill in and out of the room where his machine and others like it were in operation. He was of mature age, and there is no suggestion that his eyesight or his intelligence was defective. He had opportunity to examine the cloth when not in motion. The case finds that there was nothing to prevent his seeing the holes in the cloth except the speed at which it moved as it passed from the ceiling down directly before his eyes as he stood in front of the machine, which was the usual place for his work. He had to guide it into the machine, take out scrims as well as double edges, and necessarily had to handle the cloth more or less as it passed along. It usually ¹⁰⁸ ran when in motion at a speed of about fifty yards per minute, or two and one-half feet per second, or one and three-fourths miles per hour. Nothing prevented his examining the cloth, as it came down from above to his machine, as closely as he desired. While doing his work at the tension bar, the distance of his eyes from the cloth could not exceed

the length of his arms. The proposition is, whether a man who was looking and attentive could see holes "varying from the size of a marble to the size of a man's head" in a band of cloth, as the cloth passed before his eyes at arm's length, at a speed of about one-half the rate of an ordinary walk; or, what is the same thing, could a man walk at half speed by the side of a band of cloth at the level of his eyes and at arm's length from him, and, when looking at it for the purpose, fail to see holes of the size described? Admitting the possibility of a difference among reasonable men upon the question whether the plaintiff in fact knew of the possible existence of holes in the cloth between the seams, it is clear that reasonable men cannot differ in the conclusion that the plaintiff could have seen the holes if he had exercised care to ascertain whether any imperfections might exist in the cloth to cause the danger of which he knew and by which he was injured.

As the plaintiff is chargeable with knowledge which he could have acquired with ordinary care, and as such care would have disclosed to him the danger of which he complains he was not warned, the failure to warn him of a danger of which he knew or ought to have known is not a ground of action against his employer: *Crowley v. Pacific Mills*, 148 Mass. 228, 230, 19 N. E. 344; *Rooney v. Sewall etc. Cordage Co.*, 161 Mass. 153, 160, 36 N. E. 789; *Stuart v. West End etc. Ry. Co.*, 163 Mass. 391, 393, 40 N. E. 180; *Kenney v. Higham Cordage Co.*, 168 Mass. 278, 282, 47 N. E. 117. Furthermore, it was suggested by counsel for the plaintiff, in oral argument, that by holding the hand, when attempting to straighten the double edge, with the fingers pointing in the direction the cloth was passing, the danger of being caught by a hole in the cloth would be avoided. If this be so, the precaution suggested was as necessary to prevent injury from a hole in the band of cloth at the seams as from one elsewhere. Knowing that holes are liable to occur in the band of cloth, which could be guarded against in a certain way, there is nothing in the testimony tending to show that a knowledge of the precise possible location of the hole was essential to his safety. A failure to warn him of a fact which his knowledge rendered immaterial on the question of his safety will not support the servant's action against his employer: *Henderson v. Williams*, 66 N. H. 405, 23 Atl. 165.

The plaintiff claims that on the occasion when he was injured he was expressly directed to go around behind and take out the ¹⁰⁰ double edges, and that when so directed it had been his habit

to go behind and take out the edges on the expander. This testimony, if found true, would tend to answer the claim that the plaintiff was guilty of negligence in attempting this work upon the expander. If the plaintiff had never before done the work at this point in the machine or seen it done, and had suddenly been directed to do it in this manner, the immediate command of his superior would be evidence upon the question whether he ought to have appreciated or understood the danger, and might be considered an excuse for his failure to do so. But the plaintiff puts his case on the ground that it was necessary and proper to do the work at this place. He had done it himself, had been seen by his superiors doing it, and had seen the foreman in charge of his work do it. From this it follows that the plaintiff was not suddenly directed to do a work with the dangers of which he had no opportunity to familiarize himself, but was merely called upon to perform a labor incident to his service and within the scope of his employment. He was merely directed to perform an act undoubtedly dangerous, but with the dangers of which, upon his own representation of the duties he had undertaken to perform, he could have informed himself by the exercise of ordinary care. Under these circumstances, the fact that he was injured while acting under the direct orders of his superior does not give him a right of action: *Davis v. Detroit etc. R. R. Co.*, 20 Mich. 105, 4 Am. Rep. 364, 376; *Wilson v. Mills*, 159 Mass. 154, 34 N. E. 90; *Russell v. Tillotson*, 140 Mass. 201, 4 N. E. 231.

A careful examination of the minutes of the testimony which have been furnished fails to disclose any evidence upon which the verdict found for the plaintiff can be sustained. The motions for a nonsuit and verdict for the defendants should have been granted.

Exceptions sustained, verdict set aside, judgment for the defendants.

All concurred.

A Master is not Required to Give Warning of dangers known to his servant, or which are so obvious that by the exercise of care he could have known: *Smith v. Wilmington etc. R. R. Co.*, 129 N. C. 173, 39 S. E. 805, 85 Am. St. Rep. 740, and cases cited in the cross-reference note thereto. It is otherwise, however, when there is any hidden or unusual danger connected with the service: *Kibich v. Lake Superior Smelting Co.*, 123 Mich. 401, 81 Am. St. Rep. 215, 82 N. W. 279; *Lindsev v. Tioga Lumber Co.*, 108 La. 468, 92 Am. St. Rep. 384, 32 South. 464.

A Servant Ordered by One in Authority to do a dangerous act is not required to balance the degree of danger and decide whether he may safely do the act; and even if he has knowledge of such dan-

ger, it does not defeat a recovery for injury, when, in obeying his master's command, he acts with that degree of prudence which an ordinarily prudent man would exercise under the same circumstances: *Illinois Steel Co. v. McFadden*, 196 Ill. 344, 89 Am. St. Rep. 319, 63 N. E. 671; *Gundlach v. Schott*, 192 Ill. 509, 85 Am. St. Rep. 348, 61 N. E. 332.

THOMPSON v. BARTLETT, HAYWARD & CO.

[71 N. H. 174, 51 Atl. 633.]

MASTER AND SERVANT—Safe Place and Appliances—Contributory Negligence.—It being the duty of the master to provide the servant with a safe place and safe appliances to work with, the servant is not bound to inspect to see whether the master's duty in this behalf has been performed, but may, without being subjected to the consequences of contributory negligence, proceed with his work, relying upon the presumption that the master's duty has been performed and recover for an injury received because it has not, unless, notwithstanding the duty of the master and the presumption of performance, the servant ought, in the exercise of ordinary care, to discover the master's default and avoid the danger arising from it. (p. 505.)

Doyle & Lucier and G. B. French, for the plaintiff.

Hamblett & Eaton, for the defendants.

¹⁷⁵ REMICK, J. For present purposes it must be assumed that it was the legal duty of the defendants to prepare and move the staging for the plaintiff, and in such manner that it would be and remain in a reasonably safe condition; that notwithstanding this duty, the defendants so moved the staging, just previous to the plaintiff's injury that one of the planks was insecurely placed; that the plaintiff had no actual knowledge that the plank was misplaced, or of the danger arising from it, and had no opportunity for knowledge other than that afforded by the circumstances attending his approach to the danger at the very time of his injury; that during this brief interval his attention was preoccupied with his own peculiar duties as the defendants' servant.

Upon these facts we are asked to say, as a matter of law, that the plaintiff ought to have discovered the danger occasioned by the misplaced plank, and avoided it. It is indeed settled, at least ¹⁷⁶ in this jurisdiction, that actual knowledge of the danger is not necessary to bar recovery. The rule in this respect

was clearly stated by Carpenter J., in *Nashua Iron etc. Co. v. Worcester etc. R. R. Co.*, 62 N. H. 159, 162, as follows: "The result is the same whether the plaintiff acts with full knowledge of the danger, or, by reason of a want of proper care, fails to discover it seasonably. If he is not bound to anticipate, and in advance provide for, another's negligence, he may not willfully or negligently shut his eyes against its possibility. He is bound to be informed of everything which ordinary care would disclose to him. He can no more recover for an injury caused by driving into a dangerous pit, of which he is ignorant, but of which ordinary care would have informed him, than for one caused by carelessly driving into a known pit." But in the application of this rule to the relation of master and servant, it is to be borne in mind that where, as is expressly found in the present case, and as is the general rule, it is the duty of the master to provide the servant a safe place and safe appliances, the servant is not bound to inspect to see whether the master's duty in this behalf has been performed, but may, without being subjected to the consequences of contributory negligence, proceed with his work, relying upon the presumption that it has been performed, unless the circumstances are such that, notwithstanding the duty of the master, and the presumption of performance in favor of the servant, the servant ought, in the exercise of ordinary care, to discover the master's default, and avoid the danger arising from it: *Hutchinson v. York etc. Ry. Co.*, 5 Exch. 343; *Union Pacific Ry. v. Jarvi*, 53 Fed. 65, 68, 69; *Norman v. Wabash Ry Co.*, 62 Fed. 727, 728, 729; *Clow v. Boltz*, 92 Fed. 572, 574, 575; *Northern Pac. R. R. Co. v. Everett*, 152 U. S. 107, 14 Sup. Ct. Rep. 474; *Whitcher v. Boston etc. R. R. Co.*, 70 N. H. 242, 46 Atl. 740; *Hennessy v. Boston*, 161 Mass. 502, 37 N. E. 668; *Bartholomeo v. McKnight*, 178 Mass. 242, 59 N. E. 804; *Whipple v. New York etc. R. R. Co.*, 19 R. I. 587, 61 Am. St. Rep. 796, 35 Atl. 305; *Comben v. Bellevue Stone Co.*, 59 N. J. L. 226, 36 Atl. 743; *Cole v. Warren Mfg. Co.*, 63 N. J. L. 626, 44 Atl. 647; *Chicago etc. R. R. Co. v. Hines*, 132 Ill. 161, 22 Am. St. Rep. 515, 23 N. E. 1021; *Chicago etc. R. R. Co. v. Cullen*, 187 Ill. 523, 58 N. E. 455; *Russell v. Minneapolis etc. Ry. Co.*, 32 Minn. 230, 20 N. W. 147; *Cook v. St. Paul etc. Ry. Co.*, 34 Minn. 45, 24 N. W. 311; *Gibson v. Pacific R. R. Co.*, 46 Mo. 163, 2 Am. Rep. 497; 14 Am. & Eng. Ency. of Law, 1st ed., 854, 855; *Shearman and Redfield on Negligence*, 2d ed., 95.

Having in mind that it was the defendants' duty to make and keep the staging reasonably safe for the plaintiff; that the plaintiff had the right to presume that this duty had been performed by the defendants; that the plaintiff had no actual knowledge of the defendants' default in respect to the misplaced plank, and no opportunity for knowledge other than that afforded by the immediate circumstances and occasion of the injury, and while he was preoccupied with his own duties, the court would hesitate to say ¹⁷⁷ even were it the courts province, that the plaintiff ought in the exercise of ordinary care to have discovered the danger. Much less can the court say that it is so clear that the plaintiff ought to have discovered the danger that impartial men, acting as jurors, could not reasonably have found otherwise.

Whether the plaintiff ought to have discovered the danger was, under the circumstances, a question for the jury. The refusal of the court to direct a verdict for the defendants was, therefore, properly denied. This conclusion is as well supported by authority as it is sound in reason: *Kane v. Northern Cent. Ry. Co.*, 128 U. S. 91, 9 Sup. Ct. Rep. 16; *Snow v. Housatonic R. R. Co.*, 8 Allen, 441, 85 Am. Dec. 720; *Ferren v. Old Colony R. R. Co.*, 143 Mass. 197, 9 N. E. 608; *Babcock v. Old Colony R. R. Co.*, 150 Mass. 467, 23 N. E. 325; *Gustafsen v. Washburn etc. Mfg. Co.*, 153 Mass. 468, 27 N. E. 179; *Hannah v. Connecticut Riv. R. R. Co.*, 154 Mass. 529, 28 N. E. 682; *Donahue v. Boston etc. R. R. Co.*, 178 Mass. 251, 59 N. E. 663; *Plank v. New York Cent. etc. R. R. Co.*, 60 N. Y. 607.

Exception overruled.

All concurred.

It is the Duty of a Master to use reasonable diligence in seeing that the place where his servant is at work is safe for that purpose, and the latter has a right to assume that such duty is discharged: *Downey v. Gemini Min. Co.*, 24 Utah, 431, 91 Am. St. Rep. 798, 68 Pac. 414; *Western Stone Co. v. Muscial*, 196 Ill. 382, 89 Am. St. Rep. 325, 63 N. E. 664; *Illinois Steel Co. v. McFadden*, 196 Ill. 344, 63 N. E. 671, 89 Am. St. Rep. 319, and cases cited in the cross-reference note thereto. He is not required to test and inspect the place: *Wellston Coal Co. v. Smith*, 65 Ohio St. 70, 87 Am. St. Rep. 547, 61 N. E. 143.

RUSSELL v. CLOUGH.

[71 N. H. 177, 51 Atl. 632.]

CONTRACTS—Mutual Misunderstanding as to Terms—Recovery for Work Done.—If a contract for services fails by reason of a mutual misunderstanding as to material terms of payment, the person who has partially performed the contract as he understands it may recover reasonable compensation for his services. (p. 508.)

The parties to this suit entered into an agreement whereby the plaintiff was to cut and make into lumber all the timber on a certain lot belonging to the defendants. There was a mutual misunderstanding to when payments on account were to be made. The provisions as to the time when such payments were to be made constituted a material consideration for the contract. The plaintiff, after performing part of the work, asked for a payment on account, and this being refused, he sued to recover for services rendered.

J. F. Brennan, for the plaintiff.

Burnham, Brown & Warren, for the defendant.

¹⁷⁸ REMICK, J. The court having found as a fact that the minds of the parties did not meet respecting a material and necessary element of the supposed contract, there was no contract. "There can be no contract without mutual assent. This is vital to its existence. There can be none where it is wanting. Where there is a misunderstanding as to anything material, the requisite mutuality of assent as to such thing is wanting; consequently the supposed contract does not exist, and neither party is bound. In view of the law in such case, there has been only a negotiation resulting in a failure to agree. What has occurred is as if it were not, and the rights of the parties are to be determined accordingly": *Utley v. Donaldson*, 94 U. S. 29; *National Bank v. Hall*, 101 U. S. 43; *Delano v. Goodwin*, 48 N. H. 203, 206, 97 Am. Dec. 601; *Cook v. Bennett*, 51 N. H. 85, 93; *Clark v. Sanborn*, 68 N. H. 411, 36 Atl. 14; *Concord Coal Co. v. Ferrin*, ¹⁷⁹ 71 N. H. 33, ante, p. 496, 51 Atl. 283; *Hartford etc. R. R. Co. v. Jackson*, 24 Conn. 514, 63 Am. Dec. 177; 1 *Parsons on Contracts*, 4th ed., 399b; 7 *Am. & Eng. Ency. of Law*, 2d ed., 113.

But it does not follow that the plaintiff was without remedy for services performed under the supposed contract. He was entitled to recover of the defendants what his labor and services

were reasonably worth, deducting what he had received. This was the view entertained in *Collins v. Richmond Stove Co.*, 63 Conn. 356, 28 Atl. 534, where the court said: "If there was an honest mistake by the parties as to what the contract really was, the plaintiff understanding it as claimed by him, and the defendant understanding it as claimed by its counsel, there was then no meeting of the minds of the parties, and hence no contract; and in such case the plaintiff would be entitled to recover of the defendant, for the work done by him, and such materials as he furnished in the work at its request, such a sum as they would be reasonably worth."

In *Van Deusen v. Blum*, 18 Pick. 229, 29 Am. Dec. 582, the result was announced as follows: "The plaintiffs undertook to execute a contract between themselves and the company. But there being no such contract in existence, they are left to resort to their equitable claim for their labor and materials. So far as these benefited by the company, the plaintiffs are entitled to recover against them": See, also, *Norris v. School District*, 12 Me. 293, 28 Am. Dec. 182; *Turner v. Webster*, 24 Kan. 38, 36 Am. Rep. 251.

The principle is well stated by Brewer, J., in the case last cited: "Webster never assented to a contract to work for one dollar and fifty cents a day. He agreed to do a certain work, and did it, but his understanding was that he was to receive three dollars per day. Turner & Otis employed him to do that work, and knew that he did it; but their understanding was that they were to pay but one dollar and fifty cents a day. . . . What, then, should result? Should he receive nothing because there was no mutual assent to the compensation? That were manifest injustice. Should his understanding bind both parties? That were a wrong to them. Should theirs control? That were an equal wrong to him. The law, discarding both, says a reasonable compensation must be paid."

The same principle underlies the decisions in this jurisdiction: *Britton v. Turner*, 6 N. H. 481, 26 Am. Dec. 713; *Clark v. Manchester*, 51 N. H. 594; *Carroll v. Giddings*, 58 N. H. 333. The principle seems as sound in reason as it is well supported by authority. The action of the superior court, to which the defendants excepted, was in accordance with this principle.

Exception overruled.

All concurred.

Contract Founded on Misunderstanding.—If goods are sold and delivered upon a mutual misunderstanding as to the mode of payment, the fact of a benefit received from the purchase is insufficient to establish the legal duty to pay in cash for the goods, in the absence of a showing of a contract in fact, express or implied, or by estoppel: *Concord Coal Co. v. Ferrin*, 71 N. H. 13, ante, p. 496, 51 Atl. 283.

JOHNSON v. LANG.

[71 N. H. 251, 51 Atl. 908.]

EXEMPTIONS.—If a Wagon is a tool of the debtor's occupation it is exempt from attachment. (p. 509.)

EXEMPTIONS—Necessity of Claim of.—If a tool of a debtor's occupation is attached, he may maintain trover against the officer without specifically claiming the right of exemption. (p. 510.)

EXEMPTIONS—Waiver and Revocation.—A waiver of claim of exemption arising from the failure of the owner of attached property to claim it as exempt is revoked by a subsequent demand therefor before the rights of third persons have intervened. (p. 510.)

L. P. Snow, for the plaintiff.

A. L. Foote, for the defendant.

²⁵² REMICK, J. It is found as a fact that the wagon in question was a tool of the plaintiff's occupation: *Hall v. Nelson*, 59 N. H. 573. It was therefore exempt (Pub. Stats., c. 220, sec. 2, cl. 9), and the attachment was unlawful. Under these circumstances the plaintiff was not bound, even at the defendant's suggestion, to go and take the wagon or lose his remedy. Nor was he bound at once to ascertain and specifically define and demand his rights, on pain of forfeiture.

The case is not like those where the exemption was an alternative one, and where, from the circumstances, a duty of election or selection rested upon the debtor (*Buzzell v. Hardy*, 58 N. H. 331, 332; *Clapp v. Thomas*, 5 Allen, 158); but rather like those where having no duty to perform, the debtor merely leaves the officer to act upon his own responsibility: *Woods v. Keyes*, 14 Allen, 236, 92 Am. Dec. 766; *Dow v. Cheney*, 103 Mass. 181, 184.

If the plaintiff's mere nonaction when told that he could take the wagon "if he claimed it was as exempt from attachment" were sufficient, standing alone, to warrant a finding of waiver,

his subsequent action in demanding the wagon, before any sale and even before the return of the writ upon which it was attached, positively forbids such a finding.

If waiver of the exemption and consent to the attachment could be implied from such mere nonaction, being without consideration, and no prejudice appearing, such waiver and consent were revoked by the subsequent demand: *Rice v. Chase*, 9 N. H. 178, 32 Am. Dec. 346; *White v. Phelps*, 12 N. H. 382; *Carpenter v. Cummings*, 40 N. H. 158, 169; *Stone v. Sleeper*, 59 N. H. 205, 206; *Gould v. Blodgett*, 61 N. H. 115, 120; 12 Am. & Eng. Ency. of Law, 197, 198.

There should, therefore, be judgment for the plaintiff, in accordance with the finding of the superior court, for twelve dollars and costs.

Case discharged.

All concurred.

To Secure the Benefit of the Exemption Laws, the debtor must, by timely interposition, select and reserve such property as he claims to be exempt: *Thibault v. Lennon*, 39 Or. 280, 87 Am. St. Rep. 657, 64 Pac. 449. It is generally held that a claim of exemption may be filed at any time before the sale: *Boylston v. Rankin*, 114 Ala. 408, 62 Am. St. Rep. 111, 21 South. 995; *State v. Carson*, 27 Neb. 501, 20 Am. St. Rep. 681, 43 N. W. 361.

BALDWIN v. THAYER.

[71 N. H. 257, 52 Atl. 852.]

SALES—Change of Possession—Conflict of Laws.—The question whether a sale of personalty is accompanied by such change of possession as to render the transaction valid against attaching creditors of the vendor is to be determined by the law of the state where the property is situated and the attachment is made. (p. 511.)

SALES—Change of Possession.—To render a sale of personal property valid as against the vendor's subsequent attaching creditors, there must be a change of possession of the property from the vendor to the vendee, and such change must be exclusive and apparent. (p. 511.)

SALES—Change of Possession.—Notice of the sale of personalty without change of possession does not affect the claim of an attaching creditor of the vendor thereto. (p. 512.)

SALES—Change of Possession.—If personalty is allowed to remain in the possession of the vendor without any apparent ownership in the vendee, the act of the former in taking part of the goods to a railway station, requesting the railway company to provide

a car for the use of the vendee and to issue a shipping receipt for the goods in his name, while the car is loaded by the vendor's servants, is not such a change of possession or notice of change of ownership as will render the sale valid as against a subsequent attaching creditor of the vendor. (p. 513.)

SALES—Change of Possession.—Personal property sold and put upon railroad premises for shipment is not thus placed in the constructive possession of the vendee, so that it cannot be reached by the vendor's creditors unless he has parted with all control and custody of it and the railway company has become a bailee in relation thereto. (p. 513.)

SALES—Change of Possession—Attaching Creditors.—It is only when alleged personality of a vendor and debtor is apparently in the open, visible, and exclusive possession of a third person that an attaching creditor of the vendor is put upon inquiry as to the title. (pp. 513, 514.)

Smith & Smith, for the plaintiff.

S. Sloane, for the defendant.

²⁵⁹ **BLODGETT, C. J.** Whether at the time of the attachment the title to the lumber in question had passed as between the vendor and the vendee, it is unnecessary to determine; for treating the transaction as a completed sale as to the parties, we think it was void as to the attaching creditor.

By the law of Vermont, as we understand it to be held, and by which this case is to be determined, "a sale is fraudulent in law unless there is a change of possession; possession in the vendee, open, notorious and exclusive; that is, apparent and such as would indicate to an observer a change of ownership; exclusive, not joint; and if any of these requisites are wanting to the sale, the property is liable to attachment by the creditors of the vendor, notwithstanding the bona fides of the transaction": *Weeks v. Prescott*, 53 Vt. 57. "The rule in this state is well understood by the profession, that to render a sale of personal property valid against the vendor's creditors there must be a change of possession of the property from the vendor to the vendee; that the vendee's possession must be exclusive and apparent": *Wheeler v. Selden*, 63 Vt. 429, 431, 25 Am. St. Rep. 771, 21 Atl. 615. "Our books abound with the expressions that a bona fide sale without a change of possession is not valid as against creditors. But to be strictly accurate, it should be said that such sales do not prevent the property from being attached upon process against the vendor. And that this is the real point of the doctrine is made apparent by the consideration that one may attach property in this state so situated, notwithstanding he may have full notice of the transfer, and have no reason

to doubt or question its perfect fairness and adequate consideration. But in regard to subsequent purchasers, the rule is otherwise: *Rice v. Curtis*, 32 Vt. 460, 468, 469, 78 Am. Dec. 597, per Redfield, C. J.; *Hart v. Farmers' etc. Bank*, 33 Vt. 252, 263. "Notice of the sale of personal property without change of possession will not affect the claim of an attaching creditor and vendor thereto": *Perrin v. Reed*, 35 Vt. 2, 8, 9. And "when personal property is sold which is in the custody of a third person, the vendee must himself, or by some person other than the vendor, give notice of the sale to the person in whose possession the property is, and such person must assent, and agree, to keep the property for the vendee, or it will be liable ²⁶⁰ to be attached by the creditors of the vendor": *Whitney v. Lynde*, 16 Vt. 579, 580. "Without this notice the possession cannot be considered as changed, so that the property should not be subject to attachment at the suit of the creditors of the vendor": *Whitney v. Lynde*, 16 Vt. 586. "The rule laid down in *Whitney v. Lynde* . . . has always been adhered to in this state, so far as I know": Redfield, C. J., in *Rice v. Curtis*, 32 Vt. 470, 78 Am. Dec. 597. See, also, *Pierce v. Chipman*, 8 Vt. 334, 339, and authorities cited; and *Hart v. Farmers' etc. Bank*, 33 Vt. 263. The seller must become divested of the possession: *Chase v. Snow*, 52 Vt. 525, 529.

To this enunciation of what has been termed "Vermont's fraud-in-law doctrine," the only exception of which we are aware is, that in the case of personal chattels "cumbersome in character" and "difficult of removal," or when "removal is impracticable," the sale is valid against attaching creditors without an actual removal or manual change of possession (*Kingsley v. White*, 57 Vt. 565, 568); and within this exception are the cases of *Hutchins v. Gilchrist*, 23 Vt. 82, and *Birge v. Edgerton*, 28 Vt. 291, upon which much reliance is had by the defendant.

In the light of these decisions, do the facts before us show a change of possession so open, notorious, and exclusive as would inform the public, or those who were accustomed to deal with Getchell, that the property had changed hands, and that the title had passed to Thayer, at the time of the attachment? We cannot think so. On the contrary, we think there was no outward sign manifested, nor indicia exhibited, nor notice given, which could apprise the attaching creditor or the public of any change of possession or ownership. Certainly Thayer had done nothing in these respects. So far as appears, he had seen but a portion

of the lumber; had given no directions about it; had taken no charge of it; had notified no one of his claimed ownership; and, furthermore, although the larger part of the lumber was upon the premises of the railroad at the time of sale, he concedes and claims that all of it was then in Getchell's possession. Being admittedly in his possession then, and consequently liable to attachment as his property by a creditor having actual knowledge of the sale, when and how, during the six hours succeeding, did Getchell become divested of the possession and the lumber exempted from attachment by a creditor having no knowledge of the sale? The only acts on his part, in the meanwhile, in respect of the lumber were, the drawing of the balance of it to the railroad premises with his teams; his request to the station agent to set in a car for Thayer upon which the lumber might be loaded; his direction that when a shipping receipt was issued it should be made out to Thayer; and the loading of about three-fourths of ²⁶¹ the lumber on the car by Getchell's servants, who were actually so engaged when the attachment was made. Plainly, these acts did not effect a divestment of Getchell's possession. The possession of his servants was his possession; their acts were his acts; and something yet remained to be done in the performance of his contract of sale. Nor, during this period, had the railroad assumed or contracted any new obligation or relation to the property. No shipping receipt for it had been issued, no additional control of it taken, and no additional responsibility on account of it assumed.

The doctrine of constructive possession cannot be invoked by the defendant. The relation of bailor and bailee did not exist between him and the railroad. The lumber was on the railroad premises as a place of deposit merely. Doubtless personal chattels may be delivered by a vendor to a third person under an arrangement with him to hold them for the purchaser, and the title pass as against the vendor's creditor. But that is not this case. Suppose, however, that it were true; in such a case the vendor must part with all control over the property, and not remain in the apparent possession and custody of it. Where there is actual possession, there is no place for constructive possession.

Nor can we assent to the defendant's further contention, that the plaintiff was bound to make inquiry of the railroad before attaching the property. It is only when the alleged property of the vendor or debtor is apparently in the open, visible and exclusive possession of a third party that an attaching creditor is

put upon inquiry. The contention is based upon the erroneous assumption that the railroad had such a possession when the attachment was made. The facts show the contrary to be true, and, beyond this, it is expressly found that "there was no evidence that the attaching creditor had any notice of the sale of the lumber before the attachment." In the most favorable view to the defendants which we think can possibly be taken consistently with the facts, the lumber was in the joint possession of Getchell and the railroad; but this would not shield or exempt it from attachment by Getchell's creditors.

The plaintiff is entitled to judgment for one hundred and twenty dollars and eighty-four cents, and interest from the date of his writ.

Exemption sustained.

All concurred.

What Change of Possession of goods sold is sufficient as against creditors and subsequent purchasers is considered in the monographic note to Clafin v. Rosenberg, 97 Am. Dec. 340-348. While it is possible for the vendee to employ the vendor and yet make such a change of possession as will support a sale, still if the vendor is left in entire charge of the property, or so apparently in charge that there is no visible change in its possession, and nothing to indicate any change in the title or possession, then there is no such actual change of possession as is required by law: Etchenare v. Aguirre, 91 Cal. 288, 25 Am. St. Rep. 180, 27 Pac. 668. See, further, Murphy v. Mulgrew, 102 Cal. 547, 41 Am. St. Rep. 200, 36 Pac. 857; Stephens v. Gifford, 137 Pa. St. 219, 21 Am. St. Rep. 868, 20 Atl. 542; Renninger v. Spatz, 128 Pa. St. 524, 18 Atl. 405, 15 Am. St. Rep. 692, and note.

The Delivery of Goods by a Vendor to a carrier, as a general rule, is equivalent to a delivery to the vendee, subject to the right of stoppage in transit: Scharff v. Meyer, 133 Mo. 428, 54 Am. St. Rep. 672, 34 S. W. 858.

WARD v. MARYLAND CASUALTY COMPANY.

[71 N. H. 262, 51 Atl. 900.]

INSURANCE—Notice of Accident or Claim.—Under an employer's liability insurance policy providing that the insured shall give the insurer "immediate notice" of an accident, a claim thereunder, or of a suit to enforce such claim, it is intended that the notice in each case shall be given as soon after the fact as, in view of all the circumstances, makes it reasonably immediate, and if such notice is given with due diligence under the circumstances and

without unnecessary or unreasonable delay, it answers the requirement of the contract. Whether the notice as given is reasonably immediate is a question of fact. (pp. 515, 516.)

INSURANCE—Accident — Full Particulars—An employer's liability insurance policy requiring the insured to furnish to the insurer "full particulars" of an accident does not call for unnecessary details, but only such as will enable the insurer to determine whether a claim is likely to be made. Such provision does not call upon the insured to make and report an exhaustive examination of the circumstances attending the accident, or to decide the facts upon conflicting evidence. Whether the information furnished is sufficiently full under the circumstances to answer the requirement of the policy is a question of fact. (p. 516.)

INSURANCE—Indemnity—Notice of Action.—Under an employer's liability insurance policy failure of the insured to forward to counsel for the insurer the process served upon him in an action by an employe for injury from an accident, does not exempt the insurer from liability in the absence of a special provision to that effect in the policy. (p. 517.)

S. Sloane and G. F. Morris, for the plaintiffs.

Jewell, Owen & Veazey, for the defendants.

²⁶⁶ CHASE, J. The defendants' liability depends in part upon the answer to the question whether the plaintiffs gave them "immediate" notice in writing of O'Connell's accident, the claim made ²⁶⁷ on account of it, and the suit that was brought to enforce the claim. This involves an ascertainment of the meaning of the word "immediate" as used in the policy. The word, when relating to time, is defined in the Century Dictionary as follows: "Without any time intervening; without any delay; present; instant; often used like similar absolute expressions, with less strictness than the literal meaning requires; as, an immediate answer." It is evident that the word was not used in this contract in its literal sense. It would generally be impossible to give notice in writing of a fact the instant it occurred. It cannot be presumed that the parties intended to introduce into the contract a provision that would render the contract nugatory. As "immediate" was understood by them, it allowed the intervention of a period of time between the occurrence of the fact and the giving of notice more or less lengthy according to the circumstances. The object of the notice was one of the circumstances to be considered. If it was to enable the defendants to take steps for their protection that must necessarily be taken soon after the occurrence of the fact of which notice was to be given, a briefer time would be required to render the notice immediate according to the understanding of the parties than would be required if the object could be equally

well attained after considerable delay. For example, a delay of weeks in giving notice of the commencement of the employé's suit against the plaintiffs might not prejudice the defendants in preparing for a defense of the action, while a much shorter delay in giving notice of the accident might prevent them from ascertaining the truth about it. The parties intended by the language used that the notice in each case should be given so soon after the fact transpired that, in view of all the circumstances, it would be reasonably immediate. If a notice is given "with due diligence under the circumstances of the case, and without unnecessary and unreasonable delay," it will answer the requirements of the contract: *Chamberlain v. New Hampshire Fire Ins. Co.*, 55 N. H. 249, 265, 268; *May on Insurance*, 1st ed.; sec. 462; *May on Insurance*, 4th ed., sec. 462; *Donahue v. Windsor County etc. Ins. Co.*, 56 Vt. 374; *Lockwood v. Middlesex etc. Assur. Co.*, 47 Conn. 553, 568. Whether the notices were reasonably immediate—like the kindred question of what is a reasonable time—are questions of fact that must be determined in the superior court: *Tyler v. Webster*, 43 N. H. 147, 151; *State v. Plaisted*, 43 N. H. 413; *Chamberlain v. New Hampshire Fire Ins. Co.*, 55 N. H. 265; *Austin v. Ricker*, 61 N. H. 97; *Ela v. Ela*, 70 N. H. 163, 165, 47 Atl. 414.

The defendants further allege that the plaintiffs did not give full particulars of the accident. The provision of the contract requiring full particulars did not call for unnecessary details, but only such as would enable the defendants to determine whether a ²⁰⁸ claim was likely to be made against the plaintiffs. Nor did it call upon the plaintiffs to make an exhaustive investigation of the circumstances attending the accident, or to decide what the facts were upon a consideration of conflicting evidence. The request, made by the defendants' resident managers in Boston of persons insured in the company, that they would notify the defendants' attorneys by telegraph or telephone of an accident, so that they might send a person at once, to make an investigation, shows that the defendants so understood the matter. The purpose of the notice was to put the defendants upon inquiry rather than to give them full information concerning the accident. Whether the particulars furnished by the plaintiffs were sufficiently full under the circumstances to answer the requirement of the policy is also a question of fact to be determined in the superior court: *Stone v. Granite State Fire Ins. Co.*, 69 N. H. 438, 45 Atl. 235.

The provision in the third condition of the policy that the assured when requested by the company shall aid in securing information and evidence, is of a similar nature, and should be interpreted and applied in accordance with the foregoing views.

To the defendants' claim that their liability under the policy, was ended by the plaintiffs' failure to forward to the defendants' counsel the summons or paper served upon the plaintiffs in the O'Connell action immediately after service, in compliance with the counsel's request, it is a sufficient answer that there is no provision in the policy making such failure a cause of forfeiture of the plaintiffs' rights. Such failure would be competent evidence on the question whether the plaintiffs reasonably aided the defendants in securing information concerning the action. Its weight would depend upon the circumstances, and must be determined by the tribunal charged with the duty of deciding questions of fact.

The court ruled pro forma that the correspondence and telegrams were a substantial compliance with the conditions of the policy, and found for the plaintiffs. If this means that the questions were treated as matters of law, there was error in the course adopted and the finding must be set aside. If it means that upon a consideration of the correspondence and telegrams it was found as a fact that there was a substantial compliance with the condition of the policy, the only additional question of law raised by the defendants' exception is whether there was sufficient evidence to warrant such a finding. The evidence was ample. Not to mention any other testimony, the request made by the defendants' counsel of the plaintiffs, about August 20, 1900—fifteen months after the accident and fourteen months after the last request for further information concerning the accident—that the plaintiffs would send the summons in the O'Connell action to the counsel ²⁶⁹ in order that they might take the proper steps to defend the plaintiffs, very strongly shows that the defendants did not understand that their liability had ceased because of any prior failure of the plaintiffs to comply with the requirements of the policy. It was a practical admission that the prior efforts of the plaintiffs to fulfill the terms of the policy had been reasonable, both as to form and seasonableness. Apparently, the defendants then had full information concerning all the facts covered by the admission, except perhaps the date when O'Connell's action was begun. A finding that a notice of the beginning of the suit,

given eighteen days after the service of the writ upon one of the plaintiffs and two days before its service upon the other was "immediate" within the meaning of the word as used in the policy would not be unsupported by the evidence.

The general finding in favor of the plaintiffs is understood to include a finding of all facts in their favor that are necessary to support the general finding, and so to include findings favorable to them upon the questions of fact above mentioned. The pro forma ruling is understood to have related to the facts so found. Accordingly, unless the defendants procure an amendment of the case showing that this construction is erroneous, their exception must be overruled.

Exception overruled nisi.

All concurred.

Conditions in Policies of Insurance as to the time of giving notice of loss or accident are construed reasonably and most strongly against the insurer. If the condition is that the notice must be given immediately or forthwith, it is necessary only that due diligence be exercised and notice be given within a reasonable time: *Woodmen Accident Assn. v. Pratt*, 62 Neb. 678, 87 N. W. 546, 89 Am. St. Rep. 777, and cases cited in the cross-reference note thereto.

The Condition in a Policy of Insurance as to the manner of furnishing proofs of loss must be complied with substantially: *Weidert v. State Ins. Co.*, 19 Or. 261, 20 Am. St. Rep. 809, 24 Pac. 242; *Jones v. Mechanics' Fire Ins. Co.*, 86 N. J. L. 29, 13 Am. Rep. 405. A substantial compliance, however, is sufficient. "Due proof" calls only for such as the law will pronounce reasonable and satisfactory: *Jarvis v. Northwestern Mut. Relief Assn.*, 102 Wis. 546, 72 Am. St. Rep. 895, 78 N. W. 1089; *Rochester Loan etc. Co. v. Liberty Ins. Co.*, 44 Neb. 537, 48 Am. St. Rep. 745, 62 N. W. 877; *Buffalo Loan etc. Co. v. Knights Templar etc. Assn.*, 126 N. Y. 450, 22 Am. St. Rep. 839, 27 N. E. 942.

HUGHES v. BOSTON AND MAINE RAILROAD.

[71 N. H. 279, 51 Atl. 1070.]

RAILROADS—Infant Trespassers.—A railroad company is not in fault in not keeping its right of way clear of obstructions which may render the place dangerous to infant trespassers. (p. 519.)

RAILROADS—Infant Trespassers—Use of Torpedoes.—The facts that a railroad torpedo was found upon the railroad right of way beside the track some distance from a crossing or station and that trainmen were required by the rules of the road to be supplied with torpedoes and were directed how to use them as signals furnish no evidence of an intentional or wanton desire to inflict an injury to an intermeddling infant trespasser. (p. 520.)

NEGLIGENCE must be Proved either by testimony directly establishing the fact, or by proof of facts from which such negligence reasonably follows and must be presumed. (p. 520.)

RAILROADS—Trespassers.—If a railway company conducts its lawful business in a legal and proper manner, it is not liable to one who is injured, not by its acts, but by his own intermeddling with railroad machinery upon railroad land where the presence of the person injured is without right. (p. 521.)

RAILROADS—Infant Trespassers.—A railroad company is under no obligation to warn or protect infant trespassers. (p. 521.)

RAILROADS—Infant Trespassers.—Invitation to an infant trespasser to go upon railroad premises cannot be inferred from the fact that other persons go there without objection. (p. 521.)

Shannon & Young, and E. A. and C. B. Hibbard, for the plaintiff.

Jewett & Plummer and F. S. Streeter, for the defendants.

284 PARSONS, J. If the unexploded torpedo lying beside the track rendered the defendants' premises unsafe for the use which the plaintiff, a boy nine years old, was attempting to make of them, that fact does not establish that the defendants were guilty of negligence. Actionable negligence is the breach of a duty owed by the defendant to the plaintiff. Where there is no duty there is no negligence: *McGill v. Maine etc. Granite Co.*, 70 N. H. 125, 127, 85 Am. St. Rep. 618, 46 Atl. 684. "The ownership of land imposes no duty upon the owner for the benefit of trespassers": *Davis v. Boston etc. R. R. Co.*, 70 N. H. 519, 520, 49 Atl. 108. Hence, in the words of the plaintiff's brief a land owner "is not obliged to fence a disused reservoir while filling it up (*Clark v. Manchester*, 62 N. H. 577), or a manufacturing corporation to stop its machinery or forcibly to eject a trespassing child (*Buch v. Amory Mfg. Co.*, 69 N. H. 257, 76 Am. St. Rep. 163, 44 Atl. 809), or a railroad to lock its turntables or discover chance trespassers (*Frost v. Eastern R. R. Co.*, 64 N. H. 220, 10 Am. St. Rep. 396, 9 Atl. 790; *Shea v. Concord etc. R. R. Co.*, 69 N. H. 361, 41 Atl. 774)," or to fence its right of way for the protection of an infant trespasser: *Casista v. Boston etc. R. R. Co.*, 69 N. H. 649, 45 Atl. 712. These propositions are admitted by the plaintiff upon the authorities in this state, and from them it follows that a railroad is not in fault for not keeping its right of way clear of obstructions which may render the place dangerous to an infant trespasser. This much appears to be conceded. But it is claimed that "throwing away poisons or explosives is an altogether different case"; that carelessness in the control of ex-

plosives and poisons "is a breach of duty to the public and to the individual injured." The claim is understood to stand upon the ground that, though a land owner is not liable for failure to take active measures for the protection of trespassers according to the authorities above cited, he is liable for injuries intentionally or wantonly inflicted: *Davis v. Boston etc. R. R. Co.*, 70 N. H. 519, 520, 49 Atl. 108; *Leavitt v. Shoe Co.*, 69 N. H. 597, 45 Atl. 558; *Frost v. Eastern R. R. Co.*, 64 N. H. 220, 222, 10 Am. St. Rep. 396, 9 Atl. 790.

At the close of the opening counsel was asked what the evidence would be to prove the defendants' fault. The ruling granting the nonsuit was, in effect, that the facts stated were insufficient to authorize the inference that the plaintiff's injuries were either intentionally or wantonly inflicted by the defendants. The ruling was correct. The only facts suggested were the finding of the torpedo upon the defendants' right of way beside the track, at a point one-fourth of a mile from a crossing or station; that the torpedo was of a kind used only by the railroad; and the inference which could be made from the rules of the road by which the trainmen were required to be supplied with torpedoes and ²⁸⁵ were directed how to use them as signals. These facts furnish no evidence of intentional or wanton injury. In the absence of evidence, it cannot be inferred from the rules requiring the use of torpedoes by trainmen that such use was unnecessary or improper. "As signal torpedoes are necessary in the operation of trains upon railroads, the possession of them by men of the train crew cannot be regarded as negligence, and it cannot be presumed that they are negligently used; but negligence in such a case, as in all others, must be proved either by testimony directly establishing the fact, or by the proof of facts from which such negligence will reasonably follow and be presumed. The jury cannot be allowed to guess that there was negligence without some proof thereof, either direct or inferential": *Cleveland etc. R. R. Co. v. Marsh*, 63 Ohio St. 236, 58 N. E. 821; *Gahagan v. Boston etc. R. R. Co.*, 70 N. H. 441, 444, 50 Atl. 146. No evidence to the contrary being offered, the only inference that can be made from the rules is that the use of torpedoes for signaling by placing them upon the rails, except at stations and crossings, was necessary and proper. Conducting their lawful business in a manner which there was no offer to prove was illegal or improper, the defendants are not liable to one who is injured, not by the defendants' acts, but by his own

intermeddling with their machinery upon their own land, where the presence of the person injured was without right: *Carter v. Columbia etc. R. R. Co.*, 19 S. C. 20, 45 Am. Rep. 754. The case cited was very near the present in its facts. It was there said, there being "no evidence except the naked facts that the defendant had placed the torpedo upon its track for a good purpose, and that the deceased, by intermeddling with it for a bad purpose, had brought upon himself the terrible calamity which resulted from its explosion," that "there was a total want of testimony as to the defendant's negligence, the gist of the action, and therefore the nonsuit should have been granted." In the present case the torpedo was found, not on the rail, but beside it. As to the cause of its being in the latter position, we are left entirely to speculation. In the absence of evidence, the jury cannot conjecture or guess that the presence of the torpedo beside, instead of upon, the rail was due to negligence. Much less could they be permitted to infer that it was wantonly or intentionally left where it was found. But the fact is of no consequence, because the plaintiff was not injured by coming in contact with it in walking along, but because he picked it up and struck it with a stone—a result equally as probable if the torpedo were found upon the rail. As the defendants owed no duty to warn or protect trespassers, the fact that the plaintiff was an infant does not create a duty where none exists: *Buch v. Amory Mfg. Co.*, 69 N. H. 257, 261, 76 Am. St. Rep. 163, 44 Atl. 809.

²⁹⁶ The allegation in the first part of the opening statement (which apparently is the declaration in the writ), that the plaintiff when injured was traveling upon the premises of the railroad, as he had a right to do, would authorize the introduction of evidence upon which, if it existed, the plaintiff might have a right to go to the jury; but it is understood from the subsequent statements and the argument that no right is claimed except what would result from the alleged fact that no objection was made to the passage of persons along the track between the Messer street crossing and the station. This claim has not been urged, but it appears to be conceded that the plaintiff was in fact a trespasser, and the case has been argued by the plaintiff only upon that ground. Invitation by the land owner to go upon his premises cannot be inferred from the fact that persons go there without objection from him: *Clark v. Manchester*, 62 N. H. 577, 579; *Cooley on Torts*, 606.

Harriman v. Pittsburgh etc. Ry. Co., 45 Ohio St. 11, 4 Am. St. Rep. 507, 12 N. E. 451, has been cited. In that case there was evidence that the torpedoes were placed where found wantonly, and not for any necessary or useful purpose. In the absence of evidence of this character, it is not advisable to discuss the doctrine of this case, which on other points embraced in the decision is in conflict with the law of this state.

The action of the plaintiff, though only nine years of age, in placing the torpedo upon the rail and striking it with a stone, might be thought to indicate he had some knowledge of its properties. Doubtless he did not know of the danger from an explosion so made. His injury is to be ascribed, upon the facts stated, to accident or misfortune attributable to his childish ignorance and inexperience, and not to any actionable fault of the defendants: 1 Thompson on Negligence, sec. 1051.

Exception overruled.

All concurred.

The Owner of Property is held to be under no obligation, in the absence of wanton or willful negligence, to keep it in a safe condition for the benefit of trespassers, idlers, intruders, or others, whether infants or adults, who come upon it, not by invitation, express or implied, but for their own purposes, to gratify their curiosity, or for pleasure: *Ryan v. Towar*, 128 Mich. 463, 92 Am. St. Rep. 481, 87 N. W. 644; *Uthermohlen v. Bogg's Run Co.*, 50 W. Va. 457, 40 S. E. 410, 88 Am. St. Rep. 884, and cases cited in the cross-reference note thereto. See the discussion of this question in the monographic note to *Barnes v. Shreveport City R. R. Co.*, 49 Am. St. Rep. 416-421. Thus a railroad company is not liable for the death of one who, while walking on the track without right, intermeddles with a torpedo placed there as a danger signal, and is killed by its explosion: *Carter v. Columbia etc. R. R. Co.*, 19 S. C. 20, 45 Am. Rep. 754. But see *Harriman v. Pittsburgh etc. Ry. Co.*, 45 Ohio St. 11, 4 Am. St. Rep. 507, 12 N. E. 451.

McLAINE v. HEAD & DOWST COMPANY.

[71 N. H. 294, 52 Atl. 545.]

MASTER AND SERVANT—Fellow-servants.—A servant who is injured by the negligence of a fellow-servant in the course of their common employment without any fault on the part of the master cannot maintain an action against him for such injury. (p. 524.)

MASTER AND SERVANT—Fellow-servants Test.—If one person is injured through the negligence of another in the same service, the test as to whether they are fellow-servants is not found in the fact that they are engaged in a common employment under

the same general control and paid by the same principal, but is whether the negligent servant in the act or omission complained of represents the master in the performance of any duty owed by the master to the servant injured. The responsibility of the master is determined by the nature of the act in question, and not by the difference in the rank or grade of service between particular servants. (p. 524.)

MASTER AND SERVANT—Fellow-servants—Dangerous Place to Work.—If the supplying of a work place is part of, or necessarily results from, the work being done, and is to be done, by the servants themselves, the master is not liable for a co-servant's negligence in the progress of the work rendering the place unsafe. (p. 525.)

MASTER AND SERVANT—Risk Assumed.—If danger to a servant arises, not from the work place itself, but from the use of it for the work, and no special skill or experience beyond that involved in doing the work is required to maintain the safety of the place, the maintenance of such safety is the duty of the servant, because it is part of the work. (p. 526.)

MASTER AND SERVANT—Act of Vice-principal.—If ordinary care requires that a warning of dangers arising from the work should, from time to time, be given by a master to his servants as the work progresses, he must provide for such a warning, and if he intrusts this duty to a competent person he is not liable for the negligence of such person. (p. 527.)

MASTER AND SERVANT—Warning of Danger—Act of Fellow-servant.—A master is not liable for the negligence of a servant in failing to notify a co-employé of the approach of a transitory peril which, as the work progresses, will render the environment unsafe for a brief period, but which may easily be avoided if due warning is given. (p. 527.)

MASTER AND SERVANT.—Negligence of a Foreman in failing to notify a servant working in a ditch of the dumping of a load of earth into the ditch is not a breach of the duty of the master to provide a safe place for the servant to do the work delegated to him. (p. 528.)

MASTER AND SERVANT—Guaranty of Protection by Fellow-servant.—The promise of a servant that he will exercise care in the work intrusted to him to avoid injury to a fellow-servant is not the promise of the master, and he is not liable therefor unless it is expressly authorized by him. (pp. 528, 529.)

MASTER AND SERVANT—Promise of Protection by Foreman.—A promise by a foreman to a servant working under him to protect him from the danger of the employment, is not binding upon the master, unless authorized by him. (p. 529.)

Plaintiff was employed by the defendants as a laborer, leveling and tamping earth in a ditch some twenty feet deep. Earth was dumped into such ditch by cartloads, and it was the practice of the boss of the gang to warn the men in the ditch that the earth was about to be dumped. Such boss had directed the plaintiff to work in the ditch and had promised to "take care of him." At the time plaintiff was injured no warning was given, and as a consequence a load of earth was dumped on him. Plaintiff was nonsuited and took exceptions.

Pattee & George, for the plaintiff.

D. A. Taggart and G. C. Bingham, for the defendants.

²⁹⁵ PARSONS, J. "A servant who is injured by the negligence of a fellow-servant in the course of their common employment, without any fault on the part of the master, **can** maintain no action against the master for such injury": *Fifield v. Northern R. R. Co.*, 42 N. H. 225, 236; *Hanley v. Grand Trunk Ry. Co.*, 62 N. H. 274; *Griffin v. Glenn Mfg. Co.*, 67 N. H. 287, 30 Atl. 344; *Lebargé v. Berlin Mills Co.*, 68 N. H. 373, 44 Atl. 533; *Fournier v. Columbian Mfg. Co.*, 70 N. H. 629, 44 Atl. 104. The test whether the individual employes concerned were fellow-servants is not found in the fact that they were engaged in a common employment under the same general control and paid by the same principal, but is whether the negligent servant, in the act or omission complained of, represented the master in the performance of any duty owed by the master to the servant injured. The responsibility of the master is determined by the nature of the act in question, and not by a difference in rank or grade of service between particular servants: *Jacques v. Great Falls Mfg. Co.*, 66 N. H. 482, 22 Atl. 552; *Small v. Allington etc. Co.*, 94 Me. 551, 48 Atl. 177; *Bailey on Master and Servant*, 284, 286.

The plaintiff, the foreman, and the teamsters were engaged in a common employment filling the trench. The plaintiff in the bottom of the ditch was injured by the negligent dumping of earth and stones upon him. If he had been warned, he could have protected himself and escaped injury. The liability of the defendants for the failure of the foreman to give the warning, assuming that such failure was due to negligence, is determined by the answer to the question whether the duty of giving the omitted warning was a duty personal to the master. The rank or grade of the employé to whom this duty was in this case intrusted is immaterial, because the foundation of the claim is the nonperformance of an alleged non-delegable duty. The only breach of the master's duty suggested is the failure to provide the plaintiff with a safe place in which to work and to keep it safe. It is urged that, as the plaintiff could not safely work in the bottom of the ditch without warning, the master's duty as to the place was not performed unless the warning were given. It is not suggested that the place itself in which the plaintiff was at work was unsafe. There was no secret danger unknown to the plaintiff;

at least, the injury is not attributed to such a cause. The plaintiff's injury was due to a danger arising in the progress of the work. So long as in the work of filling the trench no earth was thrown into it in the plaintiff's vicinity, the place where he was at work was safe. His injury resulted from the prosecution of the common work by the defendants' other employés. The place and the danger varied as the work progressed. The place was not a permanent location prepared by the master for the work, but was made and changed by the work the servants were doing. Where the ²⁹⁰ supplying of a work place is part of, or necessarily results from, the work being done, and is to be done by the servants themselves, the master is not liable for a coservant's negligence in the progress of the work, rendering the place unsafe: *Armour v. Hahn*, 111 U. S. 313, 318, 4 Sup. Ct. Rep. 433; *Zeigler v. Day*, 123 Mass. 152, 154. An illustration is to be found in the cases where a part of the work of the servants is to build scaffoldings or stagings upon which to work. In such cases it is no part of the personal duty of the master to see to it that such places are safe. His duty ends with the supply of suitable materials: *Manning v. Manchester Mills*, 70 N. H. 582, 49 Atl. 91. Having provided a safe place, the master is not liable upon the ground of that obligation if the place is made unsafe by the negligence of servants employed, not to provide the place, but to do the work in the place: *Nash v. Nashua etc. Co.*, 62 N. H. 406; *Bodwell v. Nashua Mfg. Co.*, 70 N. H. 390, 47 Atl. 613; *Hussey v. Cogger*, 112 N. Y. 614, 618, 8 Am. St. Rep. 787, 20 N. E. 556; *Cullen v. Norton*, 126 N. Y. 1, 26 N. E. 905; *Daves v. Southern Pac. Co.*, 98 Cal. 19, 35 Am. St. Rep. 133, 32 Pac. 708; *Hermann v. Port Blakely Mill Co.*, 71 Fed. 853.

The obligations of the master as to machinery and appliances and in respect to the place are the same in substance, and may both as well as his duty in the employment of servants, be comprehended by the use of the term "instrumentalities." The master's duty is to exercise care to provide reasonably safe and sufficient instrumentalities for the work. The execution of the work is the duty of the servant. "The master has not contracted or undertaken to execute in person the work connected with his business": *Wilson v. Merry*, L. R. 1 H. L. S. 326, 332. When the repair of the machinery or appliances furnished by the master requires skill and practical knowledge, the obligation is that of the master; but when the inspection and repair is incidental to the use of the appliance—i. e., is a

plosives and poisons "is a breach of duty to the public and to the individual injured." The claim is understood to stand upon the ground that, though a land owner is not liable for failure to take active measures for the protection of trespassers according to the authorities above cited, he is liable for injuries intentionally or wantonly inflicted: *Davis v. Boston etc. R. R. Co.*, 70 N. H. 519, 520, 49 Atl. 108; *Leavitt v. Shoe Co.*, 69 N. H. 597, 45 Atl. 558; *Frost v. Eastern R. R. Co.*, 64 N. H. 220, 222, 10 Am. St. Rep. 396, 9 Atl. 790.

At the close of the opening counsel was asked what the evidence would be to prove the defendants' fault. The ruling granting the nonsuit was, in effect, that the facts stated were insufficient to authorize the inference that the plaintiff's injuries were either intentionally or wantonly inflicted by the defendants. The ruling was correct. The only facts suggested were the finding of the torpedo upon the defendants' right of way beside the track, at a point one-fourth of a mile from a crossing or station; that the torpedo was of a kind used only by the railroad; and the inference which could be made from the rules of the road by which the trainmen were required to be supplied with torpedoes and ²⁸⁵ were directed how to use them as signals. These facts furnish no evidence of intentional or wanton injury. In the absence of evidence, it cannot be inferred from the rules requiring the use of torpedoes by trainmen that such use was unnecessary or improper. "As signal torpedoes are necessary in the operation of trains upon railroads, the possession of them by men of the train crew cannot be regarded as negligence, and it cannot be presumed that they are negligently used; but negligence in such a case, as in all others, must be proved either by testimony directly establishing the fact, or by the proof of facts from which such negligence will reasonably follow and be presumed. The jury cannot be allowed to guess that there was negligence without some proof thereof, either direct or inferential": *Cleveland etc. R. R. Co. v. Marsh*, 63 Ohio St. 236, 58 N. E. 821; *Gahagan v. Boston etc. R. R. Co.*, 70 N. H. 441, 444, 50 Atl. 146. No evidence to the contrary being offered, the only inference that can be made from the rules is that the use of torpedoes for signaling by placing them upon the rails, except at stations and crossings, was necessary and proper. Conducting their lawful business in a manner which there was no offer to prove was illegal or improper, the defendants are not liable to one who is injured, not by the defendants' acts, but by his own

intermeddling with their machinery upon their own land, where the presence of the person injured was without right: *Carter v. Columbia etc. R. R. Co.*, 19 S. C. 20, 45 Am. Rep. 754. The case cited was very near the present in its facts. It was there said, there being "no evidence except the naked facts that the defendant had placed the torpedo upon its track for a good purpose, and that the deceased, by intermeddling with it for a bad purpose, had brought upon himself the terrible calamity which resulted from its explosion," that "there was a total want of testimony as to the defendant's negligence, the gist of the action, and therefore the nonsuit should have been granted." In the present case the torpedo was found, not on the rail, but beside it. As to the cause of its being in the latter position, we are left entirely to speculation. In the absence of evidence, the jury cannot conjecture or guess that the presence of the torpedo beside, instead of upon, the rail was due to negligence. Much less could they be permitted to infer that it was wantonly or intentionally left where it was found. But the fact is of no consequence, because the plaintiff was not injured by coming in contact with it in walking along, but because he picked it up and struck it with a stone—a result equally as probable if the torpedo were found upon the rail. As the defendants owed no duty to warn or protect trespassers, the fact that the plaintiff was an infant does not create a duty where none exists: *Buch v. Amory Mfg. Co.*, 69 N. H. 257, 261, 76 Am. St. Rep. 163, 44 Atl. 809.

²⁵⁶ The allegation in the first part of the opening statement (which apparently is the declaration in the writ), that the plaintiff when injured was traveling upon the premises of the railroad, as he had a right to do, would authorize the introduction of evidence upon which, if it existed, the plaintiff might have a right to go to the jury; but it is understood from the subsequent statements and the argument that no right is claimed except what would result from the alleged fact that no objection was made to the passage of persons along the track between the Messer street crossing and the station. This claim has not been urged, but it appears to be conceded that the plaintiff was in fact a trespasser, and the case has been argued by the plaintiff only upon that ground. Invitation by the land owner to go upon his premises cannot be inferred from the fact that persons go there without objection from him: *Clark v. Manchester*, 62 N. H. 577, 579; *Cooley on Torts*, 606.

negligence of the foreman in omitting the warning, he would be liable for the negligence of the teamster who dumped his load without warning if the duty rested upon him to give warning, or for the negligence of the single shoveler who in like manner emptied his shovel upon his companion. In the later case, it would be entirely immaterial whether the one in the ditch or the one upon the ground above was foreman. The cause of the injury is the negligent throwing of the earth by the one upon the other. The absence of a warning by which the injury would have been escaped is merely evidence of negligence in the person performing the act. As the act is that of a servant, the negligence is also. It is immaterial whether the act and the omission are chargeable to the same person. The division of duty necessary in large enterprises does not make that the act of the master which in smaller concerns is the negligence of the servant. The fact that the foreman had control over the plaintiff and directed him where to work does not, under *Jaques v. Great Falls Mfg. Co.*, 66 N. H. 482, 22 Atl. 552, make the master liable for the negligence in the work of a fellow-servant. *Keenan v. New York etc. R. R. Co.*, 145 N. Y. 190, 196, 45 Am. St. Rep. 604, 39 N. E. 711. Assuming that the power of direction involved the exercise of the master's duty (which is not generally true), the plaintiff's injury did not arise from any negligence in the performance of such duty.

The parties agree in an amendment to the case that the only questions raised or transferred are (1) the liability of the defendants for the failure of the boss, who was present performing the duty of giving warnings, to warn the plaintiff at the time of the accident; and (2) the effect of the assurance of protection by the foreman to the plaintiff as an inducement to him to enter upon and continue at the work assigned him. Therefore, whether the ²⁹⁹ personal duty of the employers required them in this case to make rules for the conduct of the business or provision for a warning, and whether such duty was discharged by the assumption by the foreman of the task of giving warning, are questions not raised or presented for consideration.

While there is no implied contract for the breach of which the defendants are liable, they might be personally liable upon an express contract if one were made. There is evidence of an express undertaking by the foreman that he would "take care of" the plaintiff. Construed in the light of the practice shown by the evidence, this might be found to constitute an

agreement to give warning, or a warranty that one should be given. Accompanied by evidence of authority from the defendants, such contract and its breach would establish the plaintiff's case. The only evidence is that the foreman was in charge of the whole gang, both teamsters and shovelers, and had been all summer. It is to be inferred, therefore, that the foreman had authority to direct the men where to work. If it were necessary to place a man to give warning, he had that authority. If the assurance had been that some one—the foreman, or some one else—would be charged with the duty of warning, and no person had been directed to perform that duty, the failure might be held a breach of the master's duty intrusted to him. But there is no evidence that the foreman was authorized to do more in the name of the defendants than perform so much of the defendants' legal duty as was entrusted to him. The duty to select some one to give the warning having been performed by the assumption of that duty by himself, of whose competency no question is made, his authority so far as shown by the evidence was exhausted. In his capacity of watchman, he had no more authority to pledge the defendants as insurers of the plaintiff's safety than any man whom he might have directed to perform that duty. His authority to act for the defendants being only that implied by law, he had not authority to act for them outside the duty which the law imposed upon them. If the law imposed upon them the duty of warning, the express agreement is immaterial except upon the question of the plaintiff's care, because the defendants would be equally liable without as with the agreement; while if they are not liable, there is nothing in the case empowering the foreman to agree they should be. What the foreman said was the mere promise or guaranty of a fellow-servant. It does not purport to be anything more. The promise of a servant that he will exercise care in the work intrusted to him to avoid injury to a fellow-servant is not the promise of the master: *Martin v. Atchison etc. R. R. Co.*, 166 U. S. 399, 403, 17 Sup. Ct. Rep. 603; *Schott v. Onondaga County Sav. Bank*, 49 App. Div. 503, 63 N. Y. Supp. 631; *Tedford v. Los Angeles Electric*, 54 L. R. A. 116, note, 2.

³⁰⁰ It does not appear that the foreman hired or discharged the other employé. Intrusted with the authority to make the contract of hiring, reasonable and necessary stipulations introduced by him into the contract would be binding upon the defendants. As part of such a contract, a reasonable and nec-

essary special guaranty of notice might bind the defendants: *Bradley v. New York Cent. R. R. Co.*, 62 N. Y. 99. The case discloses nothing of the sort. The plaintiff has placed his claim solely upon the failure to give warning. The lack of warning, unexplained, may be evidence of negligence in the person whose duty it was to give it; but to charge the defendants as employers, the plaintiff must go further and show that the failure is chargeable to negligence, either in employing incompetent servants or an insufficient number, or in placing the duty of warning upon one so occupied with other duties as to be incompetent to perform this, or to a failure to make proper rules and regulations for the conduct of the work. In the absence of any evidence upon either point suggested, the nonsuit was properly ordered.

Exception overruled.

Blodgett, C. J., and Chase and Walker, JJ., concurred.

Mr. Justice Bemick Dissented, and said: "As an original question, viewed in the light of natural reason and justice, I think all will agree that, when a master, through his foreman in charge, orders a servant to work in a deep trench, caring for earth and stones, which are being dumped into it from a point above and outside of the line of his vision, assuring him, by express declaration, as well as by previous practice of warning, and by the implication arising from the nature and necessity of the service, that he will be safeguarded by warning, he should be held liable to the servant, who, while proceeding with the work in accordance with the foreman's direction and in reliance upon such assurance and previous practice of warning, is injured by the neglect of the foreman to give such warning. But it is suggested that this conclusion, so reasonable and just in the abstract, is not permissible in the present case, because, it is claimed, the neglect of the foreman to give the warning was the neglect of a fellow-servant. . . . It is no longer the doctrine that all employes of a common master in a common enterprise, excepting those charged with supreme control and management, like boards of directors, are fellow-servants, regardless of rank or service: *Columbus etc. Ry. v. Arnold*, 31 Ind. 174, 99 Am. Dec. 615; *Fifield v. Northern R. R. Co.*, 42 N. H. 225, 236; *Hard v. Vermont etc. Co.*, 32 Vt. 473. Nor is it any longer true, that having in the first instance furnished the servant a safe place and safe appliances and competent servants to keep them so, the master's obligation is discharged (*Wilson v. Merry*, L. R. 1 H. L. Cas. 326; *Waller v. Railway Co.*, 2 Hurl & C. 102; *Searle v. Lindsay*, 11 Com. B., N. S., 429; *Albro v. Agawam Canal Co.*, 6 Cush. 75; *King v. Boston etc. Corp.*, 9 Cush. 112, 129; *Gill-shannon v. Stony Brook etc. Corp.*, 10 Cush. 228; *Johnson v. Boston Towboat Co.*, 135 Mass. 209, 212, 213, 46 Am. Rep. 458; *Hard v. Ver-*

mont etc. Co., 32 Vt. 473); but the law now is, that the master by the contract of employment, assumes certain personal duties to the servant, not only in respect to original equipment, but subsequent maintenance and management, and that whoever represents him in the discharge of any of these duties—whatever his title or rank—is to that extent the master's agent, for whose negligence the master is responsible to the servant, just as he would be responsible if the negligence were directly his own: *Nall v. Louisville Ry.*, 129 Ind. 260, 28 N. E. 183, 611; *Hopkins v. O'Leary*, 176 Mass. 258, 57 N. E. 342; *Haskell v. Anchor Works*, 178 Mass. 485, 59 N. E. 1113; *Jaques v. Great Falls etc. Co.*, 66 N. H. 482, 22 Atl. 552; *Davis v. Central Vt. R. R. Co.*, 55 Vt. 84, 89, 45 Am. Rep. 590.

"In holding that the master in the present case discharged the manifest and admitted duty to warn the plaintiff by delegating it to the foreman in charge, and in citing to that effect the case of *Wilson v. Merry*, now so generally repudiated (*Jaques v. Great Falls etc. Co.*, 66 N. H. 482, 22 Atl. 552; *Davis v. Central Vermont R. R. Co.*, 55 Vt. 84, 91, 94, 45 Am. Rep. 590), the majority would appear to have given too little weight to the process of change to which reference has been made. Be this as it may, the fact remains that the change has come. True, the line separating the duties which may be delegated so as to absolve the master from those which may not is not yet clearly defined, and in the process of development much conflict of authority has arisen. Yet through all the confusion a tendency is clearly manifest to enlarge the latter class. In view of this confusion and tendency, the concrete question here presented, whether the duty to warn (which was omitted to the plaintiff's injury) was of the former or the latter class, should be determined with reference to its own peculiar circumstances and in accordance with what seems the better reason and the sounder authorities, whatever may have been the conclusions of other courts, at other times, and under other circumstances. Answering the question in this spirit, there is to my mind no room for doubt that the duty to warn, under the circumstances of the present case, was a personal duty incumbent upon the defendants by their contract of employment, for the negligent performance of which by their foreman in charge they are responsible.

"The occasion for the warning did not arise from the transitory omission or commission of some fellow-servant. It was demanded by the nature of the work and the character of the place, as an original and permanent provision. . . . No reason can be suggested why, if the danger is inherent in the service and certainly recurring, and warning with the recurrence of the danger is absolutely necessary in order to make the working place safe, the master should not be required to repeat the warning with each recurrence of the danger." As sustaining this view, the learned judge cited *Gerrish v. Ice Co.*, 63 Conn. 9, 27 Atl. 235; *Evansville etc. R. R. Co. v. Holcomb*, 9 Ind. App. 198, 36 N. E. 39; *Cincinnati etc. Ry. v. Lang*, 118 Ind.

579, 21 N. E. 317; Taylor v. Evansville etc. R. R. Co., 121 Ind. 124, 16 Am. St. Rep. 372, 22 N. E. 876; Rogers v. Leyden, 127 Ind. 50, 26 N. E. 210; Nall v. Louisville etc. Ry. Co., 129 Ind. 260, 28 N. E. 183, 611; Louisville etc. Ry. v. Hanning, 131 Ind. 528, 31 Am. St. Rep. 443, 31 N. E. 187; Wheeler v. Wasson Mfg. Co., 135 Mass. 294; Belleville Stone Co. v. Mooney, 61 N. J. L. 253, 39 Atl. 764. To the same effect, and directly supporting the proposition that the negligence of the foreman in the present case was the negligence of the master, are the following: Railway Co. v. Triplett, 54 Ark. 289, 15 S. W. 831, 16 S. W. 266; Tedford v. Los Angeles Electric Light Co., 134 Cal. 76, 66 Pac. 76; Cheeney v. Steamship Co., 92 Ga. 726, 44 Am. St. Rep. 113, 19 S. E. 33; Kirk v. Senzig, 79 Ill. App. 251; Harrison v. Detroit etc. R. R. Co., 79 Mich. 409, 19 Am. St. Rep. 180, 44 N. W. 1034; Erickson v. St. Paul etc. R. R. Co., 41 Minn. 500, 48 N. W. 332; Carlson v. Northwestern Tel. Co., 63 Minn. 428, 65 N. W. 914; Mississippi etc. Co. v. Ellis, 72 Miss. 191, 17 South. 214; Moore v. Wabash etc. Ry. Co., 85 Mo. 588; Dayharsh v. Hannibal etc. Ry. Co., 103 Mo. 570, 23 Am. St. Rep. 900, 15 S. W. 554; Bing v. Missouri etc. Ry. Co., 112 Mo. 220, 20 S. W. 436; Floetli v. Third Ave. R. R. Co., 41 N. Y. Supp. 792, 10 App. Div. 308; Mullane v. Houston etc. R. R., 46 N. Y. Supp. 957, 21 Misc. Rep. 10; McGovern v. Central Vermont R. R. Co., 128 N. Y. 280, 288, 25 N. E. 373; Lake Shore etc. Ry. v. Lavalley, 36 Ohio St. 221; Railway Co. v. Murphy, 50 Ohio St. 135, 38 N. E. 403; Hartrig v. N. P. Lumber Co., 19 Or. 522, 25 Pac. 358; Anderson v. Ogden Union Ry. Co., 8 Utah, 128, 30 Pac. 305; Luebke v. Chicago etc. Ry. Co., 59 Wis. 127, 48 Am. Rep. 483, 17 N. W. 870; Bailey on Personal Injuries, sec. 2674; Buswell on Personal Injuries, sec. 202; 18 Am. & Eng. Ency. of Law, 2d ed., 950, 955, 969.

Our own cases are entirely consistent with this view: Foss v. Baker, 62 N. H. 247; Nash v. Nashua Iron and Steel Co., 62 N. H. 406; Jaques v. Great Falls etc. Co., 66 N. H. 482, 22 Atl. 552; Griffin v. Glenn Mfg. Co., 67 N. H. 287, 30 Atl. 344; Collins v. Laconia Car Co., 68 N. H. 196, 38 Atl. 1047; Burnham v. Concord R. R. Co., 69 N. H. 280, 45 Atl. 563; Lintott v. Nashua Iron etc. Co., 69 N. H. 628, 632, 44 Atl. 98; Bennett v. Warren, 70 N. H. 564, 568, 49 Atl. 105.

"The general rule, that the master's liability to one person in his employment for the negligence of another person in the same employment is to be determined by what the latter is doing rather than by the official character in which he is doing it, is not questioned. But while such is undoubtedly the general rule, the question of rank is not always and altogether without importance. Upon principle it seems clear that when, as in the present case, the master's foreman in charge, in the prosecution of the enterprise committed to his superintendence, directs a servant to do a particular work in a particular place, assuring him that signals indispensable to his safety will be given, such direction and assurance are the acts of the master; likewise, any neglect of the foreman in the giving of

such direction, or in the fulfillment of such assurance. The assurance in the present case was an inseparable part of the order. It would have been implied from the nature of the case had it not been expressly given (*Louisville etc. Ry. v. Hanning*, 131 Ind. 528, 31 Am. St. Rep. 443, 31 N. E. 187); also, from the previous practice: *Belle-ville Stone Co. v. Mooney*, 61 N. J. L. 253, 39 Atl. 764. In fixing the responsibility for the injury, the command and assurance of the foreman, which were clearly acts of the master (*Lintott v. Nashua Iron etc. Co.*, 69 N. H. 628, 632, 44 Atl. 98; *Burnham v. Concord R. R. Co.*, 69 N. H. 280, 284, 45 Atl. 563; 20 Am. & Eng. Ency. of Law, 120; 10 Am. & Eng. Ency. of Law, 957), cannot be dissociated from his subsequent neglect to fulfill the assurance. If he was the master's agent for the purpose of the command and assurance, by which the plaintiff's services in a perilous situation were secured to the master, he was also the master's agent for the purpose of the servant's protection, in accordance with the spirit of such command and assurance. He was not the master's agent for the former purpose, and a mere fellow-servant for the latter. 'The law cannot keep pace with such protean changes': *Nall v. Louisville etc. Ry. Co.*, 129 Ind. 260, 28 N. E. 183, 611.

"In *Taylor v. Evansville etc. R. Co.*, 121 Ind. 124, 16 Am. St. Rep. 372, 22 N. E. 876, Torrence, a master mechanic in charge of the men, machinery, and work in a railroad shop, ordered a brakeman to disconnect the equalizer of one of the locomotives, and while the brakeman was engaged in so doing, under the direction of the master mechanic, the latter negligently moved the equalizer so that it fell upon and severely injured the workman. In the course of a strongly reasoned and unanimous opinion for reversal, by Elliott, C. J., it was said: 'Nor can it be held, without infringing the principles of natural justice, that if he who is authorized to give the command makes its execution unsafe, the employé, whose duty it is to obey, has no remedy for an injury received while doing what he was commanded to do. Nor do the better reasoned authorities justify such a conclusion.'

"With the reasoning of this case, if not with its application, our own decisions are entirely consistent. They fully justify its application to facts like those here: *Foss v. Baker*, 62 N. H. 247; *Nash v. Nashua Iron etc. Co.*, 62 N. H. 406; *Jaques v. Great Falls etc. Co.*, 66 N. H. 482, 22 Atl. 552; *Griffin v. Glenn Mfg. Co.*, 67 N. H. 287, 30 Atl. 344; *Burnham v. Concord R. R. Co.*, 69 N. H. 280, 45 Atl. 563; *Lintott v. Nashua Iron Co.*, 69 N. H. 628, 630, 44 Atl. 98. If these cases do not settle the question in accordance with our contention (*Lintott v. Nashua Iron Co.*; *Burnham v. Concord R. R. Co.*), they at least leave it open (*Griffin v. Glenn Mfg. Co.*, 67 N. H. 287, 30 Atl. 344) and the way clear to hold, in accordance with what would seem to be a common-sense view, that when a person intrusted by the master with his power of command, in the exercise of that power and in the course of the work committed to his superintendence, orders

a servant to work in a place where, from the inherent character of the place and the nature of the work, signals are necessary in order to make it reasonably safe, assuring him that signals will be given, in giving such command and assurance, and in giving or omitting the signals promised, he represents the master, and the master is responsible for his neglect in these respects. Whether this result is reached by regarding the rank of the foreman, or the nature of the service committed to him, is a matter of nomenclature and quite immaterial in the present case. It is easy to understand that a foreman in charge, with respect to his acts of common labor in the ordinary course, is a fellow-servant; but it is difficult to see how he can be so regarded respecting commands and assurances given in his character as foreman, and with respect to his negligence in the giving of such commands and the fulfillment of such assurances, when, as in the present case, the command is only such as he is authorized to give and the servant is expected to obey, and the assurance is merely that a particular thing will be done, which it is the 'manifest duty' of the foreman to have done, as the official representative of the master.

"From the position in which the plaintiff was working, and by the foreman's order, the dumping of each load was a concealed danger in the truest sense. The cases all agree that it is the personal and absolute duty of the master to give warning of such dangers: *Collins v. Laconia Car Co.*, 68 N. H. 196, 38 Atl. 1047; *Lintott v. Nashua Iron etc. Co.*, 69 N. H. 628, 632, 44 Atl. 98; *Bennett v. Warren*, 70 N. H. 564, 49 Atl. 105; *Gerrish v. Ice Co.*, 63 Conn. 9, 22 Atl. 235; *Evansville etc. R. R. v. Holcomb*, 9 Ind. App. 198, 36 N. E. 39; *Louisville etc. Ry. v. Hanning*, 181 Ind. 528, 81 Am. St. Rep. 443, 31 N. E. 187; *Wheeler v. Wasson Mfg. Co.*, 185 Mass. 294; *Coombs v. Jordage Co.*, 102 Mass. 572, 3 Am. Rep. 506; 20 Am. & Eng. Ency. of Law, 95. The present case is stronger in this respect than *Belleville Stone Co. v. Mooney*, 61 N. J. L. 253, 39 Atl. 764, because in these cases there would seem to have been a possibility of the servants guarding themselves, while in the present case the concealment was such that the servant was absolutely dependent upon the warning. . . .

"While the discussion on both sides has so far proceeded upon the theory that the master had provided that the foreman should give the omitted warning, and the conclusion herein reached is based upon that idea, it is worthy of note that no special provision for warning, either by rule, appointment, or otherwise, appears to have been made by the master. As the case stands, it may have been, and very likely was, the fact that the warnings given were the voluntary undertaking of the foreman, in the exercise of his general power of superintendence. In this view the master would be liable, according to authorities conceded by the majority to be sound and cited by them: *Cheaney v. Ocean Steamship Co.*, 92 Ga. 726, 44 Am. St. Rep. 113, 19 S. E. 33; *Hartvig v. N. P. Lumber Co.*, 19 Or. 522, 25 Pac. 358; *Luebke v. Chicago etc. Ry. Co.*, 59 Wis. 127, 48 Am. Rep. 483, 17 N. W. 870."

A Master is not Liable to His Servant for injuries caused solely by the negligent act of a competent fellow-servant: *Kelly v. New Haven Steamboat Co.*, 74 Conn. 343, 50 Atl. 871, 92 Am. St. Rep. 220, and cases cited in the cross-reference note thereto. Whether one servant is a fellow-servant of another does not depend upon their respective grade or rank, but upon the nature of the services being performed: *Wiskie v. Montello Granite Co.*, 111 Wis. 443, 87 Am. St. Rep. 885, 87 N. W. 461; *Morgridge v. Providence Tel. Co.*, 20 B. I. 386, 78 Am. St. Rep. 879, 39 Atl. 328; monographic note to *Mast v. Kern*, 75 Am. St. Rep. 587-589. A foreman of a stone quarry, whose duty it is to warn servants working in one tunnel to leave their work before a blast in an adjoining tunnel is fired, is a fellow-servant of one who is injured by reason of his failure to give such warning: *Donovan v. Ferris*, 128 Cal. 48, 79 Am. St. Rep. 25, 60 Pac. 519. Compare the monographic note to *Mast v. Kern*, 75 Am. St. Rep. 618.

If a Master Intrusts a Duty due to his servant to another servant or agent, the latter occupies the place of the master, and the negligence of such servant is the negligence of the master: *Chicago etc. R. R. Co. v. Eaton*, 194 Ill. 441, 88 Am. St. Rep. 161, 62 N. E. 784. On who is a vice-principal, see the monographic note to *Mast v. Kern*, 75 Am. St. Rep. 584-640.

REYNOLDS v. BURGESS SULPHITE FIBRE COMPANY.

[71 N. H. 332, 51 Atl. 1075.]

DISCOVERY, Bills of—Personal Chattels.—A bill of discovery may be maintained to compel the production and right of inspection of fragments of broken machinery in the possession of the defendant in aid of the proper preparation for a trial of a suit at law for a personal injury. (p. 537.)

DISCOVERY.—To Warrant Discovery, it is not necessary that there should be absolutely no means of proving the plaintiff's case without it. (p. 542.)

DISCOVERY—Personal Chattels.—A bill of discovery may be employed to compel the production of personal chattels for inspection and examination, in aid of an action at law. (p. 543.)

DISCOVERY—Personal Chattels—Expert Testimony.—A bill of discovery may be employed to compel the production of personal property for inspection and examination in order to enable expert witnesses to testify in relation thereto in an action at law. (p. 544.)

DISCOVERY—Personal Tort.—A bill of discovery may be invoked in aid of an action at law for a personal tort arising from negligence not involving moral turpitude, a crime, or misdemeanor, or a forfeiture of property. (p. 546.)

DISCOVERY.—Statutes removing the disability of parties as witnesses authorizing the taking of depositions, and the court to order a view, do not furnish such a complete remedy for obtaining information concerning personal property in the possession of the defendant as to oust the court of jurisdiction to grant a bill of discovery in aid of an action at law. (p. 549.)

C. D. Henning, for the plaintiff.

Chamberlin & Rich and O. D. Baker, for the defendants.

³²³ CHASE, J. Whatever may have been the fact prior to 1842 (Laws 1832, c. 89, sec. 9; *Dover v. Portsmouth Bridge*, 17 N. H. 200), there can be no doubt that ever since that date courts of this state have possessed full equity powers in respect to discovery: Rev. Stats., c. 171, sec. 6; Gen. Stats., c. 190, sec. 1; Gen. Laws, c. 209, sec. 1; Pub. Stats., c. 205, sec. 1. In the grant of equity powers by the last-named statute, which is now in force, discovery is specially mentioned. The jurisdiction of the court over the subject generally is not questioned, but it is said that this case does not fall within the jurisdiction. In considering the reasons that have been offered in support of this position, it is necessary to have in mind the origin, purpose, and general nature of this remedy.

"The common law laid down as a maxim, '*Nemo tenetur armare adversarium suum contra se*'; in furtherance of which principle it generally allowed litigant parties to conceal from each other, up to the time of trial, the evidence on which they meant to rely, and ³²⁴ would not compel either of them to supply the other with any evidence, parol or otherwise, to assist him in the conduct of his cause": Best on Evidence, sec. 624; 1 Greenleaf on Evidence, sec. 329. A different rule grew up in equity. The defendant there was obliged to answer under oath the allegations of the bill, and might be compelled to produce for inspection by the plaintiff documents that were in the defendant's possession and control and were material to the issues involved in the suit. In such cases the discovery was incident to the equitable relief sought. But it was not limited to the issues arising in suits in equity. "Many cases existed in which the plaintiff had a legal title, or a legal right, or was pursuing a legal remedy, but wherein no redress could be actually obtained, simply because the plaintiff's evidence either rested in the breast of the defendant, or consisted, in whole or in part, of documents in the defendant's possession. Hence, there was failure of justice at common law, and hence there arose the equitable remedy of bills for discovery, which was made use of simply for the purpose of assisting or supplementing the plaintiff's remedy at common law": Bispham's Equity, 6th ed., sec. 557; 2 Story's Equity Jurisprudence, secs. 1484, 1485; 1 Pomeroy's Equity Jurisprudence, secs. 191, 195. The law excepted from the testimony which a party might be compelled to furnish against himself in this way, testimony tending to convict him of a violation of the criminal law, or to subject him to a penalty or forfeiture; also communications be-

tween him and his attorney relating to the matters in suit, and, if a public officer, testimony a publication of which would be prejudicial to the community. With these exceptions, a party could be compelled "to discover and set forth upon oath every fact and circumstance within his knowledge, information, or belief," and to produce and allow his adversary to inspect and copy every document in the party's possession material to the other's case: *Adam's Equity*, c. 1.

The defendants say that this case is not within this equitable jurisdiction, because the discovery and inspection sought is of articles of personal property belonging to them, in which the plaintiff has no right of property or possession. The gist of the action at law, in aid of which this suit was brought, is the negligence of the defendants in furnishing the plaintiff's intestate, their employé, with improper, unsuitable, and dangerous machinery for use in his employment. It is a necessary inference from the allegations of the bill that the "improper, unsuitable, and dangerous" element in the machinery existed in the strap on the connecting rod of the engine. This broke and, it is alleged, caused the intestate's death. The alleged unsuitableness of the strap may be due to inadequacy of size, error in form, imperfection in construction, or inferiority of the materials from which it was made. An inspection of the fragments ³²⁵ will evidently aid in determining whether there was one or more of these defects in it, and if so, which. As matters of proof, the fragments would at least be ancillary to other testimony on the point: 3 *Greenleaf on Evidence*, secs. 328, 329; *Best on Evidence*, sec. 200. They may be the most reliable and weighty testimony, one way or the other. The bill alleges that the plaintiff cannot properly prepare her action at law for trial without an inspection and examination of them. By reason of the demurrer, this allegation must be taken as true. Unless the equitable remedy of discovery has been superseded by the provision of some plain, adequate, and complete remedy at law, or is not applicable to a case of tort like that alleged in the plaintiff's action at law—points that are hereinafter considered—it is certain that the defendants through their officers and agents might be compelled in a suit like the present one to discover the form in which the strap was constructed, the character of the workmanship by which and the materials from which it was made—in short, all the facts within their knowledge, information, or belief tending to show that it was defective. If they had in their possession

a plan of the strap or of the broken pieces, they might be compelled to produce it for examination by the plaintiff. Why, then, may they not be compelled to produce the broken pieces themselves? Two reasons are suggested: one—positive and, if well founded, substantial—that the defendants' right to possess and control the property, growing out of their ownership of it, cannot be infringed in this way; and the other—negative and not applying to the merits of the question—that there is no precedent for a discovery and inspection of such property. It must be admitted that the defendants' right of property in the broken strap will be interfered with to some extent if they are required to produce it and allow the plaintiff and others to examine it. But such interference will not differ in kind or degree from that which occurs when a party is required to produce his letters, deeds, plans, other documents, or books, for inspection. The rights of the defendants arising from the ownership of the strap are no more sacred than would be their rights arising from the ownership of a plan of the strap if they had one. The infringement of property rights in such cases is justified upon the ground that it is necessary to the administration of justice. Such necessity is alleged by the plaintiff and admitted by the defendants. It is apparent that an examination of the strap will afford a better means of ascertaining the truth in respect to its suitability or unsuitableness for the office it was to perform than any possible description or plan of it could afford; and the necessity for an inspection of it is correspondingly greater than the necessity for an oral description or a plan.

³³⁶ The following cases illustrate the application that has been made of the doctrine of discovery in aid of actions at law, in respect to documents and books: *Anonymous*, 2 Ves. Sr. 620; *Moodalay v. Morton*, 1 Bro. C. C. 469; *Burrell v. Nicholson*, 1 Mylne & K. 680; *Storey v. Lennox*, 1 Mylne & C. 523; *Smith v. Beaufort*, 1 Hare, 507; *Chadwick v. Bowman*, L. R. 16 Q. B. Div. 561; *Peck v. Ashley*, 12 Met. 478. The documents, a discovery of which was sought in these cases, were not muniments of title, or documents containing evidence bearing upon an accounting between the parties, but were letters, books and papers supposed to contain evidence in support of the plaintiff's case in actions at law. Indeed, no cases have been found in which it is held that the right of discovery in respect to documents depends upon the fact that the documents are muniments of title to property in dispute in the action at law,

or that they are relevant to an accounting between the parties sought in such action. The right to the discovery of documents, etc., is as extensive as the right to discovery by oral testimony, and depends upon the same principles.

Marsden v. Panshall, 1 Vern. 407, decided in 1686, is an authority that discovery may be had of personal property other than documents, etc. The plaintiff in the suit, a clothier, intrusted clothes to B for sale in London, and B pawned them to the defendant. The defendant confessed that B pawned clothes to him, but did not admit that they were the plaintiff's. The report says: "Sergeant Maynard this day moved for the plaintiff that the defendant might be ordered to let the plaintiff, with two or more persons present, have a sight of the clothes pawned, . . . which was ordered accordingly; the meaning of which was, and so it was taken by the court, that the plaintiff should thereby be enabled to bring an action at law." The defendants say that this was not an order compelling inspection of the defendant's property, as the title was alleged to be in the plaintiff, and this was not denied. But the title to the clothes was the fact to be determined in the action at law. It might turn out that they belonged to the defendant. *Macclesfield v. Davis*, 3 Ves. & B. 16, is to the same effect. These cases must be regarded as authorities for the plaintiff in this action.

Occasion for the use of the remedy for the discovery of chattels and for their inspection has undoubtedly arisen more frequently in patent cases than in others, but the remedy itself has no special features peculiar to such cases. Their peculiarity consists in the manner of affording relief. "It may be by an interlocutory injunction in the first instance. But much more frequently, unless the case is of the strongest possible kind, it is by merely putting the matter in train for determination of the right at law, and then at the hearing a perpetual injunction is granted, upon the plaintiff ³³⁷ succeeding in the action at law": *Patent Type Founding Co. v. Walter*, John. 727, 730. It should be noted in this connection, also, that the same principles govern discovery, whether it be invoked in aid of other issues involved in the suit in equity, or be invoked independently in aid of an action at law: *Drake v. Drake*, 3 Hare, 525; *Lyell v. Kennedy*, L. R. 8 App. Cas. 217; *Wigram's Points in the Law of Discovery*, 123. If discovery of personal chattels may be had in the former case, it may be had in the latter.

In *Bovill v. Moore*, 2 Coop. Ch. Cas. 56, Lord Eldon, in 1815, said: "There is no use in this court directing an action to be brought if it does not possess the power to have the action properly tried. The plaintiff has a patent for a machine used in making bobbin lace. The defendant is a manufacturer of that article and, as the plaintiff alleges he is making it with a machine constructed upon the principle of the machine protected by the plaintiff's patent. Now, the manufactory of the defendant is carried on in secret. The machine which the defendant uses to make bobbin lace, and which the plaintiff alleges to be a piracy of his invention, is in the defendant's own possession, and no one can have access to it without his permission. The evidence of the piracy at present is the bobbin lace made by the defendant. The witnesses say that the lace must have been manufactured by the plaintiff's machine, or by a machine similar to it in principle. This is obviously in a great measure conjecture. No court can be content with evidence of this description. There must be an order that the plaintiff's witnesses shall be permitted, before the trial of the action, to inspect the defendant's machine and to see it work." It is true, as the defendants in this case say in their brief, that the order was placed "upon the general doctrine that without such inspection the case could not be properly tried." As has been seen, the remedy for discovery in aid of actions at law was introduced for the very purpose of securing proper trials therein. The application of the remedy to the case was in accordance with the general rule. An action for infringing the patent was brought—probably by direction of the court after compliance with this order—and was tried by a jury: *Bovill v. Moore*, 2 Marsh. 211. *Browne v. Moore*, 3 Bligh, 178, was a similar case, in which the plaintiff was permitted to inspect the machine which he alleged infringed his patent. *Russell v. Cowley*, 1 Web. Pat. Cas. 457, was a bill for discovery as to the defendant's infringement of the plaintiff's patent right for making iron tubing, and for an accounting. The plaintiff's counsel acceded to terms proposed by the other side that an account should be kept and two persons appointed on each side, as inspectors of the defendant's works, for the purpose of giving evidence at the trial of an action at law to be begun forthwith. An order was made accordingly, ²³² and an action was thereupon brought, at the trial of which the inspectors testified, giving expert testimony. The defendants question the authority of this case on the ground that the order of inspection was made with the consent of the parties.

Whether the consent was of the nature which the defendants infer it was, is at least doubtful. It may have resulted from a consciousness that the court had power to make the order sought, and may have been given merely to expedite the proceedings. The case is cited as a precedent for the jurisdiction of the court to order an inspection in such cases in *Patent Type Founding Co. v. Lloyd*, 5 Hurl. & N. 192. In *Morgan v. Seaward*, 1 Web. Pat. Cas. 167, an order of inspection of paddle-wheels and machinery was ordered. *Patent Type Founding Co. v. Lloyd*, 5 Hurl. & N. 192, was an action at law in which the plaintiffs claimed to own a patent for type, the novelty being the use of a large proportion of tin, which made the type hard, tough and enduring. They moved, under 15 and 16 Victoria, chapter 83, section 42, for leave to inspect the defendant's type, and if necessary to take specimens for analysis in order that they might produce evidence of the analysis at the trial. The court, being of the opinion that the statute did not give them authority to grant an order for specimens, denied the motion. A few days later the plaintiffs filed a bill in equity praying for an injunction and for liberty to inspect the type and take samples. Liberty was granted—the parties to make the inspection being named in the order—and the defendant was ordered to furnish not exceeding four ounces of type for analysis: *Patent Type Founding Co. v. Walter* (the defendant in one of the two actions reported in 5 Hurl. & N. 192), John. 727.

There is also a line of cases in which an inspection of real estate has been ordered: *Lonsdale v. Curwen*, 3 Bligh, 168; *Walker v. Fletcher*, 3 Bligh, 172; *East India Co. v. Kynaston*, 3 Bligh, 153; *Attorney General v. Chambers*, 12 Beav. 159; *Lewis v. Marsh*, 8 Hare, 97. In a note to the first-named case, Bligh, the reporter says: "The practice in courts of equity of granting orders for inspection of mines, machines, etc., is well settled. But no notice has ever been taken of the point in the books of practice and no authorities are to be found upon the subject in the reports of cases in equity, except in the case in the court below of *Kynaston v. East India Co.*, as reported 3 Swan, 248, and upon appeal to the house of lords, now reported in the text and which case as it relates to warehouses is distinct from former authorities and new in its kind. Two cases of orders for inspection extracted from the register's book are therefore subjoined"—being *Walker v. Fletcher*, 3 Bligh, 172, and *Browne v. Moore*, 3 Bligh, 178—the former

providing for an inspection of mines and the latter, as has already been stated for an inspection ³³⁹ of machinery in a case for an infringement of a patent. Story, after speaking of the defect in the administration of justice in courts of common law, arising from their want of power to "compel the production of deeds, books, writings and other things" material to the issues on trial, says the defect is "remediable in courts of equity which will compel the production of such books, deeds, writings, and other things": 2 Story's Equity Jurisprudence, secs. 1484, 1485. See, also, 1 Pomeroy's Equity Jurisprudence, sec. 191. It would seem that these authors had in mind something besides books and documents.

One reason suggested by the defendants why these cases do not support the plaintiff's claim is because, as they say, in all of them the plaintiffs set up an interest in the property to be inspected. As has been already observed, it is not perceived how this affects the question. The inspection was ordered in each case while the interest was undetermined, and there was no presumption that it would be determined in favor of the plaintiffs. If determined in favor of the defendants, the inspection would in fact be of their property, the same as in the cases cited in which letters and other documents were subjected to inspection. The defendant in *East India Co. v. Kynaston* had no interest whatever in the warehouse, for the examination of which he sought an order. The facts of this case, at least, do not support the defendants' contention. It is also to be noticed that none of the cases places the right of discovery upon this circumstance. The right, as in all other cases, depends upon the necessity for discovery in the administration of justice.

To warrant discovery, it is not necessary that there should be absolutely no means of proving the plaintiff's case without it. In *Bovill v. Moore*, there were witnesses who would say that the lace made by the defendant was manufactured by the plaintiff's machine or one constructed on the same principle. The plaintiff had some evidence to sustain his case, but it was not satisfactory. A party may maintain a bill for discovery, "either because he has no proof, or because he wants it in aid of other proof": 2 Story's Equity Jurisprudence, sec. 1483; Mer. Eq., secs. 853, 854. "When the plaintiff has any case to make out, he has a right to discovery of anything that may assist him in proving his case or even the smallest title of it": *Jenkins v. Bushby*, 35 L. J. Ch. 400.

The defendants cite three New York cases in support of their contention, *Kennedy v. Nichols*, 33 Misc. Rep. 726, 68 N. Y. Supp. 1053; *Ansen v. Tuska*, 1 Rob. (N. Y.) 663, and *Cooke v. Lalance etc. Mfg. Co.*, 29 Hun, 641. In the first case, provisions of the code and of general rules of practice adopted under the authority of the code, relating to discovery upon a motion in an action at law, are construed, and what is said respecting discovery is based upon *Ansen v. Tuska*, 1 Rob. (N. Y.) 663. That ³⁴⁰ was an action at law in which there was a motion under the code, by the defendant, for the production of the goods involved in the action and an inspection of them by persons to be selected by him to enable them to testify as experts. In denying the motion, the court refer to the equitable remedy of discovery, and say in general terms that there is no authority or principle for discovery such as was asked for in the case. There is no discussion of the principles, and no authorities are cited relating to the matter. In *Cooke v. Lalance etc. Mfg. Co.*, 29 Hun, 641, the question is disposed of without an examination of authorities. The reasons given for the holding are that a discovery and inspection of the personal property of an adverse party would be a usurpation of authority to search and inspect his private premises, and that discovery of books and documents is discretionary with the court, and is exercised only where the party applying has some right or interest in the books and documents. While the defendant may be compelled to disclose whether he has the article in his possession and control, and if he has to produce it for inspection, the procedure is not a search in the sense indicated. It affords no just cause for the fear expressed by the court that "the dwellings of our citizens will be of small security to them if they may be invaded by their enemies and searched for articles of personal property to be inspected under an order of a court." Neither does the right of discovery of books and documents depend upon the discretion of the court (*Wigram's Points in the Law of Discovery*, 51; *Drake v. Drake*, 3 Hare, 523); nor upon the party's having some right or interest in them other than as items of testimony in his favor: *Wigram's Points in the Law of Discovery*, 209, 210, 256; *Kerr on Discovery*, 202; 2 *Story's Equity Jurisprudence* sec. 1490; 1 *Pomeroy's Equity Jurisprudence*, sec. 205; *Attorney General v. Thompson*, 8 Hare, 106; *Arnold v. Pawtuxet Valley Water Co.*, 18 R. I. 189, 26 Atl. 55. The slight infringement of the right of property that is involved in an inspection of it under an order of a court of equity

is justified by "due process of law" or "the law of the land," and is in no sense a violation of the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures.

A consideration of the origin of the equitable remedy for discovery, and of its nature and purpose, leads to the conclusion that it may be employed to compel the production of personal chattels, as well as books, deeds, letters and other documents, for inspection and examination in aid of an action at law; and the foregoing cases confirm this conclusion.

The defendants' second objection is because the discovery and inspection are sought for the purpose of having the broken strap examined by persons with a view of enabling them to testify as experts in the action at law. This objection must also be overruled. It is evident that expert testimony may be competent upon ³⁴¹ the issue to be tried, whether it relate to the form of the strap, the manner of its construction, or the character of the materials from which it was made. The defendants have ample opportunity to procure such testimony. Justice requires that the plaintiff shall also have an opportunity to have the strap examined by persons in whose skill and scientific knowledge she has confidence. There cannot be a fair trial of the case unless such opportunity is given to the plaintiff. Indeed, it may be that she cannot establish her right—if she have one—without having the opportunity. The necessity for it is alleged and admitted by the demurrer. The object of the plaintiff's bill is the discovery of testimony for use at the trial, but the discovery must necessarily take place prior to the trial. In *Marsden v. Panshall*, 1 Vern. 437, the suit in equity was begun before the action at law in order that "the plaintiff should thereby be enabled to bring an action at law": See, also, *Bovill v. Moore*, 2 Coop. Ch. Cas. 56; *Heathcote v. Fleete* 2 Vern. 442; *Morse v. Buckworth*, 2 Vern. 443; 2 Story's Equity Jurisprudence, sec. 1495; 1 Pomeroy's Equity Jurisprudence, sec. 197. In *Russell v. Cowley*, 1 Webst. Pat. Cas. 457; *Patent Type Founding Co. v. Walter, Johns*, Eng. Ch. 727, and apparently in the other patent cases cited, the inspection was ordered to enable witnesses to give expert testimony at the trial of the actions at law: See, also, *Burrell v. Nicholson*, 1 Mylne & K. 680; *Arnold v. Pawtuxet Valley Water Co.*, 18 R. I. 189, 26 Atl. 55.

The defendants place much reliance upon their third point, viz., that the equitable remedy for discovery cannot be invoked

in aid of an action at law for a personal tort. They do not question, and in view of the authorities cannot question, the proposition that discovery may be had in aid of actions of tort relating to property, such as trover, detinue, trespass, waste, etc.: *East India Co. v. Evans*, 1 Vern. 307; *Marsden v. Panshall*, 1 Vern. 407; *Heathcote v. Fleete*, 2 Vern. 442; *Morse v. Buckworth*, 2 Vern. 443; *Sloane v. Hatfield*, Bunb. 18; *Taylor v. Crompton*, Bunb. 95; *Macclesfield v. Davis*, 3 Ves. & B. 16; *Burrell v. Nicholson*, 3 Barn & Adol. 649, 1 Mylne & K. 680. But they say that a defendant cannot be called upon to implicate himself directly or indirectly in a personal tort because it would tend to show moral turpitude, and so is inconsistent with principles of natural justice. It is true, as has already been stated that a person cannot be called upon to furnish testimony in aid of such an action or any other which tends to show that he has committed a crime or misdemeanor or that he is liable to a penalty or a forfeiture of property. Testimony of this kind is excepted from the operation of the remedy, in deference to the fundamental law that no subject shall be compelled to accuse or furnish evidence against himself in a criminal proceeding. It is said also that this equitable jurisdiction will not be exercised in controversies involving moral turpitude and arising from acts clearly ³⁴³immoral, even though brought for the purpose of recovering pecuniary compensation: 1 Pomeroy's Equity Jurisprudence, sec. 197; 2 Story's Equity Jurisprudence, sec. 1494; Wigram's Points in the Law of Discovery, 83, and authorities cited in notes. If this be so, this case is not thereby excluded from the jurisdiction; for, so far as appears, it does not involve moral turpitude or immoral conduct on the part of the defendants. They are charged with negligence, merely, consisting of a failure to perform their implied contractual obligation to provide the plaintiff with suitable machinery for the performance of his duties, or a suitable place in which to work. Although the action at law is in form tort, it is in fact based upon the failure to perform a duty arising from an implied promise. It is as distinguishable in this respect from an action of trespass to the person, as an action against a common carrier for the loss of goods in his custody is distinguishable from an action for setting fire to one's house: *Morse v. Buckworth*, 2 Vern. 443.

If the case is excepted from the equitable jurisdiction pertaining to discovery, it must be for some other reason than that a discovery would show moral turpitude or immoral conduct on the part of the defendants; and none has been suggested ex-

cepting an absence of precedents supporting the jurisdiction. The plaintiff cites and relies upon *Macaulay v. Shackell*, 1 Bligh, N. S., 96, as an authority in her favor upon this point. Macaulay brought an action at law against Shackell and others for libel, and the defendants pleaded the truth of the alleged libelous matter, and in aid of their defense filed a bill for discovery and a commission for examining witnesses abroad. Macaulay filed a demurrer to the bill, which was overruled by Lord Eldon, Chancellor, and Macaulay appealed to the house of lords, where the judgment of the lord chancellor was affirmed, so far at least as it granted a commission for taking testimony abroad. There seems to be a difference of opinion regarding the scope of the decision, some holding that it required Macaulay to answer the bill and make the discovery sought, and others that it only granted a commission to take testimony abroad: See Redfield's note to 2 Story's Equity Jurisprudence, sec. 1494. The decision was rendered in 1827, and Mr. Shadwell (presumably Sir Lancelot) was senior counsel for Macaulay. Four years later the case of *Wilmot v. Maccabe*, 4 Sim. 263, was before Sir Lancelot Shadwell as vice-chancellor. This was also a bill for discovery in aid of a defense alleging the truth of the libelous matter with which the party was charged in an action at law. The vice-chancellor, referring to *Macaulay v. Shackell*, 1 Bligh, N. S., 96, said: "Lord Eldon, and the house of lords on appeal, decided that where a person brings an action for a libel it follows as commensurate with the right to bring the action, that the party who complains ³⁴³ is bound to give the discovery which the defendant at law claims to have by his bill." The vice-chancellor must have been familiar with the decision in the Macaulay case; and if the report of the case leaves a doubt regarding the decision, the statement of the vice-chancellor would seem to be sufficient to remove the doubt. In an earlier case of the same kind (*Thorpe v. Macauley*, 5 Mad. 218) the discovery sought was denied on the ground that it would show that the party had committed a misdemeanor, but the vice-chancellor, Sir John Leach, used the following language in disposing of the question: "It was next argued that a court of equity would not lend its aid, either for discovery or commission, to either party in an action at law proceeding *ex delicto* No such limitation of the jurisdiction as to discovery is hinted at in any book of practice or by the dictum of any judge. Courts of equity exercise a direct jurisdiction in matters of waste and public nuisance, which are *ex delicto*. I

am not, therefore, prepared to say that a court of equity will refuse its ordinary aid to the parties in any action at law proceeding for a civil remedy." This cannot be regarded as authority on the point, but it is worthy of notice in this connection. Chancellor Walworth regarded these cases as authorities in favor of the right of discovery in actions for libel unless the discovery would tend to incriminate the party or render him infamous: *Marsh v. Davison*, 9 Paige, 580, 584, 585, 586.

A dictum of Lord Langdale master of rolls (who Lord Campbell, in his *Lives of the Lord Chancellors*, volume 12, page 351, says "is without vigor and has not a judicial mind"), in *Glynn v. Houston*, 1 Keen, 329, decided in 1836, has added to the doubts regarding the decision in *Macaulay v. Shackell*, 1 Bligh, N. S., 96. The case was a bill for the discovery of books and documents in aid of an action at law for an assault and false imprisonment. The discovery was denied on the ground that it would incriminate the party called on to make it. The dictum referred to is as follows: "I have looked into the authorities, which tend very much to confirm my opinion that a bill of discovery cannot be sustained in aid of an action for a mere personal tort. If it were necessary to expressly decide this point, I think it is clear what the course of my duty would be; but it is not here necessary, because a bill of discovery cannot be sustained in any case where the matter sought to be discovered may be made the subject of a criminal charge." The defendants say that this is a decision upon the point, but it is apparent that it is far from being such. If it had been necessary to decide the point, it is highly probable that *Macaulay v. Shackell*, 1 Bligh, N. S., 96, and *Wilmot v. Maccabe*, 4 Sim. 263, would have been noticed and either distinguished, overruled, or set right. There is no distinction between libel and assault, as ³⁴⁴ personal torts, which would account for a difference in the application of the doctrine of discovery to them. There are similar dicta by Cockburn, C. J., in *Pye v. Butterfield*, 5 Best & S. 829, 836, and by Lord Fitzgerald, in *Lyell v. Kennedy* 8 App. Cas. 217, 233. These dicta certainly cannot be regarded as settling the law on the subject. Attention has not been called to any English case in which they have been adopted as the law. The industry of the counsel on both sides in searching for English and American authorities bearing upon the case, manifested by the numerous citations which they have made, justifies a conclusion that no such case exists. Wigram cites *Glynn v. Houston*, three times, but makes no mention of the point in Lord

Langdale's dictum: Wigram's Points in the Law of Discovery, 5, 81, 85. Kerr says "it seems" that a bill for discovery will not be entertained in aid of an action for a mere personal tort, citing *Glynn v. Houston*. In the next paragraph he says: "It is no objection that the discovery be sought in aid of actions which sound in tort. Bills may also be brought for discovery in aid of or in defense to actions of trespass and trover; and, in general, there seems to be no civil right, the trial of which will not be aided by a bill of discovery": Kerr on Discovery, 6, 7. Evidently Lord Langdale's dictum did not appeal to him as having much weight.

One American case has been cited in which the point was decided in favor of the defendants' contention—*Robinson v. Craig*, 16 Ala. 50. The decision was based solely upon *Glynn v. Houston*, and the absence of authorities the other way. There was no consideration whatever of the principles involved in the question. If the absence of authorities is entitled to any weight, it is under the circumstances very slight. Cases for personal torts arising from the action of the defendant—willful torts, so to speak—in which the defendant could make discovery without incriminating himself, must from the nature of the case be very rare. It is possible that there have been none excepting *Macaulay v. Shackell*, 1 Bligh, N. S., 96, and cases of like nature that have been decided in accordance therewith without again raising the question. Cases for negligence were not common prior to the middle of the last century. The use of steam and electricity, and the commercial activity consequent thereon, have immensely multiplied cases of this kind. Lord Campbell's act for giving compensation to the families of persons killed by the negligence of others was enacted in 1846. Eight years later a procedure bill was passed, largely through the agency of Lord Campbell (17 and 18 Victoria, chapter 125), by which, among other things, it was provided that either party to a civil action in the superior courts "shall be at liberty to apply to the court or a judge for a rule or order for the inspection by the jury, or by himself, or by his witnesses, of any real or personal property, the inspection of which ³⁴⁵ may be material to the proper determination of the question in dispute": *Ibid*, sec. 58. In speaking of this act, Lord Campbell says: "It brings about, as far as is now practicable, the fusion of law and equity, and establishes the principle on which our jurisprudence must henceforth be moulded, one court for one cause—i. e., that the court in which the suit commences shall carry

it through all its stages, and finally determine it and everything connected with it. Thus parties will no longer be kept oscillating between law and equity till the subject matter in controversy is wasted in costs": *Lives of the Lord Chancellors*, vol. 12, p. 395. In passing, it may be remarked that if the act and the reasons of its enactment do not show that its author understood that courts of equity had jurisdiction to order an inspection of real or personal property when such inspection was material to the proper determination of an issue, it certainly shows that he felt there was a necessity for such inspection in the administration of justice. The act relieved parties from the necessity of resorting to equity for discovery, and reasonably accounts for the absence, in England, of bills of discovery in aid of actions at law for negligence since that time.

"Cases must arise from time to time which are new cases in specie, but which are not new cases with respect to the general principle by which they must be decided": *Macaulay v. Shackell*, 1 Bligh, N. S., 133; *Walker v. Walker*, 63 N. H. 321, 56 Am. Rep. 514; *Boody v. Watson*, 64 N. H. 162, 9 Atl. 794; *Gage v. Gage*, 66 N. H. 282, 29 Atl. 593. If *Macaulay v. Shackell*, 1 Bligh, N. S., 133, and *Wilmot v. Maccabe* are not authorities in favor of the maintenance of the plaintiff's bill, the general principles governing the remedy of discovery certainly justify its maintenance. The case may be a new case in specie, so far as discovery is concerned, but it belongs to a class to which the remedy of discovery is applicable.

It has been suggested that this is a "fishing bill," and should be dismissed for that reason. The plaintiff is not endeavoring to ascertain what defense the defendants contemplate making, nor facts that exclusively relate to the defendants' case, but is seeking discovery of facts that will enable her to prove her case. It is not a fishing bill.

The defendants further say that the statutes of the state removing the disability of parties as witnesses (*Pub. Stats.*, c. 224, sec. 13), authorizing the taking of depositions before trial (*Pub. Stats.*, c. 225), and giving the court authority to order a view at the trial (*Pub. Stats.*, c. 227, sec. 19), furnish a full, complete and adequate remedy at law for obtaining the testimony which the plaintiff seeks, and so ousts the court of its equitable jurisdiction. If these statutes have such effect in cases where the testimony sought may be obtained under them, which is doubtful (*Wheeler v. Wadleigh*, 37 ³⁴⁶ N. H. 55; *Howell v. Ashmore*, 9 N. J. Eq. 82, 57 Am. Dec. 371; *Shotwell*

v. Smith, 20 N. J. Eq. 79; Union etc. Ry. v. Baltimore, 71 Md. 238, 17 Atl. 933; Russell v. Dickenschied, 24 W. Va. 61, 68; Lovell v. Galloway, 17 Beav. 1; 1 Story's Equity Jurisprudence, sec. 64), it does not appear that the plaintiff could obtain by virtue of them an inspection of the broken strap prior to the trial. The size and character of the strap are not stated, but it is reasonably certain that a subpoena duces tecum would be powerless to cause its production at the taking of depositions. A view of it at the trial would not answer the requirements of justice, according to the allegations of the bill.

The demurrer should be overruled.

Exception sustained.

All concurred.

Bills for Discovery are favored in equity, and will be sustained in all cases where some well-founded objection does not exist against the exercise of the jurisdiction: Howell v. Ashmore, 9 N. J. Eq. 82, 57 Am. Dec. 371. Whether the action is in tort or on contract in aid of which the discovery is sought, if the plaintiff has an equitable right, a discovery may be enforced: Skinner v. Judson, 8 Conn. 528, 21 Am. Dec. 691. But to obtain jurisdiction, the bill must aver that the facts sought to be discovered are material to the cause of action, that the orator has no means of proving them in a court of law, and that the discovery of them by the respondent is indispensable as proof: Lancy v. Randlett, 80 Ma. 169, 6 Am. St. Rep. 169, 13 Atl. 686.

MAC DONALD v. GRAND TRUNK RAILWAY COMPANY.

[71 N. H. 448, 52 Atl. 982.]

FOREIGN JUDGMENTS—Conclusiveness of.—A foreign judgment upon the merits upon a cause of action arising within one of the states of the United States, rendered by a competent court having jurisdiction of the parties and the subject matter, if valid, final, and unreversed, is conclusive against a subsequent suit in such state between the same parties for the same cause of action. (p. 554.)

FOREIGN JUDGMENTS—Conclusiveness—Mistake of Law. The conclusiveness of a foreign judgment as a defense is not affected by the fact that it contravenes the policy of the country where the cause of action arose, especially if it appears that the decision resulted from a failure to furnish information of such policy. (p. 560.)

Matthews & Sawyer, for the plaintiffs.

C. A. Hight, L. L. Hight and Chamberlain & Rich, for the defendants.

⁴⁴⁹ PARSONS, J. The plaintiffs, prior to the commencement of this suit, voluntarily submitted the claim which they now make against the defendants—their right to damages for the negligent destruction of their property while in the hands of the defendants as common carriers—to a judicial tribunal established by the government of which they were citizens and to whose decree they owe obedience. The tribunal to which they appealed was a court of record of general jurisdiction; it had jurisdiction of the parties and of the subject matter of the controversy. Both parties appeared and were heard; the plaintiffs had full opportunity to present such matters of fact and to argue such propositions of law as they deemed essential to their case. The judgment was upon the merits and against the plaintiffs. It is not claimed that, by any erroneous ruling of the court, the plaintiffs were prevented from fully and fairly presenting their case, nor is it suggested that the court erred in its decision of the legal question which the parties considered decisive of their rights. No accident or mistake on the part of the plaintiffs in the presentation of their case is suggested. Fraud is not charged. It is apparent that if the plaintiffs' claims had been sustained in Canada, the defendants would have been bound by the result and would have been compelled to satisfy any judgment that might there have been obtained against them. Is there any reason why the plaintiffs having compelled the defendants to litigate the claim made in this suit before a tribunal of the plaintiffs' selection, and having suffered defeat without fraud, accident or mistake, and after a fair hearing, by the results of which the defendants were necessarily bound, should not also be everywhere bound by the judicial determination which they invoked, and be estopped from presenting before any other tribunal the claim once judicially decided against them? The judgment in Canada was final and is not reversed. It is conclusive against the plaintiffs in their own country. As an expression of the will of the sovereign to whom their allegiance is due, they owe obedience thereto, abroad as well as at home. Upon every ground of natural right and justice, it would seem that they should be debarred from invading the courts of another country to retry a controversy settled against them at home.

⁴⁵⁰ Against the binding effect upon the plaintiffs here of the judgment in Canada, it is urged that in this court that judgment is a foreign judgment. "It is universally agreed that the laws of a state have, *ex proprio vigore*, no extraterritorial force":

Crippen v. Loughton, 69 N. H. 540, 549, 76 Am. St. Rep. 192, 44 Atl. 538, 541; Smith v. Godfrey, 28 N. H. 379, 381, 382, 61 Am. Dec. 617. But the courts of the state are open to others besides our own citizens (Pub. Stats., c. 216, sec. 1); and the controversies our courts are called upon to determine are not limited to those which arise within this sovereignty or under its laws. The substance and effect of foreign laws are, therefore, subjects of frequent consideration. "There is, perhaps, no general principle of law better established than that the validity of a contract is to be decided by the law of the place where the contract is made. If valid there, it is valid elsewhere; but if void or illegal by the law of the place where made, it is void everywhere. . . . But there are some exceptions to this rule, and among them is this: That no nation is bound to recognize or enforce any contracts which are injurious to its own interests, or to those of its own citizens, or which are in fraud of its laws": Smith v. Godfrey, 28 N. H. 379, 381, 61 Am. Dec. 617. That the law of the country where a contract is made or to be executed is to be examined to ascertain what the agreement was which the parties made, is elementary: Limerick Nat. Bank v. Howard, 71 N. H. 13, ante, p. 489, 51 Atl. 641; New York Life Ins. Co. v. McKellar, 68 N. H. 326, 328, 44 Atl. 516. "If there is a conflict between the *lex loci* and the *lex fori*, the former governs in torts the same as in contracts, in respect to the legal effect and incidents of acts": Beacham v. Portsmouth Bridge, 68 N. H. 382, 73 Am. St. Rep. 607, 40 Atl. 1066. If there is no ground of action in the sovereignty where the tort is alleged to have occurred, there is none anywhere: Wilson v. Rich, 5 N. H. 455; Leazotte v. Railroad, 70 N. H. 5, 6, 45 Atl. 1084. To ascertain the rights resulting from acts done or omitted, attention must be paid to the circumstances under which the events took place; and one of the governing circumstances is the law of the place which characterizes the act. It is sometimes said that in such circumstances the courts of one country, out of comity, give effect to the laws of another (Smith v. Godfrey, 28 N. H. 379, 381, 61 Am. Dec. 617), but a more exact view has been taken. "When the courts of one country consider the laws of another in which any contract has been made, . . . in construing its meaning, or ascertaining its existence, they can hardly be said to act from courtesy, *ex comitate*; for it is of the essence of the subject matter to ascertain the meaning of the parties, and that they did solemnly bind themselves; and it is clear that you must presume them to have intended what the law of the

country sanctions or supposes; it is equally clear that their adopting the forms and solemnities ⁴⁵¹ which that law prescribes shows their intention to bind themselves, nay more, it is the only safe criterion of their having entertained such an intention. Therefore the courts of the country where the question arises resort to the law of the country where the contract was made, not *ex comitate*, but *ex debito justitiæ*, and in order to explicate their own jurisdiction by discovering that which they are inquest of, and which alone they are in quest of, the meaning and intent of the parties": *Warrender v. Warrender*, 2 Clark & F. 488, 530. In like manner, when a right is claimed upon acts occurring in another country, courts look to the law of that country, not to extend the binding force of a foreign law beyond the territorial limits of the sovereignty to which it belongs, but to ascertain whether the right claimed exists or not. It is not the foreign law, but the rights acquired under it, which are enforced by the courts of another country; and this is true, whether the question be one of contract, tort, or status. As the will of the sovereign expressed in general law can of itself have no extraterritorial force, the same will expressed in concrete form in a judgment between two suitors can have no greater effect. A plaintiff cannot here have execution upon a foreign judgment, nor a successful defendant have execution for costs, in the absence of legislative direction to that effect. The question is not of the enforcement of the foreign judgment, but it is, What are the rights of the parties? The particular law declared by the judgment is evidence of the rights now in controversy, as would be the general law if the dispute related to matters which had not passed into judgment.

The plaintiffs, MacDonald & Co., contracted with the Allan Steamship Company for the transportation of certain goods from Glasgow, Scotland, to Toronto, Canada. One of the stipulations of the written contract, called the bill of lading, provided that the carriers should not be liable for loss from fire even if resulting from their own negligence. The goods were delivered to the Grand Trunk Railway Company in Portland, Maine, who accepted them upon the terms of the original bill of lading. While in transport across this state, the goods were destroyed by fire through the negligence of the defendant railroad. The claim in this suit is, that the stipulation releasing the carrier from liability for loss through negligence is void by the law of this state, and that, as the loss occurred through the defendants' tort in this state, the plaintiffs can maintain an

action for the value of the goods. Assuming this claim to be sound without examination, and that upon the occurrence of the loss the plaintiffs had a valid claim against the defendants for the amount of it, it does not necessarily follow that they can now maintain an action for it. By ⁴⁵² contract subsequently made in Canada they could have released the defendants from liability. By an arbitration and award against them their claim might be destroyed. Had either event taken place in Canada, the question would be, Was the contract, or arbitration and award, valid by the laws of Canada? The action for the tort being transitory, the Canadian court had jurisdiction of the claim, and to determine if required, the law of New Hampshire, which apparently was the law of the case: *Hughes v. Pennsylvania R. R. Co.*, 202 Pa. St. 222, 51 Atl. 990. The fact that the defense set up is a legal adjudication, instead of a contract of release, or an arbitration and award, does not alter the legal question, which, in respect to the legal effect and incidents of the acts of the parties, is determined by the law of the place. It is conceded that the judgment was upon the merits, is final, valid and unreversed, and that by the law of Canada it conclusively establishes the defendants' right to protection against further litigation of the same claim. This right resulting from the plaintiffs' acts is not limited by territorial lines, nor destroyed by the plaintiffs' selection of another sovereignty as the place for the renewal of litigation. This right of the defendants depends, not upon the extraterritorial force of the Canadian judgment, but (1) upon the "universal law of justice . . . which binds one to submit to a final decision resulting from his own acts" (*Fisher v. Fielding*, 67 Conn. 91, 132, 52 Am. St. Rep. 270, 34 Atl. 714, dissenting opinion, Hamersley, J.; *Schibsby v. Westenholz*, L. R. 6 Q. B. 155, 161; *Williams v. Jones*, 13 Mees. & W. 628, 633. The principle is that of a voluntary submission to arbitration: *Erle, C. J.*, *Barber v. Lamb*, 8 Com. B., N. S., 95, 100); (2) upon the plaintiffs' obligation of obedience to the government of which they are citizens, "for it is a part of the original contract entered into by all mankind who partake of the benefits of society, to submit in all points to the municipal constitutions and local ordinances of that state of which each individual is a member" (3 Blackstone's Commentaries, 158); and (3) upon the fundamental principle of the common law, that a matter once litigated and determined before a court of competent jurisdiction shall not again be controverted before any court. "The law as laid down in the *Duchess of Kingston's*

Case, 11 How. St. Tr. 261, seems to be the law to-day: that a judgment of a court of competent jurisdiction directly upon the point involved is as a plea, a bar; as evidence, conclusive": New York etc. R. R. Co. v. McHenry, 17 Fed. 414, 417.

"The maxim, '*Interest reipublicæ ut sit finis litium*,' is not restricted in its application to controversies or suits originating in the state before whose courts it is invoked. It does not rest on the excellence of any particular system of jurisprudence. It governs wherever the parties come, in the last resort, before a court constituted ⁴⁵³ under an orderly establishment of legal procedure. No one who has been, or could have been, heard upon a disputed claim, in a cause to which he was duly made a party, pending before a competent judicial tribunal, having jurisdiction over him, proceeding in due course of justice, and not misled by the fraud of the other party, should be allowed, after a final judgment has been pronounced, to renew the contest in another country. The object of courts is hardly less to put an end to contests than to decide them fairly": Fisher v. Fielding, 67 Conn. 91, 110, 52 Am. St. Rep. 270, 34 Atl. 714. The case from which this quotation is taken was a suit in Connecticut to recover the amount of an English judgment rendered by default, service having been made upon the defendant while temporarily in England. By the majority of the court the English judgment was held conclusive. Hamersley, J., dissented solely upon the ground that by a default the matter in controversy was not *res judicata* in the sense that it had in fact been submitted by the parties to a court, and heard and determined. The following is from the dissenting opinion in the same case (pages 130, 131, 67 Conn., page 270, 52 Am. St. Rep., and page 724, 34 Atl.): "The principle broadly stated is this: a claim once submitted by the parties to a court of competent jurisdiction, fully heard, determined and decided by that court, shall not thereafter be controverted between the same parties. This principle is entirely distinct from the right given by law to a party to a judgment to ask the state to exercise its sovereign power in compelling obedience to that judgment. It is simply a principle of jurisprudence firmly established in our municipal law, and based on considerations so general in their application, so clearly equitable and essential in any administration of justice, that it may fairly be called a universal principle of jurisprudence. This principle does not, and from its very nature cannot, depend upon the particular court whose judicial action has been invoked, so long as its jurisdiction is competent

and its judgment final. It applies wherever the parties have so submitted their claims to a final decision by a court of competent jurisdiction, whether that court be inferior or superior, of law or equity, domestic or foreign. . . . Whether we call this law a rule of comity of nations is immaterial to the matter in hand. It is a part of our law, and derives its force from that fact; and foreign laws, as conclusive evidence of the legal effect of acts done under them, are received by virtue of our law, with the vital qualification stated by Story: 'Unless they are repugnant to its policy or prejudicial to its interest.' . . . In assuming that the real obligations of the parties are controlled by the fact that they arose or were undertaken with reference to the law prevailing where their acts were done, our courts do not assume to execute a foreign law, although ⁴⁵⁴ the obligation they enforce as legal under our own law may also find its source in the command of a foreign sovereign; they treat the foreign law as a fact essential, in connection with other facts, to ascertain what the parties really meant by what they have done; and if, in receiving and weighing such fact they may also theoretically enforce the will of a foreign sovereign, it is only as an incident to the exercise of the judicial power vested in the courts, and does not offend the sovereignty of the state where such law may be proved as a fact."

It is urged that a foreign judgment, though admissible in evidence, is not conclusive, but is merely *prima facie* evidence. Support for this proposition is to be found in early English cases and dicta, where the judgment was offered as evidence of debt in an action to recover the amount found due by the former judgment. In *Phillips v. Hunter* (1795), 2 H. Black. 402. 410, a distinction was made by Lord Chief Justice Eyre, between cases where a judgment was brought before an English court upon the application of a successful party to enforce and obtain the fruits of it against the defendant, and those cases where the defendant sets up the foreign judgment as a bar to a new suit with reference to the former subject matter. "It is in one way only," he said, "that the sentence or judgment of the court of a foreign state is examinable in our courts, and that is, when the party who claims the benefit of it applies to our courts to enforce it. . . . In all other cases we give entire faith and credit to the sentences of foreign courts, and consider them as conclusive upon us." The latter statement does not appear to have been questioned in England: *Burrows v. Jemino*, 2 Strange,

733; *Boucher v. Lawson*, Hardw. 85, 87, 89; *Barber v. Lamb*, 8 Com. B., N. S., 59; *Ricardo v. Garcias*, 12 Clark & F. 368. The distinction has, however, been abandoned, and foreign judgments are not now held examinable there to the extent suggested by Chief Justice Eyre: *Bank of Australasia v. Nias*, 16 Ad. & E. 717; *Scott v. Pilkington*, 2 Best & S. 11; *Godard v. Gray*, L. R. 6 Q. B. 139.

At the time of the Revolution, it appears to have been understood as the law of England that a judgment offered as evidence of a debt, in an action by the plaintiff to obtain its fruit, was merely *prima facie* evidence and examinable upon the merits: *Hilton v. Guyot*, 159 U. S. 113, 187, 17 Sup. Ct. Rep. 139. This view was followed by the early American cases, among which is the case of *Robinson v. Prescott*, 4 N. H. 450, and to this view is to be ascribed the expressions found in *Bryant v. Ela*, Smith (N. H.), 396, 404; *Thurber v. Blackbourne*, 1 N. H. 242, 243; *Taylor v. Barron*, 30 N. H. 78, 95, 64 Am. Dec. 281. The American cases, however, adopted in full the distinction made in *Phillips v. Hunter*, 2 H. Black. 402, 410, which, it is said by ⁴⁵⁵ Story, "has been very frequently recognized as having a just foundation in international justice," upon the ground that where a defendant sets up a foreign judgment as a bar to the proceedings, "if it has been pronounced by a competent tribunal and carried into effect, the losing party has no right to institute a new suit elsewhere, and thus to bring the matter again into controversy; and the other party is not to lose the protection which the foreign judgment gave him. It is then *res judicata*, which ought to be received as conclusive evidence of right; and the *exceptio rei judicatæ* under such circumstances is entitled to universal conclusiveness and respect": Story on Conflict of Laws, sec. 598; 2 Kent's Commentaries, 120. See Rigelow on Estoppel, 196-203; Freeman on Judgments, sec. 592; Black on Judgments, sec. 228; Dicey on Conflict of Laws, 417.

It has been said that "all the American cases agree that where a foreign judgment comes incidentally in question it is conclusive": *Cummings v. Banks*, 2 Barb. 602, 605; and that "it is an established rule that a foreign judgment, when used by way of defense, is as conclusive to every intent as those of our own courts": *Griswold v. Pitcairn*, 2 Conn. 85, 92. "Foreign judgments are never re-examined, unless the aid of our courts is asked to carry them into effect by a direct suit upon the judgment. The foreign judgment is then held to be only *prima*

facie evidence of the demand; but when it comes in collaterally, or the defendant relies upon it under the exceptio rei judicatae, it is then received as conclusive": Kent, C. J., in *Smith v. Lewis*, 3 Johns. 157, 169. 3 Am. Dec. 469; *Monroe v. Douglas*, 4 Sand. Ch. 126, 181; *Williams v. Preston*, 3 J. J. Marsh. 600, 20 Am. Dec. 179.

Burnham v. Webster, 1 Wood & M. 172, Fed. Cas. No. 2179, appears to be the only American case which questions the conclusiveness of a foreign judgment offered as a defense. The general expressions used by the distinguished author of the opinion in that case, if carried out, would render a foreign judgment of little value, and would, it has been said, "destroy the force and effect of judicial proceedings, and make the judgments of a foreign tribunal, no matter how high its rank or how binding its decisions within its own jurisdiction, of little greater effect than the original contract or promise sued upon: *McMullen v. Ritchie*, 41 Fed. 502. But the precise point in the case to which the decision is expressly limited is not in opposition to, but in support of, the general ground upon which the foreign judgment has been held conclusive. In that case, in answer to a suit upon a promissory note, the defendant offered a judgment in a suit in New Brunswick, in which the plaintiff declared upon the note then in suit, with others, and had judgment only for the others. The plaintiff offered to prove that, before the former case was submitted to the jury, the note then in ⁴⁵⁶ suit was by agreement withdrawn and was not submitted to the jury, but by mistake the counts upon this note were not struck from the declaration before judgment. The evidence, if true and admissible, established that the former judgment was not an adjudication as to the note in suit, and the only point in fact decided was that the plaintiff could show what was in fact adjudicated in the former suit. *Hohner v. Gratz*, 50 Fed. 369, is within the general exception that rights under a foreign law will not be enforced to the injury of the citizens of the forum. The subject matter and the parties in the two suits were different, and the principle of *res judicata* did not apply: *Dunstan v. Higgins*, 20 L. R. A. 677, note.

Both upon reason and all the authorities, it is clear that a plea of former adjudication, except as a merger of a cause of action, is sustained by proof of such adjudication in a foreign as well as a domestic tribunal. The supreme court of the United States, by a bare majority, has considered that the effect to be given to a foreign judgment is determined by the treatment

given our judgments in the courts of the country whose judgment is under consideration; that courts are required to do, not as justice and reason require, but as they are done by: *Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. Rep. 139. But this question does not arise here, because the courts of Ontario hold judgments of courts of the United States conclusive upon the merits: *Ritchie v. McMullen*, 159 U. S. 235, 16 Sup. Ct. Rep. 171; *Fowler v. Vail*, 27 U. C. C. P. 417, 4 Ont. App. 267. The contrary contention of the plaintiffs is founded upon earlier cases based upon a statute (23 Vict., c. 24, sec. 1) which was repealed by 39 Victoria, chapter 7 (1875-76): *Fowler v. Vail*, 27 U. C. C. P. 417, 4 Ont. App. 267.

The effect of a foreign judgment upon the same subject matter, as establishing the defense of *res judicata*, is the only question now involved. The tendency of the later American cases seems to be to follow the modern English doctrine as to foreign judgments generally: *Rankin v. Goddard*, 54 Me. 28, 89 Am. Dec. 718; *S. C.*, 55 Me. 389; *Fisher v. Fielding*, 67 Conn. 91, 52 Am. St. Rep. 270, 34 Atl. 714; *Lazier v. Westcott*, 26 N. Y. 146, 82 Am. Dec. 404; *Dunstan v. Higgins*, 138 N. Y. 70, 34 Am. St. Rep. 431, 33 N. E. 729; *Baker v. Palmer*, 83 Ill. 568; *Roth v. Roth*, 104 Ill. 35, 44 Am. Rep. 81; *Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. Rep. 139; *McMullen v. Ritchie*, 159 U. S. 235, 16 Sup. Ct. Rep. 171; 5 Eng. R. R. Cas. 746; 1 Freeman on Judgments, sec. 597. To what extent the doctrine of these cases is the law of this state need not now be determined.

It is stated as a fact agreed that the judgment pleaded was upon the merits of the issue presented. The issue presented in that case, as in this, was the defendants' liability for the destruction of the plaintiffs' property. It may be the fact was agreed with a different understanding by one of the parties, at least, as to what was the issue presented by the case. But regardless of the agreed fact, it is apparent from the facts stated that the judgment ⁴⁵⁷ was upon the merits and was an adjudication of the plaintiffs' right to recover the damages claimed in this suit. The plaintiffs were not defeated because the action which they brought was not a legal remedy for the wrong claimed (*Kittredge v. Holt*, 58 N. H. 191), nor upon the ground that the form of their action was misconceived (*Meredith etc. Assn. v. American Twist Drill Co.*, 67 N. H. 450, 39 Atl. 330), but upon the merits of their claim. The matter upon which

they proceeded by their declaration, and which the defendants denied by their plea, was the defendants' liability for the loss complained of. This was the issue: *King v. Chase*, 15 N. H. 9, 41 Am. Dec. 675; *Metcalf v. Gilmore*, 63 N. H. 174. The decision of this question, when the same question as to the same goods is again raised, concludes all matters of fact or law which were or might have been proved or urged in support of or against the decision reached: *Metcalf v. Gilmore*, 63 N. H. 189.

If the plaintiffs, in the exigencies of their case as then presented, and in view of their claim that the question was determined by the Canadian statute, thought it wise not to offer proof of New Hampshire law, they must abide by the result so long as that judgment remains unreversed. If the result was due to accident, mistake, or misfortune, which is not claimed, the proper tribunal in which relief should be sought would seem to be the high court of justice of Ontario.

A foreign law will not be given effect when it contravenes some established and important policy of the state of the forum, or would involve injustice and injury to the people of the state whose courts are appealed to: *Min. Conf. Laws*, 9; *Story on Conflict of Laws*, sec. 38. It is urged that the policy of this state does not permit common carriers to release themselves from liability for negligence. Assuming this to be so, it only follows that in rendering the judgment a mistake was made as to the law of New Hampshire, which does not detract from the force of the judgment as an adjudication, especially when, as in this case, the court is led into error by the failure of the complaining parties to inform it as to the foreign law: *Godard v. Gray*, L. R. 6 Q. B. 139, 5 Eng. R. R. Cas. 726. A domestic judgment pleaded could not be answered by an averment that it was founded upon a mistaken admission of the parties as to the law. There is no reason why such an averment should avail against a foreign judgment. The plaintiffs are not citizens of this state. The defendants are sued here because found here. Their presence in this state is authorized by law. In a sense, they are citizens here. Public policy, which forbids an application of the principles of comity toward the subjects or laws of a foreign country to the injury of our own citizens, for this reason protects the citizens of the state from ⁴⁵⁸ repeated suits upon the same matter. A citizen who has been compelled to litigate a matter in a foreign country,

and take there the chance of an unfavorable decision, ought not to be again required to litigate the same question at home. A rule of public policy for the protection of the citizen cannot properly be applied to do injustice to him.

Upon the question raised as to the validity of the contract releasing the defendants from liability for negligence, no opinion is expressed. The defendants' plea of former adjudication states a defense to this action. Upon the facts stated they are entitled to judgment.

Judgment for the defendants.

All concurred.

Foreign Judgment.—A contract which our law deems immoral, and which the courts of this state are prohibited to enforce, is not purged of its illegality by a judgment rendered thereon in another state against a citizen of this state sued and served with process on being found temporarily in the jurisdiction of the court, so that in a suit here on such judgment the illegal character of the cause cannot be inquired into: *Lum v. Fauntleroy*, 80 Miss. 737, 92 Am. St. Rep. 620, 32 South. 290. But see *Vaught v. Meador*, 99 Va. 569, 86 Am. St. Rep. 908, 39 S. E. 225.

LACONIA SAVINGS BANK v. VITTUM.

[71 N. H. 465, 52 Atl. 848.]

MORTGAGES — Discharge — New Mortgage — Priority.—If a creditor holding a first mortgage belonging to his debtor as collateral security for his debt, allows it to be canceled and surrendered, and takes a new mortgage upon the same premises in his own name to secure his debt, in ignorance of a second recorded mortgage thereon, and without intention to postpone his mortgage or affect his security, his mortgage is a superior lien to that of the second mortgagee. (p. 562.)

MORTGAGES—Priorities.—If a new mortgage is substituted in ignorance of an intervening lien without intent to affect the security, the mortgage released through mistake may be restored in equity and given its original priority as a lien. (p. 563.)

E. A. and C. B. Hibbard, for the plaintiff.

Albin & Shurtleff, for the defendants.

408 WALKER, J. The plaintiff seeks a foreclosure of the mortgage which it originally received as collateral security for Melcher's note. The defendants, including the mortgagor and

two subsequent mortgagees, defend upon the ground that the Melcher note and the collateral note and mortgage having been canceled and surrendered, and a new note and mortgage having been given to the plaintiff in place of the original notes and mortgage, the plaintiff must now rely wholly and exclusively upon the last security. The effect of this claim, if valid, would be to make the plaintiff's security subordinate to the mortgages given to Mattoon and Busiel, while its original collateral mortgage constituted a first lien upon the property. The material inquiry is: Did the parties intend to change their practical rights and liabilities by the new method they adopted of expressing the indebtedness to the bank? If not, is it equitable that the second mortgagees should become first mortgagees in consequence merely of the nominal discharge of Vittum's mortgage to Melcher?

"When a new mortgage is substituted in ignorance of an intervening lien, the mortgage released through mistake may be restored in equity and given its original priority as a lien": 1 Jones on Mortgages, sec. 971. "This is based upon the presumption, as matter of law, that the party must have intended to keep on foot his mortgage title, when it was essential to his security; . . . and it is no matter whether the parties, through ignorance of such intervening title, or through inadvertence, actually discharged the mortgage and canceled the notes, and really intended to extinguish them; still, on its being made to appear that such intervening title existed, the law would presume conclusively that the mortgagee could not have intended to postpone his mortgage to the subsequent title. Such cases are very numerous in our own state, and need not be cited": *Stantons v. Thompson*, 49 N. H. 272, 279; *Buchanan v. Balkum*, 60 N. H. 406; *Hammond v. Barker*, 61 N. H. 53; *International Trust Co. v. Davis etc. Mfg. Co.*, 70 N. H. 118, 46 Atl. 1054. If it were held that the presumption of intention in such cases is one of fact, and not one of law, the case discloses the fact that the parties did not intend to change their relations by the transaction of 1898. They did not understand that they were changing the bank's security from a first to a second mortgage, or modifying the effectiveness of that security in any practical respect. Evidently, the new arrangement was made merely for greater convenience and simplicity in the statement of the indebtedness. Vittum's debt to Melcher and Melcher's debt to the bank for

the same amount could be more briefly evidenced by one note than by two. The bank's surrender of the Melcher note was not a payment of his debt, nor was its surrender of the Vittum note which ⁴⁶⁷ it held as collateral a payment of his debt; and Vittum's giving a new note to the bank, with Melcher as surety, in place of the original notes, was not a payment of both debts or of either, because the parties did not intend it should have that effect: *Foster v. Hill*, 36 N. H. 526; *Ward v. Howe*, 38 N. H. 35, 42. As the debt remained, for the payment of which Vittum's original note and mortgage were pledged to the plaintiff, the intention that the plaintiff should continue to have the same collateral for its debt must be enforced: 1 *Jones on Mortgages*, sec. 924; *Elliot v. Sleeper*, 2 N. H. 525. There is no equitable reason why it should not be. *Mattoon and Busiel* are not prejudiced by a restoration and enforcement of Vittum's first mortgage, subject to which their mortgages were given. Their position is not changed by a cancellation of the discharge of Vittum's first mortgage: *Holt v. Baker*, 58 N. H. 276. They have not been misled by that discharge, nor have they "done or omitted to do any act relying upon the recorded discharge": *International Trust Co. v. Davis etc. Mfg. Co.*, 70 N. H. 119, 46 Atl. 1054; hence their defense to this action presents no equities in their favor: *Cobb v. Dyer*, 69 Me. 499; *Ponder v. Ritzinger*, 102 Ind. 571, 575, 1 N. E. 44; *Campbell v. Trotter*, 100 Ill. 281; *Packard v. Kingman*, 11 Iowa, 219.

The fact that the plaintiff was not the mortgagee of the original mortgage, but merely held it as pledgee, does not preclude it from the equitable relief sought in this action. It had in equity the rights of the mortgagee, one of which was that the mortgage should be deemed to subsist until the debt secured thereby was paid or discharged, and that a formal discharge of the mortgage by mistake should not inure to the advantage of second mortgagees having no equitable right dependent upon such discharge: *Causler v. Sallis*, 54 Miss. 446; *Bruse v. Nelson*, 35 Iowa, 158. The mortgage note was pledged with the plaintiff, and this was sufficient to give it the benefit of the mortgage, whether technically assigned or not: *Whittemore v. Gibbs*, 24 N. H. 484, 487. The objection, if valid, that Melcher, the mortgagee, should be a party plaintiff, may be obviated by an amendment joining him with the bank.

Exception overruled.

All concurred.

If a New Mortgage is substituted in ignorance of an intervening lien, the mortgage released through mistake may be restored in equity and given its original priority as a lien where the rights of third parties will not be affected: See the monographic note to *Young v. Shaner*, 37 Am. St. Rep. 705; *Kern v. Hotaling*, 27 Or. 205, 50 Am. St. Rep. 710, 40 Pac. 168; *Title Guarantee Co. v. Wrenn*, 35 Or. 62, 76 Am. St. Rep. 454, 56 Pac. 271. See, also, *Threefoot Brothers & Co. v. Hillman*, 130 Ala. 244, 89 Am. St. Rep. 39, 30 South. 513; *Woodside v. Lippold*, 113 Ga. 877, 84 Am. St. Rep. 267, 39 S. E. 400.

WILSON v. OTIS.

[71 N. H. 483, 53 Atl. 439.]

JUDGMENTS—Jurisdiction—Collateral Attack.—If, upon competent evidence it appears that the court having jurisdiction of the subject matter determined the issue or point presented by the petition, the parties are concluded thereby, and whether the judgment was actually entered in the technical form of a decree, is not material, is a collateral proceeding. (p. 565.)

JUDGMENTS—Blank Decree—Collateral Attack.—If the court having jurisdiction of the subject matter and parties makes specific finding of fact relating to the merits of the action and signs a blank decree, the work of filling up the blanks is merely clerical, requiring the exercise of no judicial function, and may be done by the clerk. Such decree is not subject to collateral attack. (p. 565.)

JUDGMENTS AS RECORDS.—The fact that the pleadings and blank decree in a case are taken from the files of the court and afterward returned, does not affect their character as public records. (p. 566.)

ADOPTION—Assent of Parent.—A decree of adoption is not necessarily invalid because it does not recite, nor the petition allege, the assent of the parents to facts excusing their assent. (p. 567.)

ADOPTION—Validity of Decree.—If, upon a petition for adoption omitting allegations of consent of the parents, or of facts excusing such consent, the court finds the necessary facts, its decree of adoption is valid, and not subject to collateral attack. (p. 567.)

L. P. Snow, for the plaintiffs.

J. A. Edgerly, for the defendants.

⁴⁸⁵ WALKER, J. Whether the administrator is a necessary party does not seem to be of importance in this case, and is not considered, since the widow and Arthur H. Edgerly or Otis on the one side, and the next of kin to the deceased on the other, are proper parties, having a direct pecuniary interest in the distribution of the estate.

The question raised by the case is whether the defendants are entitled to inherit a part of the estate; and this depends upon the question whether Arthur was legally adopted by the deceased. If he was legally adopted, it is conceded that he would inherit the estate subject to the widow's rights and to the exclusion of the defendants: Gen. Laws, c. 188, sec. 4. Their contention is that there was no valid judgment or decree of adoption by the probate court, in which the deceased entered a petition for that purpose. It is found as a fact that upon that petition the judge of probate did judicially what the imperfect document signed by him, upon a ⁴⁸⁶ reasonable construction thereof, shows he did. If upon competent evidence it appears that the court, having jurisdiction of the subject matter, determined the issue or point presented by the petition, the parties are concluded thereby. Whether the judgment was actually entered up in the technical form of a decree is not material in this collateral proceeding: *Nihan v. Knight*, 56 N. H. 167.

Did the court grant the prayer of the petition? It appears from the record that the court, presumably upon competent evidence, found certain facts which were essential to a decree of adoption: Gen. Laws, c. 188, sec. 3. These facts are expressly recited in the signed document, which, taken in connection with the petition, indicate with much force that the judge understood that he had decided the question of adoption, and that nothing remained to be done except to enter up a formal decree. The signing of the blank form of a decree of adoption as a part of the record would be inconsistent with a judgment denying the prayer of the petition, and would not indicate that the court was in doubt as to what the final order should be. Nor is it reasonable to infer that the judge did not attach any importance to this document—that he regarded it as a waste piece of paper. Having some significance, it must be deemed to indicate the judge's finding upon the petition in favor of adoption. As he had made specific findings of fact relating to the merits of the action and signed a blank decree, the work of filling up the blanks was merely clerical, requiring the exercise of no judicial function. If he had entered a minute on the docket to the effect that "the petition is granted," that would have been conclusive evidence, in a collateral proceeding, of the judicial act of rendering judgment in accordance with the prayer of the petition: *State v. Narcarm*, 69 N. H. 237, 45 Atl. 744; *State v. Cox*, 69 N. H. 246, 41 Atl.

862; *Matthews v. Houghton*, 11 Me. 377; *Felter v. Mulliner*, 2 Johns. 181; *Fish v. Emerson*, 44 N. Y. 376, 378; *Swain v. Gilder*, 61 Miss. 667, 671; *Overall v. Pero*, 7 Mich. 315; *Lynch v. Kelly*, 41 Cal. 232, 233; but such evidence would be no more convincing than the evidence furnished by the record in this case. Upon a reasonable construction of the record, the fact that a judgment of adoption was rendered is not susceptible of serious doubt: *Freeman on Judgments*, 4th ed., sec. 45; *McDonald v. Frost*, 99 Mo. 44, 48, 48 S. W. 363.

The fact that the petition with the blank decree at some time after the hearing was taken from the files or from the possession of the judge, and was not returned for some years, did not have the effect of invalidating the previous action of the court. The record, having been restored, is as competent and conclusive evidence of the judgment as though it had remained on the files.

⁴⁸⁷ But it is insisted that the judge of probate had no jurisdiction to decide the question presented, or to render a judgment thereon, because it does not affirmatively appear in the record that the mother of the boy consented in writing to the adoption, as required by the statute: *Gen. Laws, c. 188, sec. 2*. This fact, however, is not necessarily essential to the exercise of jurisdiction by the probate court. If the parent has abandoned the child for three years, his consent to adoption proceedings is rendered unnecessary by the statute: *Gen. Laws, c. 188, sec. 2*. It is for the court, after having acquired jurisdiction by the filing of an appropriate petition, to decide in the first instance whether the parent has consented to a decree of adoption; if not, whether there is any valid excuse for his nonaction, as death, insanity, or other disability; or whether he has so far abandoned his parental duties for three years as to render his consent unnecessary. These, with other preliminary questions that might be suggested, must be determined upon evidence and a hearing by the judge, after he has acquired jurisdiction of the general subject matter of the petition. The filing of the petition and the appearance of proper parties gave him, under the statute (*Gen. Laws, c. 189, sec. 4*), power to act judicially: *Horne v. Rochester*, 62 N. H. 347, 348, 349; *Spaulding v. Groton*, 68 N. H. 77, 78, 44 Atl. 88. The court was not asked to do what it had no judicial power to do under any circumstances. It became its duty to act upon the subject matter presented, and to receive evidence upon all material

questions suggested, among others upon the question of abandonment as an excuse for the failure of the mother to consent to a decree of adoption: *State v. Arlin*, 27 N. H. 116, 129. If its decision was erroneous upon this question, the error did not render the proceedings absolutely void (*State v. Richmond*, 26 N. H. 232; *White v. Landaff*, 35 N. H. 128, 130), so that they might be disregarded in a collateral suit. The error, if there was one, was correctible by appellate procedure, and does not prove a want of jurisdiction in the probate court: *Fowler v. Brooks*, 64 N. H. 423, 424, 10 Am. St. Rep. 425, 13 Atl. 417; *Kimball v. Fisk*, 39 N. H. 110, 75 Am. Dec. 213.

Nor does the absence in the petition of an allegation of abandonment, or of the mother's consent, affect the question of general jurisdiction. It is not necessary that the petition should contain a full statement of all facts essential to a decree. It might seriously fail in this respect, or be demurrable, and still state a case calling for and requiring the exercise of the judicial power of the court. The test has been said to be, not whether it states a perfect case, but whether the court has the power to grant the relief sought in a proper case: *Van Fleet on Collateral Attack*, sec. 61. If upon a petition for adoption which omits these allegations the court finds the fact of abandonment, as well as other necessary facts, its decree⁴⁸⁸ of adoption is valid. The judgment or decree necessarily implies a finding of all material facts not inconsistent with the record, one of which may be the fact of abandonment. In this case, as the finding of that fact is not inconsistent with other facts disclosed by the case or the record, it is included in the general finding in favor of adoption, and furnishes a valid excuse for the nonconsent of the mother: *Erwin v. Lowry*, 7 How. 172; *Florentine v. Barton*, 2 Wall. 210, 216; *Thornton v. Baker*, 15 R. I. 553, 2 Am. St. Rep. 925, 10 Atl. 617. The judgment of adoption, therefore, is not impeachable in this proceeding.

Whether the defendants claiming title under Otis, the original petitioner, are in a position to attack a decree granted in his favor and recognized by him as valid for many years, may not be a doubtful question (*State v. Weare*, 38 N. H. 314, 316); but it is unnecessary to decide it at this time. For reasons above suggested the defendants are not entitled to share in the estate under a decree of a distribution.

Case discharged.

All concurred.

Adoption.—The necessity of obtaining the consent of the child's parents in an adoption proceeding is considered in the monographic note to *Van Matre v. Sankey*, 39 Am. St. Rep. 220, 221, on adoption by one person of the children of another. It is held that a petition in adoption proceedings is fatally defective if it fails to state the name and residence of the parents, whether they consent to the adoption, or that they have deserted the child: *Watts v. Dull*, 184 Ill. 86, 75 Am. St. Rep. 141, 56 N. E. 303. Other subsequent cases on the law of adoption are *Lynn v. Hockaday*, 162 Mo. 111, 85 Am. St. Rep. 480, 61 S. W. 885; *Estate of Camp*, 131 Cal. 469, 82 Am. St. Rep. 371, 63 Pac. 736; *In re Estate of McCormick*, 108 Wis. 234, 81 Am. St. Rep. 890, 84 N. W. 148; *Martin v. Martin*, 108 Wis. 284, 81 Am. St. Rep. 895, 84 N. W. 439.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

TRUSTEES OF UNION COLLEGE v. CITY OF NEW YORK.

[178 N. Y. 88, 65 N. E. 853.]

A CONDITION SUBSEQUENT is created in a grant to a city of a plat on which to build a city hall, if the deed provides that in case the land ever ceases to be used for city buildings, it shall revert to the grantor. (p. 571.)

CONDITION SUBSEQUENT.—Ten Years is a Reasonable Time in which compliance should be made with a condition subsequent in a grant to erect a city building. (p. 571.)

CONDITION SUBSEQUENT, Breach of.—Long-continued Silence of the grantor, where the grantee has failed to comply with an express condition subsequent, does not preclude him from insisting on a forfeiture and claiming possession of the premises. (p. 571.)

CONDITION SUBSEQUENT, Breach of.—Proof of Demand for possession before bringing ejectment, where a condition subsequent has not been complied with, is unnecessary. (p. 572.)

CONDITION SUBSEQUENT, Breach of.—By Way of Damages, the grantor of land on a condition subsequent which has not been complied with, is entitled, on recovering judgment in ejectment against the defendant in possession, to the rents and profits, or the value of the use and occupation of the land, from the commencement of the action. (p. 572.)

Action in ejectment. The complaint alleged that a condition, upon which the property had been conveyed, had been broken, that the plaintiff was entitled to possession, and that the defendant was in possession, or claimed to be entitled to possession, as successor of Long Island City, the grantee in the conveyance. Following the description of the premises in the deed is this clause: "Said plat of land is to be used by said Long Island City for the purpose of building a city hall thereon, and this conveyance is made upon the express condition that in case

the said plat of ground above described shall ever cease to be used by said Long Island City for a city hall, or other similar city buildings, then and in that case the said plat of land shall revert back to the parties hereto of the first part as if this conveyance had not been made." The trial judge made findings of fact, to the effect that the express condition, upon which the conveyance was made, had been broken; that the defendant was in possession, or claimed to be entitled to the possession, of the premises, as the successor of the grantee in the conveyance, and "that at the date of said deed a reasonable time for the erection of a city hall, or other similar city buildings, upon the premises in question, did not exceed ten years." As conclusions of law, he held that the condition subsequent in the deed had been broken, and that the plaintiff, by reason thereof, is seised in fee and is entitled to the immediate possession of the premises. Judgment for the plaintiff was affirmed by the appellate division, and an appeal is now taken to this court.

George L. Rives and James McKeen, for the appellant.

Perry Dudley, for the respondent.

40 GRAY, J. The opinion delivered at the appellate division by Mr. Justice Jenks very ably and accurately reviews the 41 legal questions presented and abridges the discussion here. Whether a condition in a deed is a condition precedent, or a condition subsequent, depends upon a construction of the language used by the grantor, in connection with the purpose of the grant. In this case I think there is no room for doubt as to the nature of the condition upon which the grantee took an estate in the premises conveyed: *Stuyvesant v. Mayor etc. of N. Y.*, 11 Paige, 414; *Upington v. Corrigan*, 151 N. Y. 143, 45 N. E. 359. The language of the deed expressed a condition, which was to defeat, not to create, an estate in the grantee. The grantor had parted with every interest and estate in the real property conveyed. The act to be performed by the grantee followed the vesting of the estate and the language imported a condition merely, and not a covenant. The case, therefore, being one of a conveyance of land upon condition subsequent, came within the operation of the rule in such cases, that the grantee should comply within a reasonable time with the condition: *Washburn on Real Property*, *449. The trial judge found as a fact that ten years, at the date of the conveyance, was a reasonable time for the purpose expressed in the condition. It was conceded that up to the com-

mencement of the action in 1898, a period of twenty-five years, no city building had ever been erected. In that respect, the case is similar to that of *Upington v. Corrigan*, 151 N. Y. 143, 43 N. E. 359, where the condition of the grant was that a church building should be erected and where it was held that a reasonable time for such erection was the period of ten years: See *Stuyvesant v. Mayor etc. of N. Y.*, 11 Paige, 414; *Palmer v. Ft. Plain etc. Plank Road Co.*, 11 N. Y. 376; *Hayden v. Stoughton*, 5 Pick. 528. With the finding as to a reasonable time for compliance by the grantee, in this case, I think this court cannot interfere. The evidence shows that, while the condition of the property in 1873, when the conveyance was made, was that of farming land, in 1874, and for several years subsequent thereto, the land was improved and streets were laid out, graded, sewered, flagged, etc.

The appellant argues that the condition of the conveyance⁴² upon which the land should revert back, was if it "shall ever cease to be used by said Long Island City for a city hall or other similar city buildings"; and as no building was, in fact, erected, the condition did not arise. I see no force in the argument. The whole language, in which the condition is expressed, must be considered, and then it becomes quite apparent that the condition of the conveyance, which the grantee accepted, was that a city hall, or building, was to be erected and that, if the land should ever cease to be used for such purposes, the land should revert to the grantor. The condition was the use and the continuing use of the land for the purpose of the grant. The long-continued silence of the plaintiff could not operate as an estoppel upon, or preclude, it from insisting upon a forfeiture, and from claiming possession of the premises. The effect of an express condition in a deed cannot be destroyed by silent acquiescence: *Jackson v. Crysler*, 1 Johns. Cas. 125. The title to the property was vested in the grantee, and the plaintiff was entitled to assume that its grantee would comply with the condition of the grant. If it elected to await compliance as long as it did, that fact cannot be construed against its right to reclaim possession.

The appellant argues that it was incumbent upon the plaintiff to demand performance before it could become entitled to re-enter, as for condition broken. If this clause was in the nature of a covenant by the grantee, a demand might be necessary; but, being a condition subsequent, proof of demand of possession before commencing the action was unnecessary: *Plumb v. Tubbs*, 41 N. Y. 410.

As to the right to damages, the reasoning of the learned justice at the appellate division is quite conclusive. The allegation in the complaint that the defendant was in possession of the premises, or claimed to be entitled to their possession as successor of Long Island City, the grantee in the deed, was not denied by the answer. The evidence amply shows that the defendant was in possession. Within the authority of *Clason v. Baldwin*, 129 N. Y. 183, 189, 29 N. E. 226, the plaintiff, in ⁴³ recovering judgment, was entitled, by way of damages, to the rents and profits, or the value of the use and occupation of the land, from the commencement of the action.

The judgment below was right and I advise its affirmance here, with costs.

Parker, C. J., O'Brien and Bartlett, JJ., concur.

Haight, J., dissents.

Cullen and Werner, JJ., absent.

MODE OF TAKING ADVANTAGE OF BREACHES OF CONDITIONS SUBSEQUENT.*

I. Effect of Breach of Condition.

a. Does not Ipso Facto Revest Estate.

II. By and Against Whom a Breach of Condition may be Asserted.

III. Demand for Performance of Condition.

IV. Re-entry for Breach of Condition.

V. What is a Sufficient Re-entry.

VI. Form of Action and Relief Given.

I. Effect of Breach of Condition.

a. Does not Ipso Facto Revest Estate.—The breach of a condition subsequent in a deed does not ipso facto revest the estate in the grantor or his proper substitute. Notwithstanding the breach, the estate continues to exist until he has, by an entry or its equivalent, manifested his determination to take advantage of the forfeiture: See *Lewis v. Lewis*, 74 Conn. 630, 92 Am. St. Rep. 240, 51 Atl. 854; *Robinson v. Ingram*, 126 N. C. 327, 35 S. E. 612; monographic note to *Cross v. Carson*, 44 Am. Dec. 754. Up to the time he does so, he has only a right of action: *Trustees of Union College v. City of New York*, 73 N. Y. Supp. 51, 65 App. Div. 553.

II. By and Against Whom a Breach of Condition may be Asserted.

Where the rules of the common law have not been abrogated or modified by statute, a breach of a condition subsequent can be taken

*REFERENCES TO MONOGRAPHIC NOTES.

What words create a condition subsequent: 79 Am. St. Rep. 747-768.

When, how, and by whom may a deed be avoided for breach of a condition subsequent: 44 Am. Dec. 748-768.

advantage of only by the grantor or his heirs at law: Skipwith v. Martin, 50 Ark. 141, 6 S. W. 514; Board of Education v. Trustees, 63 Ill. 204; Bangor v. Warren, 34 Me. 324, 56 Am. Dec. 650; Hayward v. Kinney, 84 Mich. 591; Dewey v. Williams, 40 N. H. 222, 77 Am. Dec. 708; Schulenberg v. Harriman, 21 Wall. 44, 63. Of the right of the heirs of the grantor to take such measures as may be necessary to recover the property because of the breach of condition, there can be no doubt (O'Brien v. Wagner, 94 Mo. 93, 4 Am. St. Rep. 362, 7 S. W. 19), though they are not referred to in the conveyance, and the right of re-entry is not therein expressly conferred upon them: Jackson v. Topping, 1 Wend. 388, 19 Am. Dec. 515. A right of entry for a breach of condition subsequent cannot be vested in the devisee of the grantor, though, by the statutes of the state, every interest in real property is made devisable: Upington v. Corrigan, 79 Hun, 488, 29 N. Y. Supp. 1002.

The grantor's right of re-entry cannot be assigned by him to a third person, nor does it pass by any subsequent grant made by him of the property subject thereto: Underhill v. Saratoga etc. Co., 20 Barb. 455; Pierce v. Kator, 9 Hun, 532; De Peyster v. Michael, 6 N. Y. 506; Nicoll v. New York etc. R. R. Co., 12 N. Y. 121, 12 Barb. 460. In truth, such a grant appears to have an operation precisely the reverse of that intended, for, while it does not vest in the grantee any right whatever, it is said to release or waive the grantor's right, and the grantee in the original deed, or his successor in interest, therefore holds the property discharged of the condition: Berrinbroick v. St. Luke's Hospital, 48 N. Y. Supp. 363, 23 App. Div. 339; Tinkham v. Erie R. R. Co., 53 Barb. 393. In Pennsylvania, however, a right of re-entry for a breach of condition may be reserved to the grantor's assigns by words indicating that purpose in the conveyance by which the condition is created: McKissick v. Pickle, 16 Pa. St. 140. In some of the states statutes have been enacted abrogating the rule of the common law and conferring on the grantees of the grantor the same right which he has to enforce a forfeiture on breach of a condition subsequent: Lewis v. Lewis, 74 Conn. 630, 92 Am. St. Rep. 240, 51 Atl. 854; Austin v. Cambridgeport Parish, 21 Pick. 215; Cornelius v. Ivins, 26 N. J. L. 376; Bouvier v. Baltimore etc. R. R. Co., 69 N. J. L. 313, 47 Atl. 722; Martin v. Ohio R. R. Co., 37 W. Va. 319, 16 S. E. 589. If a grantor enters for a breach of condition and thereby becomes re-vested with the estate, he may convey the property to another, who may assert his rights by an action of ejectment or other appropriate remedy: Moore v. Wingate, 53 Mo. 398. Perhaps, where by statute the grantor is relieved from the necessity of making any re-entry for breach of the condition subsequent, such breach at once vests in him title and the right to the immediate possession of the land, and the title thereto may afterward pass under a devise made by him: Austin v. Cambridgeport Parish, 21 Pick. 215; or by assignment under the insolvent laws of the state: Stearns v. Harris, 8 Allen, 597. Creditors of a grantor or other persons entitled to re-enter for a breach of a condition subse-

quent cannot obtain the benefit of his right. His interest or right is not subject to attachment or execution, and hence cannot be the subject of an execution sale: *Cross v. Carson*, 8 Blackf. 134, 44 Am. Dec. 742; *Bangor v. Warren*, 34 Me. 324, 56 Am. Dec. 650; *Freeman on Executions*, sec. 172a.

Conveyances containing conditions subsequent may be executed by two or more grantors. If they were husband and wife, and the property conveyed was his, he may, without her concurrence, terminate the estate for a breach of the condition: *Copeland v. Copeland*, 89 Ind. 29. Where, however, the grantors were cotenants or otherwise conveyed in their own right, we are not able to assert upon authority whether any less than all of their number may elect to terminate the estate, but if the conveyance was executed by a single grantor, who has died, leaving two or more heirs, it appears probable that either may, acting for himself alone, elect to terminate the estate, and by appropriate action afterward may recover at least his moiety: *Cruger v. McLaury*, 41 N. Y. 219; *Jackson v. Topping*, 1 Wend. 388, 19 Am. Dec. 515; *Cole v. Patterson*, 25 Wend. 456.

There is, so far as we are aware, no exception to the rule that a breach of a condition subsequent may be taken advantage of as against every person who may be effected thereby. The condition itself must necessarily appear in some conveyance, and all persons acquiring title or liens under it must take notice of all its terms and conditions, and hold their title or lien subject to the contingency of loss if there is any breach of a condition which would warrant a grantor or his heirs in re-entering or prosecuting an action to recover possession, if the original grantee continued to be the only party in interest. When re-entry is made, or something equivalent thereto is done for the purpose of reclaiming the property pursuant to the terms of the grant, the title, in the absence of any equity preventing the legal effect of such facts, becomes re-vested as absolutely as if no conveyance had been made: *Barler v. Cobb*, 36 N. H. 344; *Maginnis v. Knickerbocker Ice Co.*, 112 Wis. 585, 88 N. W. 300.

III. Demand for Performance of a Condition.

As already suggested, every person acquiring title which is subject to a condition precedent must take notice thereof, and must see that it is not broken, and he cannot escape the consequence of a breach on the ground that no demand was made on him to perform the condition. Some of the cases seem not properly to discriminate between a demand for the performance of a condition and a demand for possession or the re-entry generally essential after the condition has been broken to terminate the title of the grantee. With respect to the demand for the performance of the condition, there is no doubt that the party in possession or entitled to retain the title, on the performance of the condition, may not escape the consequence of its breach by showing that no demand was made on him to fulfill or respect the condition (*Royal v. Altman-Taylor Co.*, 116 Ind. 424, 19 N. E. 202; *Gibert v. Peteler*, 38 N. Y. 165, 97 Am. Dec. 785; *Plumb v. Tubbs*, 41 N. Y. 442; *Trustees of Union College v. City of New*

York, 173 N. Y. 38, 93 Am. St. Rep. 569, 65 N. E. 853), unless there has been an apparent waiver of the right to have the condition performed: *Bonniwell v. Madison*, 107 Iowa, 85, 77 N. W. 530.

IV. Re-entry for Breach of Condition.

We have already shown that the general rule is that a breach of a condition subsequent does not of itself revert the estate in the grantor or terminate the title of the grantee. Without denying this general rule, a number of the American decisions affirm that, for the purpose of sustaining an action to recover the property, there is no longer any necessity either to demand a surrender of possession or to make formal entry for the breach of condition: *Cornell v. Colorado S. Co.*, 3 Colo. 82, 100 U. S. 55; *Ritchie v. Kansas etc. Ry. Co.*, 55 Kan. 36, 39 Pac. 718; *Sioux City etc. R. R. Co. v. Singer*, 49 Minn. 301, 32 Am. St. Rep. 554, 51 N. W. 905; *Little Falls W. Co. v. Belin*, 69 Minn. 253, 72 N. W. 69; *Cornelius v. Ivins*, 26 N. J. L. 376; *Bouvier v. Baltimore etc. R. R. Co.*, 65 N. J. L. 313, 47 Atl. 772; *Plumb v. Tubbs*, 41 N. Y. 442; *Martin v. Ohio R. R. Co.*, 37 W. Va. 349, 16 S. E. 589. These decisions, in so far as they are founded on statutes which, in effect, make a breach of condition operate ipso facto to divest the title of the party in possession and to vest it in the party entitled to rely on the breach, are defensible, but some of them do not appear to be so justified. In the absence of such a statute, we think the decided weight of authority, both at the common law and in this country, affirms that there must be either an entry for breach of condition or some act equivalent thereto before ejectment or any other action to recover possession of the property can be brought: *Bowen v. Bowen*, 15 Conn. 535; *Warner v. Bennett*, 31 Conn. 468; *Lewis v. Lewis*, 74 Conn. 630, 92 Am. St. Rep. 240, 51 Atl. 854; *Board of Education v. Trustees*, 63 Ill. 204; *Clark v. Holton*, 57 Ind. 564; *Elkhart C. W. Co. v. Ellis*, 118 Ind. 215, 15 N. E. 249; *Van Horn v. Mercer*, 29 Ind. App. 277, 64 N. E. 531; *Bonniwell v. Madison*, 107 Iowa, 85, 77 N. W. 530; *Tallman v. Snow*, 35 Me. 342; *Merrifield v. Cobler*, 4 Cush. 178; *Hubbard v. Hubbard*, 97 Mass. 188, 93 Am. Dec. 75; *Morris v. Hoyt*, 11 Mich. 9; *Memphis C. R. R. Co. v. Napers*, 51 Miss. 412; *Missouri H. Soc. v. Academy of Sciences*, 94 Mo. 409, 8 S. W. 396; *Spear v. Fuller*, 8 N. H. 174, 20 Am. Dec. 391; *Rollins v. Riley*, 44 N. H. 9; *Phelps v. Chesson*, 12 Ired. 194; *Robinson v. Ingram*, 126 N. C. 327, 35 S. E. 612; *Hammond v. Port Royal etc. Ry. Co.*, 15 S. C. 10, 34; *Kibler v. Luther*, 18 S. C. 606; *Houston etc. Co. v. Ennis-Calvert C. Co.*, 23 Tex. Civ. App. 331, 56 S. W. 367. There may, indeed, be found in the conveyance stipulations the effect of which is to relieve the party from the necessity of making any entry for breach of the condition. Such was held to be the case when the conveyance stipulated that the grantee would convey the land when he ceased to use it for a purpose specified therein: *Baker v. City of St. Louis*, 75 Mo. 671. If the grantor is already in the possession of the land, no further entry upon the possession can be required of him, and the title, upon the breach of the condition, vests in him without any formal act, if he manifests his intention to hold possession by

reason of such breach: *Taylor v. Cedar Rapids etc. R. Co.*, 25 Iowa, 371; *Frost v. Butler*, 7 Me. 225, 22 Am. Dec. 129; *O'Brien v. Wagner*, 94 Mo. 93, 4 Am. St. Rep. 362, 7 S. W. 19; *Rollins v. Riley*, 44 N. H. 9; *Hamilton v. Elliott*, 5 Serg. & R. 375; *Hubbard v. Hubbard*, 97 Mass. 188, 93 Am. Dec. 75.

V. What is a Sufficient Re-Entry.

It is said that an entry for a breach of condition must be such a notorious and unequivocal act as to demonstrate the intention of the grantor to terminate the previous estate: *O'Brien v. Henley*, 6 Ala. 787. In this case it appeared that the property originally conveyed consisted of fourteen lots situate on opposite sides of a street; that after the grantee went into possession of one of these lots and built a house on it, he, after two or three years, abandoned it and went to another state, and that thereupon the grantor entered into possession of this lot. It appeared that the other lots were vacant, and the court held the act of the grantor equivocal as to those lots. The case would appear to be authority for holding that, where distinct tracts were subject to the same conveyance, there must be a re-entry upon each for the purpose of revesting the grantor with title to it; but, doubtless, if the entry is made professedly for the whole, it is sufficient though made only on one of the parcels embraced in the deed: *Rowell v. Jewett*, 69 Me. 293. Perhaps the Alabama case cannot safely be accepted as authority, except for the proposition that the act which is intended to terminate an estate must be of an unequivocal character and made for the express purpose of terminating it; and that "entry for the purpose of taking advantage of the breach of a condition is a thing of substance; it operates as an entire change of title, which at the time of the entry remains in the grantee precisely as if no breach of the condition had happened. It is therefore an important act, divesting one party of his title and vesting it in another. An act of this description, so important in its consequences, it would seem ought to be shown by satisfactory proof." While it may be unnecessary to declare in express terms the object of his entry, this declaration is to be dispensed with only when his object sufficiently appears in some other way. In other words, his object may be proved by the acts of the party as well as by his declarations: *Bowen v. Bowen*, 18 Conn. 535. If it appears that the entry was made for some other purpose, as where the party entered, claiming the right to do so as a cotenant, or where his entry was for the purpose of foreclosing a mortgage, in neither case can the entry subsequently be treated as being one for the breach of the condition of a deed: *Bowen v. Bowen*, 18 Conn. 535; *Stone v. Ellis*, 9 Cush. 95. Where there has been no entry for breach of condition, a secret or surreptitious attornment from the tenant in possession cannot operate as the equivalent of such entry, or revert the estate in the grantor or his heirs: *Missouri H. Soc. v. Academy of Sciences*, 94 Mo. 459, 8 S. W. 356. If premises are unfenced, so that they are accessible from the highway and also from adjoining land of the grantor, the fact that he occasionally turned his cattle upon them or

occasionally used them to obtain a more convenient access to his own land, is consistent with an intention not to enter for breach of condition, and therefore these acts on his part, being at most equivocal and indecisive, do not amount to an entry for breach of condition sufficient to support a conveyance subsequently made by such grantor: *Guild v. Richards*, 16 Gray, 309. "What constitutes an entry for condition broken? It is deducible from the authorities that it must be an act. An intention to make an entry is not enough. The right to make it, so long as it is postponed, is considered for the time being a waiver. A mere entry upon the land is not enough. The entry must be for the purpose of taking the land back. The factum and the animus must concur in order to make the entry available. A mere casual or accidental presence upon the land would not operate to do it. The intention must be sufficiently shown either by the act itself or by words accompanying the act. Therefore, it has been customary to take witnesses upon the land and personally express the intention in their presence. It is not necessary to turn the grantee off the premises. Nor to take possession in his presence. Nor to give him actual notice of it. Still the act itself must be of such a character as would serve to indicate to the person in possession that his right to the locus was regarded as terminated": *Jenks v. Walton*, 64 Me. 97. In this case an entry was held to be sufficiently established by testimony showing that the grantor made the entry in the presence of witnesses, and notified the party on the premises that possession would be taken, because the condition of the deed had been broken. If a conveyance is made on the condition that the grantee support the grantor, an entry for breach of this condition is sufficient if the grantor goes to the property and, in the presence of witnesses, informs the grantee that he comes to make an entry on the property for breach of the condition of the deed in failing or refusing to furnish the support therein provided for: *Rowell v. Jewett*, 69 Me. 293. Nor is the presence of witnesses necessary where the party makes the entry and keeps possession of the property: *Dugan v. Thomas*, 79 Me. 221, 9 Atl. 354. In truth, we apprehend that the presence of witnesses, while a very proper precaution, is in no case necessary, if the fact of the entry and its purpose can otherwise be proven. It is not necessary that the grantee or other person to be affected by the re-entry have actual notice thereof: *Langley v. Chapman*, 134 Mass. 82. "Where an entry or attempted entry cannot be made, none can be required": *Hubbard v. Hubbard*, 97 Mass. 188, 93 Am. Dec. 76. It is obvious that in many cases an actual entry upon land might be impossible without committing a breach of the peace. The purpose of the entry is by some unequivocal act to indicate the intention of the grantor to terminate the estate because of the breach of condition, and whatever clearly evinces this intention appears to be equivalent, in legal effect, to an entry. Hence, all that is necessary is to demand possession, or to otherwise indicate to a party found in possession that the grantor, because the condition has been broken, has elected to consider himself reinvested with the estate, and to assert his ownership and right to the possession thereof: *Clark v. Holton*,

57 Ind. 564; *Frost v. Butler*, 7 Greenl. 225, 22 Am. Dec. 199; *Jenks v. Walton*, 64 Me. 97.

VI. Form of Action and Relief Given.

In the principal case the form of the action taken to enforce the rights of the grantor for breach of a condition subsequent is ejectment. This is a proper remedy: See *Soper v. Guernsey*, 71 Pa. St. 219; *Martin v. Ohio River R. R. Co.*, 37 W. Va. 349, 16 S. E. 589. In Texas, trespass to try title lies: *Alford v. Alford*, 1 Tex. Civ. App. 245, 21 S. W. 283. In a proper case, as when the condition of the deed is the support and maintenance of the grantor during his life, the deed may be canceled and set aside and the land restored: *Peck v. Hoyt*, 39 Conn. 9; *Jenkins v. Jenkins*, 19 Ky. (3 T. B. Mon.) 327; *Dodge v. Dodge*, 92 Mich. 109, 52 N. W. 296; *Rexford v. Schofield*, 101 Mich. 480, 59 N. W. 837. If such a conveyance is made, and the grantee abandons the property and fails to perform the condition, the grantor, having remained in possession, may maintain an action to quiet title: *Richter v. Richter*, 111 Ind. 456, 12 N. E. 698. The grantor, on the breach of a condition subsequent, is not entitled to a decree for specific performance: *Close v. Burlington etc. Ry. Co.*, 64 Iowa, 149, 19 N. W. 886; *Palmer v. Fort Plain etc. Road Co.*, 11 N. Y. 376.

Indeed, it is often laid down that a court of equity will not lend its aid to divest an estate for breach of a condition subsequent, and thereby enforce a forfeiture: *Brown v. Chicago etc. Ry. Co. (Iowa)*, 82 N. W. 1003; *Memphis etc. R. R. Co. v. Neighbors*, 51 Miss. 412; *Moore v. Wingate*, 53 Mo. 398 (compare *Hubbard v. Kansas City etc. R. R. Co.*, 63 Mo. 68); *Smith v. Jewett*, 40 N. H. 530; *Baley v. Umatilla County*, 15 Or. 172, 3 Am. St. Rep. 142, 13 Pac. 890. Nevertheless, courts of equity frequently assume jurisdiction when necessary to the protection of the grantor, as when a conveyance is made to a son or other relative on the condition that he shall support and maintain the grantor during his life, and the grantee fails to perform the condition. In such a case equity is competent to set aside or cancel the deed or order a reconveyance: *Penfield v. Penfield*, 41 Conn. 474; *Kusch v. Kusch*, 143 Ill. 353, 32 N. E. 267; *Cooper v. Gum*, 152 Ill. 471, 39 N. E. 267; *Patterson v. Patterson*, 81 Iowa, 626, 47 N. W. 768; *Stamper v. Stamper*, 121 N. C. 251, 28 S. E. 20; *Bogie v. Bogie*, 41 Wis. 209; *Blake v. Blake*, 56 Wis. 392, 14 N. W. 173; *Morgan v. Loomis*, 78 Wis. 594, 48 N. W. 109; *Diggins v. Doherty*, 4 Mackey, 172. It may be more accurate in such a case to say that a court of equity takes jurisdiction, not to forfeit a title, but to quiet a title already forfeited. To the end that the conditional grantor's remedy may be complete, it will cancel all writings and records that otherwise might be used to his prejudice, acting, not on the theory that they are avoided by the action of the court, but that they are void independently thereof; and that equity jurisdiction is required to settle the status of the property in accordance with the facts, on the principle of *quia timet*, and to clear away those things which, though void in fact, might, by reason of their apparent force, be used wrongfully by the holders, either presently or in the future: *Glocke v. Glocke*, 113 Wis. 303, 89 N. W. 118.

WILCOX v. EQUITABLE LIFE ASSURANCE SOCIETY.

[173 N. Y. 50, 65 N. E. 857.]

LIFE INSURANCE—Theft of Policy.—A Demand for a New Paid-up Policy by an assured will not be denied in equity, because his policy has been stolen and he is unable to surrender it as conditioned for, where he has used due diligence to reclaim it and is still the owner. And he need not plead the execution of some instrument operating as a surrender of the policy and a discharge of the defendant's liability. (p. 581.)

J. Rider Cady and De Witt C. Morrell, for the appellant.

W. C. Prime and Henry H. Pierce, for the respondent.

⁵² O'BRIEN, J. The final judgment in this case sustained a demurrer to the complaint. The only question presented by the appeal is whether the complaint states facts sufficient to constitute a cause of action. It avers, in substance, that on the ninth day of October, 1883, the defendant, in consideration of the payment of an annual premium of fifty-eight dollars and eighteen cents per year and an agreement to pay such annual premium for twenty years, made and delivered to the plaintiff its policy of insurance, whereby it insured his life in the sum of two thousand dollars and promised to pay to him, if living at the expiration of said twenty years, or in the event of his death at any time within said period to his brother, the said sum of two thousand dollars. It is then alleged that the policy contained a clause whereby the defendant promised and agreed that if the premiums on the policy for not less than three complete years from the date, to wit, October 9, 1883, shall have been duly received by the defendant and the policy should become void in consequence of default in payment of a subsequent premium, then the defendant would issue in lieu of such policy a new paid-up policy without participation in profits in favor of the plaintiff for as many twentieth parts of the original amount assured as there shall be complete annual premiums received in cash by the defendant upon the policy at the date when such default should be made, provided "that said policy shall be surrendered duly receipted within six months of the date of default in payment of premium on said policy." ⁵³ It is then alleged that the plaintiff paid the defendant the annual premiums on the policy for seven consecu-

tive years and duly fulfilled all conditions on his part required by said policy; that on or about the 8th of April, 1889, the policy was stolen from the plaintiff without any fault on his part, while the same was in full force and effect, and that the plaintiff has never been able to recover the same nor has it at any time since been in his possession or control, but that he has since continued to be wholly ignorant of its whereabouts, although he has made diligent effort to recover possession of it, and he is still the owner of the same and has never transferred or assigned his interest in the same.

That when the premium fell due in the year 1890 the plaintiff defaulted in the payment of the same and has made no payment since; that he has demanded from the defendant a new paid-up policy in accordance with the terms of the contract, duly informing the defendant that he surrendered his policy, but that it had been stolen and that he was unable to recover the same, and therefore could not deliver it to the defendant, which demand was refused; that the plaintiff has always been, and still is, ready and willing to perform on his part, except as to the delivery of the stolen policy. The relief demanded is that the defendant be decreed to issue to the plaintiff a new paid-up policy of assurance without participation in the profits for as many parts of the original policy issued by the defendant as it had received in cash complete annual premiums at the date when default was made, to wit, seven twentieth parts of said two thousand dollars of assurance; that is to say, a paid-up policy for seven hundred dollars, besides the costs and disbursements of the action. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and the courts below have sustained the demurrer.

We think that this demurrer should have been overruled, and, therefore, that the judgment should be reversed. All the facts stated in the complaint are, of course, admitted by the demurrer, and the fact that the policy was stolen from the plaintiff without any fault on his part, and that he was unable to comply with the condition upon which the new paid-up policy was to be issued, namely, the surrender and receipt within six months of the date of default, constitutes in equity a sufficient excuse for the nonperformance of that condition. The action is, in substance, one for specific performance, and, of course, the plaintiff must show that he has performed on his part or state such an excuse for nonperformance as a court

of equity will recognize: *Wheeler v. Connecticut Mut. Life Ins. Co.*, 82 N. Y. 543, 37 Am. Rep. 594. Equity will not deny to the plaintiff the relief sought simply because the policy had been stolen. When that fact appears, and that the plaintiff has used due diligence to reclaim it, and that he is still the owner of the policy, a case is stated which constitutes grounds for equitable relief. It is admitted that the plaintiff is unable to deliver to the defendant the policy with a receipt indorsed upon it, and this is what the condition required, but it is said that while it was not necessary, under the circumstances disclosed, to deliver the identical paper or policy referred to, yet the plaintiff was still able to deliver to the defendant some receipt, release or other instrument which would constitute a sufficient surrender of the policy and a sufficient discharge of all liability of the defendant.

But the condition does not, in terms, require anything of that kind. What it does require is the surrender of the identical policy with a proper receipt indorsed thereon. All agree that compliance with this condition became impossible, but the courts below have attempted to put another condition in its place, namely, the execution of some instrument that would operate in law as a surrender of the policy and a discharge of the defendant's liability. It should be observed that it does not appear that the defendant ever asked or required the plaintiff to do anything of that kind. It stood and still stands upon the condition which required a surrender of the identical policy. So far as we know or can know from the pleading it does not require anything else, and if it does, that is to say, if some other writing in the form of a release or receipt is necessary for the protection of the defendant, then the court has power before rendering final judgment to require the plaintiff to execute such a paper, but it was not necessary for the plaintiff, in the first instance, to plead that he had volunteered to execute and deliver such a paper. The court, doubtless, has power before awarding the relief which the plaintiff demands to require him to execute and deliver such a paper, but it was not made by the contract a condition precedent to the right to maintain the action, and, therefore, it was not necessary to plead it.

The judgment should be reversed and judgment ordered for the plaintiff on the demurrer, with costs in all courts, with leave to the defendant to answer within twenty days on payment of costs.

Parker, C. J., Martin, Vann and Cullen, JJ., concur.

Gray, J., dissents.

Werner, J., absent.

Life Insurance.—The surrender of the original policy of life insurance as a condition precedent to the issuing of a paid-up policy is considered in *Southern Mut. Life Ins. Co. v. Montague*, 84 Ky. 653, 4 Am. St. Rep. 218, 2 S. W. 443; *Mutual Life Ins. Co. v. Jarboe*, 102 Ky. 80, 80 Am. St. Rep. 343, 42 S. W. 1097; *Cravens v. New York Life Ins. Co.*, 148 Mo. 583, 71 Am. St. Rep. 628, 50 S. W. 519. Insanity as excusing the payment of premiums on a policy is considered in *Wheeler v. Connecticut etc. Ins. Co.*, 82 N. Y. 543, 37 Am. Rep. 594; *Pitts v. Hartford etc. Ins. Co.*, 66 Conn. 376, 50 Am. St. Rep. 96, 34 Atl. 94.

PEOPLE v. SULLIVAN.

[173 N. Y. 122, 65 N. E. 989.]

MURDER TRIAL—Submitting Case in Two Aspects.—In a prosecution for murder in the first degree, it is not improper to submit the case to the jury in both aspects, premeditated and deliberate design and killing in the commission of a felony. (p. 583.)

INDICTMENT.—An Offense may be Charged in Several Counts, and the prosecution will not be compelled to elect on which count it will proceed. (p. 584.)

CRIMINAL TRIAL—Credibility of Evidence.—If, on a trial for murder, an accomplice testifies that the defendant told him that they met the deceased and he fired at them and then they fired at him, the jury may find that the defendants fired first, since they may believe that the defendants shot at the deceased and disbelieve the statement that the deceased fired first. (p. 587.)

MURDER in Attempt to Commit Burglary.—If one starts to commit a burglary, with the intent to shoot any person who interferes with him, and encounters and kills a policeman, he is chargeable with such premeditation as constitutes his offense murder in the first degree. (p. 588.)

CRIMINAL LAW.—To Constitute an Attempt to Commit a Crime, it is not necessary that the act done should bet he last proximate one for the completion of the offense. (p. 589.)

BURGLARY—Attempt to Commit.—Persons who procure tools and start toward a building with the intent to break it open, but whose design is frustrated while they are reconnoitering or inspecting it, are engaged in an attempt to commit burglary. (p. 590.)

MURDER IN FIRST DEGREE—Proof.—Under an indictment in the common-law form for murder in the first degree, the prosecution may prove facts to bring the case within any of the provisions of the statute defining that crime. (pp. 591, 594.)

Claude Mayham and Stephen L. Mayham, for the appellant.

E. A. Dox, district attorney, and George M. Palmer, for the respondent.

¹²⁶ CULLEN, J. I have been constrained to reach a different conclusion from that held by Judge O'Brien. I agree with him that as the guilt of the defendant was submitted to the jury on both claims of the people, first, that the deceased was killed with a deliberate and premeditated design to effect his death, and, second, that he was killed by the defendant while the latter was engaged in the perpetration of a felony or an attempt to commit one, if as to either claim the evidence ¹²⁷ was insufficient to justify the submission of the question to the jury the conviction must be reversed since it cannot be known on which ground the jury based its verdict. But I take issue with my associate on the proposition that there was any such inconsistency between the two claims as rendered it improper to submit both to the jury for determination. There was but a single crime charged in the indictment against the defendant, that of murder in the first degree, and the only issue to be determined by the jury was whether the defendant had been guilty of that crime. Under our statute (Pen. Code, sec. 183), so far as applicable to the case before us, proof either that the defendant killed the deceased with a deliberate and premeditated design to effect his death, or while the defendant was engaged in the commission of a felony or an attempt to commit a felony, though without any design to take life, established his guilt of the crime charged. "It is not necessary that a jury, in order to find a verdict, should concur in a single view of the transaction disclosed by the evidence. If the conclusion may be justified upon either of two interpretations of the evidence, the verdict cannot be impeached by showing that a part of the jury proceeded upon one interpretation and part upon the other": *Murray v. New York Life Ins. Co.*, 96 N. Y. 614, 48 Am. Rep. 658. So in this case it was not necessary that all the jurors should agree in the determination that there was a deliberate and premeditated design to take the life of the deceased, or in the conclusion that the defendant was at the time engaged in the commission of a felony, or an attempt to commit one; it was sufficient that each juror was convinced beyond a reasonable doubt that the defendant had committed the crime of murder in the first degree as that offense is defined by the statute. Ever since the

enactment of the Penal Code, and even before that time since the law of 1876, by which homicide in the commission of a felony was made murder in the first degree, it has been the practice, in prosecutions for that crime, to submit the case to the jury in both aspects, premeditated and deliberate design to take life and killing in the commission of a felony: *Buel v. People*, 78 N. Y. 492, 34 Am. Rep. 555; *People v. Willett*, 102 N. Y. 251, 6 N. E. 301; *People v. Johnson*, 110 N. Y. 134, 17 N. E. 684; *People v. Meyer*, 162 N. Y. 357, 56 N. E. 758. This is no new doctrine in the administration of the criminal law; on the contrary, the principle involved is very old. For far more than a century past it has been the practice, approved by all courts and text-writers, to charge, by the use of several counts, the same offense as committed in different manners or by different means. "There is no objection to stating the same offense in different ways in as many different counts of the indictment as you think necessary": Archibald on Criminal Practice, 93. "Every cautious pleader will assert as many counts as will be necessary to provide for every possible contingency in the evidence and this the law permits": Wharton on Criminal Law, sec. 424. In this state the practice is directly authorized by statute: Code of Criminal Procedure, sec. 279. Where the several counts charge the same offense, the prosecution will not be compelled to elect on which count it will proceed. "It is every day's practice to charge a felony in different ways in several counts for the purpose of meeting the evidence as it may come out upon the trial; each of the counts on the face of the indictment purports to be for a distinct and separate offense, and the jury very frequently find a general verdict on all the counts, although only one offense is proved; but no one ever supposed that that formed a ground for arresting the judgment. If the different counts are inserted in good faith for the purpose of meeting a single charge the court will not even compel the prosecutor to elect": Opinion of Chancellor, *Kane v. People*, 8 Wend. 203. In *People v. Rugg*, 98 N. Y. 537, the defendant was indicted for murder in the first degree as charged in separate counts, some alleging premeditation and deliberation, others killing in the commission of a felony. The defendant on the trial moved that the prosecution be required to elect on which count of the indictment it would proceed. The motion was denied and the jury rendered a general verdict of guilty. The judgment was affirmed by this court. It was held by the supreme court

of the United ¹²⁹ States that a general verdict of guilty was good though one count of an indictment charged the offense to have been committed in a haven or bay, and another its commission upon the high seas: *United States v. Pirates*, 5 Wheat. 201. The reasons for this practice are very clearly stated by Chief Justice Shaw in *Bemis' Webster Case* (471). "To a person unskilled and unpracticed in legal proceedings it may seem strange that several modes of death, inconsistent with each other, should be stated in the same document; but it is often necessary, and the reason for it when explained will be obvious. The indictment is but the charge or accusation made by the grand jury, with as much certainty and precision as the evidence before them will warrant. They may be well satisfied that the homicide was committed, and yet the evidence before them leave it somewhat doubtful as to the mode of death; . . . take the instance of a murder at sea; the man is struck down, lies some time on the deck insensible, and in that condition is thrown overboard. The evidence proves the certainty of a homicide, by the blow or by the drowning, but leaves it uncertain by which. That would be a fit case for several counts, charging a death by a blow and a death by drowning, and perhaps a third, alleging a death by the joint results of both causes combined." In the case suggested by the learned judge it would certainly be unreasonable that the defendant should escape conviction because of difference of opinion among the jurors as to whether his victim was killed by the blow or by drowning, when all were convinced that the killing was effected by the felonious act of the defendant.

Nor is there the theoretical inconsistency between the two claims of the prosecution that has been assumed. It is not correct to say that if the offense was committed in one way it could not have been committed in the other. It is true that in the definition of the second manner in which the crime may be committed the statute reads: "Without a design to effect death." But this does not render absence of intent an essential ingredient of the offense, such as the killing or the commission of the felony, elements which the prosecution is bound to prove ¹³⁰ beyond a reasonable doubt. "Without a design to effect death" is to be interpreted as meaning regardless of whether there was a design to effect death or not. This rule applies in a certain measure to the definitions of the various grades of homicide so far as those definitions prescribe the absence of an element which, if present, would constitute a higher degree of

crime. By section 184 of the Penal Code murder in the second degree is defined to be the killing of a human being with the design to effect the death of the person killed or another, but "without deliberation and premeditation." By sections 189 and 193 the offense is manslaughter when committed "without a design to effect death." It is not necessary, however, that the prosecution should prove beyond a reasonable doubt in the first case that there was no deliberation, or in the second that there was no design to effect death. On the contrary, the rule is that where there is reasonable doubt in which of several degrees of a crime the defendant is guilty he must be convicted of the lowest degree: Code of Criminal Procedure, sec. 390. So an acquittal on the merits on an indictment for manslaughter or for murder in the second degree will bar a subsequent prosecution for murder in the first degree (Wharton on Homicide, sec. 989; Pen. Code, sec. 36), which would not be the law if a conviction under either of such indictments could not be sustained by proof establishing the higher offense.

The direct evidence, including that of the witness Harris, who, as has been said by my associate, was sufficiently corroborated, proved circumstances which clearly established that the deceased was shot by the defendant and his associates, without relying on their subsequent statements to that effect. At about half-past 1 in the morning of the homicide the deceased and the witness Warner were standing at the corner of Main and Grand streets, in the village of Cobleskill, when, as that witness testifies, they saw a party of four or six men, whom he could not identify, pass up Grand street. He then left the deceased, went to his room and was preparing for bed when he heard the sound of shooting, several shots. He went ¹²¹ to the window and heard the barking of a dog. The noise appeared to come from the store of one Borst on Main street, a short distance from the place where he had been standing with the deceased. He immediately went to this store and found the body of the deceased there and several of the villagers present. Harris testified that the defendant and his associates turned off Main street and went toward the spot where the body of the deceased was found; that a few moments afterward they returned, and that the defendant had a wound in his hand from which a bullet was proved to have been subsequently extracted, and that Hinch, another of the party, had a wound in the shoulder, from which, also, a bullet was afterward taken. A hammer which one of the party had ob-

tained from the tool chest which they had broken open was found at Borst's store a few feet from the place of the homicide and the chisels and other tools which they had taken were found in the vicinity. Quite a fusilade had occurred and bullets had entered the windows of neighboring stores. No other persons except the defendant and his associates were seen in the vicinity of the spot where the homicide occurred. After the shooting a party of several persons was observed by the witnesses running away from that place. From these facts the inference seems irresistible that the encounter in which the life of the deceased was taken occurred between him and the men who but a few moments before had gone toward the scene of the occurrence, the men whose tools were found at the spot or in its vicinity and two of whom bore evidence on their persons in the shape of bullet wounds that they had taken part in a recent affray. Indeed it is not strenuously contended that the proof did not warrant the jury in finding that the deceased was shot by the defendant or his associates. The claim is that the evidence was insufficient to establish the premeditation and deliberation necessary to constitute murder in the first degree. It seems to me that the real question in this branch of the case is rather whether the jury was justified in finding that the killing of the deceased was criminal than the degree of the crime. Though the statement of the defendant ¹²⁹ or one of his associates to the witness Harris, "that they unexpectedly met a policeman and he fired at them and then they fired at him, and didn't know whether they hit him or not," was, as I have said, unnecessary to establish the connection of the defendant with the homicide, still, as it was put in evidence by the prosecution, the defendant was entitled to have it considered by the jury. The jury, however, was not required to believe it. The jurors could accept part and reject part; they could believe that the defendants shot at the policeman and disbelieve the statement that the policeman fired first: *People v. Van Zile*, 143 N. Y. 368, 38 N. E. 380. Stated in the baldest way, but reciting its essential features, the case is this: A party of several persons start along the street to commit burglary on the postoffice; at the scene of their intended crime they meet the deceased, a police officer; an encounter takes place, shots are fired on both sides and the police officer is killed. There is no eye-witness to the occurrence except the defendants themselves who state that the police officer fired first. Now, while the defendant and his associates were crimi-

nals, or, at least, contemplating crime, he is entitled to a fair measure of justice and the law is not to be strained against him however bad may be his character. But it is impossible to disregard the errand on which he was bound in determining what actually occurred at the time of the homicide and the inferences the jury might properly draw from the occurrence. The defendant and every one of the party at the time they left Albany were armed. If a man going out at night on a lawful errand should arm himself, and thereafter an encounter take place in which he takes the life of another person, a jury might well infer in the absence of proof of malice or of the details of the occurrence that he had either taken life in self-protection or in the heat of passion arising in some altercation. But these defendants did not arm themselves to protect their persons or their property. There is no reasonable explanation of their going armed, other than that they intended to shoot any person who should obstruct the accomplishment of their crime or at least anyone who might ¹³³ seek to apprehend them or prevent their escape. Starting out on such a mission and with such intent, they meet the police officer, shots are exchanged and the latter is killed. Which is the more reasonable inference from the occurrence, that the officer of the law seeing these persons who were strangers to him, while they were peacefully walking the street, having as yet given no evidence of any intent to commit an offense, sought without excuse or justification to shoot them, or that the defendant and his associates, fearing apprehension by the officer or being interrupted by him when they were in the attempt to commit a burglary took his life in order that they might escape arrest? I think the jury was justified in adopting the latter view. If so, the deliberation and premeditation necessary to make out the crime of murder in the first degree could well be found to have commenced at Albany when the defendants started out on their predatory excursion; they had carried on the design then formed, to shoot anyone who stood in their way.

I think the evidence was also sufficient to justify the jury in finding that the defendant and his associates were engaged in an attempt to commit a felony; to wit, a burglary, when they took the life of the deceased. "An act done with an intent to commit a crime, and tending but failing to effect its commission, is an attempt to commit that crime." As observed by Mr. Wharton (Wharton on Criminal Law, sec. 2696),

mere intent is not the subject of penal action and an overt act is essential to impart to the intent criminal responsibility. The question of what overt act is sufficient to constitute an attempt to commit a crime has been the subject of much discussion by both text writers and courts, and of some conflict in the decisions. In the early English cases the view seems to have been adopted that to constitute an attempt the overt act must be the final one toward the completion of the offense and of such a character that, unless it had been interrupted, the offense itself would have been committed. The decisions in some of these cases seem to have been based on the phraseology of the particular statutes under which the indictments were ¹³⁴ framed. This extreme doctrine has not been accepted in this country, certainly not in this state. Thus, it has been held that where a prisoner put his hand into the pocket of another intending to take its contents it was an attempt to commit larceny, although there may have been nothing in the pocket to steal: *People v. Moran*, 123 N. Y. 254, 20 Am. St. Rep. 732, 25 N. E. 412; *Commonwealth v. McDonald*, 5 Cush. 365. The question in this case, however, is not as to the subject of the intended burglary, but whether the defendant and his comrade had proceeded far enough in the execution of their design for a jury to find that they were engaged in an attempt to commit the crime, there having been discovered on the building no marks of force or violence. Mr. Wharton asserts the doctrine that mere preliminary preparations in character indifferent (here they were not indifferent in character) cannot be deemed sufficient to constitute an attempt to commit the crime (section 181). This view does not seem to be fully accepted by Mr. Bishop and appears in conflict with the decision in *People v. Bush*, 4 Hill, 133, where the defendant having solicited one K. to burn a barn and having given him a match for that purpose, was held properly convicted of an attempt to commit arson, although K. never intended to burn the barn. But assuming that mere preparation is not in all cases an attempt to commit the crime, it is well settled in this country that it is not necessary to constitute an attempt that the act done should be the last proximate one for the completion of the offense. "However attempt is viewed in England, the act need not, according to the American idea, be the next preceding the one which would render such substantive crime complete": Bishop on Criminal Law, sec. 762. "The question whether an attempt to commit a crime has

been made is determinable solely by the condition of the actor's mind and his conduct in the attempted consummation of his design. So far as the thief is concerned, the felonious design and action are then as complete as though the crime could have been, or, in fact, had been, committed, and punishment of such offender is just as essential to the protection of the public, as one whose designs have been successful": ¹²⁵ *People v. Moran*, 123 N. Y. 254, 20 Am. St. Rep. 732, 25 N. E. 412. In *People v. Lawton*, 56 Barb. 126, a conviction for an attempt to commit burglary was affirmed. The evidence showed that the defendant and an accomplice agreed to commit the burglary on a certain night; that, in pursuance of such agreement, they went to the store intended to be entered, carrying burglar's tools. When they arrived there they thought that the tools were not sufficient to effect an entrance, and thereupon they started to go to a blacksmith-shop to get a crowbar. Before entering into the blacksmith-shop alarm was given and they were arrested. The case is cited with approval by Judge Ruger in *People v. Moran*, 123 N. Y. 254, 20 Am. St. Rep. 732, 25 N. E. 412. I do not see how it is possible to distinguish that case from the one before us. I do not assert that in the present case merely procuring the tools with which to commit the burglary constituted an attempt to commit it, and it may be that merely starting on the road toward the building was also insufficient to constitute an attempt. But when the defendants reached the building a different question is presented. The going to the building with the purpose of breaking into it, having procured in furtherance of that design the necessary implements, seems to me to be a sufficient overt act. It may be asked at what point of their proceedings did the acts of the defendants constitute an attempt. It is difficult, if not impossible, to lay down any general rule by which it can be determined whether acts are too remote to constitute an attempt to commit the offense. While the defendants were at a distance from the building they might have changed their minds and abandoned the design. But if the jury believed that the defendant and his associates were at the postoffice reconnoitering or inspecting it with the intent to break it open, and that they would have done so had their design not been frustrated by the presence or interference of the deceased, the police officer, then I think it could properly find that they were engaged in an attempt to commit burglary. If one, with intent to shoot another, should procure a pistol for that purpose, that alone might not amount to an attempt to

shoot him. It may be ¹³⁶ that if, after procuring the pistol, he took a conveyance to the residence of his intended victim, still that would not constitute an attempt. But if, after this, with his design unchanged, he approaches the person he intends to shoot, but is seized before he can draw the pistol, I think he is properly punished as having attempted to commit the crime. Whenever the acts of a person have gone to the extent of placing it in his power to commit the offense unless interrupted, and nothing but such interruption prevents his present commission of the offense, at least then he is guilty of an attempt to commit the offense, whatever may be the rule as to his conduct before it reached that stage. This is clearly illustrated by Judge Daniels in *People v. O'Connell*, 60 Hun, 109, 44 N. Y. Supp. 485, where the defendant was convicted of an attempt to commit assault in the first degree. There it was said: "Where the assault charged be made by means of a firearm, or any other deadly weapon, it is necessary for the creation of the crime that the person intended to be assailed shall not be so far from the intended assailant as to be beyond all possibility of injury from him. But that is not an essential circumstance in the case of an attempt. For the assailant may load a firearm and then start toward the person to be assailed in order to attain reaching distance of him, or when the assault is intended to be made with an ax, which is the weapon mentioned in the indictment, the accused may obtain and raise it, intending to strike with it, when too far away from the person intended to be struck, and then approach toward that person and be intercepted before he can reach a position of danger to him, which would be an attempt to commit the crime charged. Each act would be an attempt to commit the crime charged. For a person who provides himself with an ax with which he intends to kill another, and afterward approaches toward him to make that use of it, but is prevented from doing so by the flight of the other, or by being himself disarmed, or otherwise prevented from reaching his intended victim, commits acts tending to effect the commission of the crime within the language of this section of the code."

¹³⁷ The objection to the sufficiency of the indictment is disposed of in the opinion of Judge O'Brien. There are no other questions raised on this appeal that require discussion. The case was submitted to the jury by the learned trial judge in a charge eminently fair, in which attention was called to every rule of law which safeguards the rights of a person on trial for

his life or liberty. The jury has found the defendant guilty. I believe that verdict to be justified by the evidence, and that this court is not called upon to interfere with it.

The judgment should be affirmed.

O'Brien, J., Dissented, saying in part: The defendant was convicted of murder in the first degree upon an indictment charging him with having, on November 27, 1900, shot and killed Matthew Wilson, a policeman, with the deliberate and premeditated design to effect his death. Wilson was found dead upon the steps of a store in the village of Cobleskill, with four bullet wounds upon his body. Three of these were not serious; the fourth was sufficient to cause instant death. The indictment was framed on the theory that the defendant either feloniously fired the shot himself, or was legally responsible for the act if committed by someone else.

The people attempted to connect the defendant with the homicide by circumstantial evidence and by the testimony of an accomplice. There is very little information in the record with respect to the defendant's antecedent history, until we come to the day prior to the homicide, when he and five others were at the house of a Mrs. Peters in Albany. One of the others was a man named Harris, who was the accomplice that testified at the trial under an arrangement with the district attorney. The defendant's presence at the house was sufficiently established without the testimony of Harris, but "what these persons were doing, or why they were together on that occasion, is not made very clear by the inmates of the house. It seems that three or more of the party took meals at the house, and the woman who testified, or at least one of them, said that she heard some conversation among them about a bank, the inference sought to be drawn from this testimony being that they were consulting upon the subject of robbing some bank. The jury, we think, could have found that some or all of the party were criminals, or at least that they were about to commit some crime, the precise nature of which is not clearly disclosed by the evidence. But their subsequent movements, culminating in the death of Wilson, so far as there is any direct testimony upon the subject, must rest almost wholly upon the testimony of Harris, the accomplice.

"He tells us that he was present at the meeting in Albany; that he and two other persons boarded or took meals at the house where they were, but did not disclose the plan of action agreed upon, if any; that at about 7 o'clock in the evening of the 26th of November the whole party boarded a freight train that ran from Albany to Cobleskill, about forty-five miles distant. It appears that they rode on top of the cars as tramps, and were seen by the conductor, who did not interfere with them, so far as appears. They had bottles of whisky, which they imbibed quite freely on the journey, and the proof shows, or tends to show, that some or all of them, including

the defendant, were drunk. The train stopped some time at the first station after leaving Albany, and the party all got off, but boarded the train again when it was about to start, and it arrived at Cobleskill about 11 o'clock. Harris relates the movements of the party from that time substantially as follows: After landing they walked on the railroad to a small shanty, broke the door, went in and remained there until about 1 o'clock in the morning smoking and drinking. Then they went to a coalhouse on the railroad in process of construction. There they broke open a tool chest, from which they took some chisels and tools. Then following the railroad, they went to a section shanty and, finding it locked, broke it open and took from it an iron crowbar. Harris says that he carried the crowbar, the defendant a hatchet, and some of the others the chisels, and they proceeded to the main street of the village. According to Harris, when they all got off the train at the station, they spoke of robbing the postoffice, which was on the main street, opposite the store where the shooting occurred. Before reaching this point on the street Harris says he and another of the party separated from the rest, and he threw away the iron bar upon a grass plat, leaving the others with only a hatchet and chisels. From this point Harris says that he had no personal knowledge of what occurred until the party was again united after the shooting, but he testified that he heard the firing, and when he and his companion were joined by the rest, they, including the defendant, told him that they had suddenly and unexpectedly met the policeman, who ordered them to stop, which order they disobeyed, whereupon he commenced to fire at them and they returned the fire. He did not, as he says, see the shooting, and, of course, was unable to identify the person who fired the fatal shot.

"The testimony of Harris, the accomplice, so far as it relates to the journey of the party on the freight train, the arrival at Cobleskill, the breaking into the coalhouse and shanties, the procurement of the tools and crowbar, and the flight of the whole party across the country, their concealment in barns during the night and other incidents which he related, was corroborated by abundant proof; but his separation from his associates at the critical time and his absence from the immediate scene of the homicide, and the alleged statements or admissions made by his associates after the shooting as to the circumstances under which it took place, all rest upon his own statements. It was shown that the defendant was shot in the hand by a bullet which was subsequently extracted, and another of the party in the shoulder. The dead policeman's revolver was found near his body with five of the six chambers bearing evidence of having been recently discharged and it is conceded that he could not have used it after he had received the fatal wound.

"These are the material facts upon which the conviction must stand or fall. The case was submitted to the jury in two aspects. The jury was permitted to find that the defendant fired the fatal shot

with a deliberate and premeditated design to effect the death of the person killed, or procured, aided, counseled or advised the act which resulted in his death. The case was also submitted to the jury upon the theory that they might find from the evidence that the defendant, without deliberation or premeditation, killed the deceased, or aided or abetted in the commission of the homicide while attempting to commit a felony under the last clause of the statute. We cannot know upon which of these theories the jury based the verdict, and, therefore, the prosecution must show that the proof justified the court in submitting the case in both aspects, and that there was evidence upon which the jury could find that the homicide was committed while the defendant was engaged in an attempt to commit a felony and that the act was the result of deliberation and premeditation. The learned counsel for the defendant contends that these two theories of the case could not have been submitted to the jury upon a common law indictment, but that the facts should have been alleged in order to bring the case within that clause of the statute which declares it to be murder in the first degree to commit the homicide when the accused is engaged in the commission, or in the attempt to commit a felony. The authorities do not support this contention. The law is now settled that under an indictment in the common-law form the prosecution may prove facts to bring the case within any of the provisions of the statute defining murder in the first degree: *People v. Giblin*, 115 N. Y. 196, 21 N. E. 1062; *People v. Osmond*, 138 N. Y. 80, 33 N. E. 739; *People v. Constantino*, 153 N. Y. 24, 47 N. E. 37; *Cox v. People*, 80 N. Y. 500; *People v. Meyer*, 162 N. Y. 357, 56 N. E. 758; *People v. Willett*, 102 N. Y. 254, 6 N. E. 301; *People v. Conroy*, 97 N. Y. 62; *Keefe v. People*, 40 N. Y. 348; *Kennedy v. People*, 39 N. Y. 245; *Fitzgerrold v. People*, 37 N. Y. 413; *People v. White*, 22 Wend. 176.

"In one of the barns where defendant and his confederates were concealed during their flight from the scene of the homicide a bottle of nitroglycerin was found, which was evidently left there by the party, and the possession of this substance, with the tools and implements already described, proved, as is contended, that the party had planned and were about to commit a burglary when they came upon the deceased. This conclusion is, doubtless, supported by the evidence, and the jury could have found that the design of the party was to break into the postoffice. but, when the firing commenced, Harris, the accomplice, according to his statement, had separated from the rest and had thrown away the crowbar, their most formidable instrument for use in the commission of this intended burglary. While the parties still had the chisel and the hatchet, and so far were prepared to make the attempt to break into the building, it is certain that no overt act was committed to that end, and the question is whether the purpose and intent of the parties had yet reached such a stage of action as to constitute an attempt to commit burglary within the meaning of the statute defining murder in the first degree.

Of course, if they had entered the building, and while there, or in attempting to escape, had killed the watchman, although in self-defense, or in order to save their own lives, plainly the act would be murder in the first degree; and if there is no substantial distinction between that case and the one at bar, then it must follow that it was properly submitted to the jury. Whether the defendant and his associates were at the time of the homicide actively engaged in an attempt to commit a felony, within the meaning of the statute defining murder, is a question that seems to me not entirely free from doubt. None of the cases cited on this point by the learned counsel for the people are quite like this. Some of them, it is true, bear a close resemblance to it, while others differ widely. In none of them was the question involved with respect to what acts constitute an 'attempt to commit a felony' within the meaning of the statute defining murder: *People v. Lawton*, 56 Barb. 126; *McDermott v. People*, 5 Park. C. C. 104; *People v. Moran*, 123 N. Y. 254, 20 Am. St. Rep. 732, 25 N. E. 412; *Mackesey v. People*, 6 Park. C. C. 114; *Commonwealth v. Jacobs*, 91 Mass. 274; *Commonwealth v. McDonald*, 59 Mass. 365. The proof in this case would justify the finding that the defendant and his associates intended to commit some burglary, and that they provided themselves with tools for committing it, but whether there was any overt act to carry out the design is not so clear. But assuming that there was evidence to submit to the jury in support of the theory that the defendant killed the deceased while engaged in the attempt to commit a felony, we must also hold in order to uphold the conviction that there was evidence to support the charge that there was a deliberate and premeditated design on the part of the defendant to effect the death of the person killed. Since both theories were submitted to the jury, they must find support in the proofs, and as there was no proof to show that the defendant fired the fatal shot, it was necessary to show that the whole party was acting in concert under an agreement or conspiracy, not only to commit a felony, but to take human life if thought necessary. All we know about the circumstances immediately preceding the homicide is based upon the statement or admissions of some one in the party, testified to by Harris, the accomplice, that they came suddenly upon the policeman, who commanded them to stop, and upon the refusal to do so he commenced to fire, and the defendant's party returned the fire which resulted in the death. The question arises here whether the proof was sufficient to warrant the jury in finding that the defendant killed the deceased from a deliberate and premeditated design to effect his death. If it was not, then the case should not have been submitted to the jury under the first clause of the statute defining murder.

"The proof in the case does not show that the party had any well-defined plan in mind when they left Albany. It does show, or tend to show, that some or all of them were more or less intoxicated,

and while that does not excuse the act it bears upon the question of intent, deliberation and premeditation. It is evident enough that they were not professional, or at least skilled, burglars, since, if they were, they would not be likely to trust to the chance of procuring the necessary tools for their purpose at the place where their operations were to be carried on, or to throw away the crowbar before they had reached the building that they had designs upon. They were criminals, no doubt, of some grade or capacity, but the whole transaction from beginning to end tends to show that they were of an inferior order, without much skill, experience or ability. They were really a band of tramps, probably intoxicated, bent upon some mischief, but precisely what it was it is very difficult to gather from the proofs. Aside from the testimony of the accomplice as to the talk among themselves there is as much reason to believe that they had designs upon the bank or any other building in the vicinity as upon the postoffice. Since there is no proof in the case to identify the person who fired the fatal shot, the defendant's legal responsibility for the homicide must rest upon the fact that he was one of a party that had entered into a joint agreement, conspiracy or confederacy to take human life if necessary in aid of some common criminal design. In order to hold the defendant responsible for the acts or statements of the rest of the party or any of them the proof must come up to this standard. Passing for the present the question whether the case was properly submitted to the jury on the theory that the homicide was committed while the defendant and others were engaged in an attempt to commit a felony under such circumstances as to render any one of the party responsible for the acts or statements of the others, I do not think that the evidence was sufficient to warrant a finding that the killing of the deceased was the result of a deliberate and premeditated design on the part of the defendant to effect his death. That intent and design cannot, upon the evidence, be imputed either to the defendant personally or to any confederacy of which he was a member.

"The evidence certainly warranted the jury in finding that the defendant was present and acting with his associates, and that they were engaged in some criminal scheme that failed of execution, but resulted in the homicide. This policeman, engaged in the performance of his duty, met his death by the act of one or more of a combination of criminals, and courts ought not to be astute to relieve any of them from the punishment which the law prescribes for such a wicked act. At the same time the defendant is entitled to a fair trial and to the benefit of the rules of law applicable to criminal procedure. The difficulty with the case is that we cannot affirm the judgment without holding that the proof sustains two propositions of fact that apparently are somewhat in conflict with each other. The one is that the defendant killed the deceased with a deliberate and premeditated design to effect his death, or counseled, aided or abetted the killing with a like design. The other is that, without

any design to effect death, he killed the deceased or counseled, aided or abetted the killing while engaged in the commission of a felony. The criminal act resulting in death is different in nature and character under the two provisions of the statute, and while the people had the right to give proof under the indictment of all the facts, yet when the proof was all in it could not establish both propositions. If the proof tended to show that the deceased was killed without any design to effect death, but while the parties were engaged in an attempt to commit a felony, it necessarily excluded the theory that he was killed from a deliberate and premeditated design. It would seem to follow that the case should have been submitted to the jury on one theory or the other, and not upon both. But while conceding that both theories should have been established by proof, it is contended that both were properly submitted to the jury, since half the jury might have accepted one theory and the other half the other theory. I am unable to appreciate the force of the reasoning in support of this proposition. If it be correct, it must follow that the chances of a conviction are very much improved by the introduction of various theories in support of a single charge. If, for instance, it were possible for the prosecutor to try the case upon a dozen theories and a single juror could be induced to assent to each theory, the whole body could unite in a verdict of guilty, although no one theory could command the assent of more than a single juror. This method of procedure, with all respect, strikes me as very much like what has long been known in legislative parlance as log-rolling, the art of which consists in framing a bill with numerous separate or independent provisions, none of which would pass upon its own merits, but each of which is made attractive enough to command a certain number of votes, which, being united, are sufficient to pass the bill. The constitution contains some provisions intended to suppress this vice in legislation, but it was never supposed that it could be introduced into the jury-room and applied in a capital case. The argument in favor of it ought not to be accepted unless the reasons and authority in favor of it are clear and conclusive, and I am bound to say that in my opinion they are not.

"The case was submitted to the jury upon the theory that there was evidence to support two conflicting propositions of fact, namely, that the homicide was committed from a deliberate and premeditated design to effect the death of the person killed and that it was committed without any such design or any intent to effect death, but when the accused was engaged in an attempt to commit a felony. When a capital case is submitted to a jury upon two different theories concerning the facts, the evidence must be of such a character as to sustain both. If either theory is not supported by evidence a verdict based upon the whole case cannot be permitted to stand. Of course, a homicide may be committed by one engaged in an attempt to commit a felony, with the intent to kill and with delibera-

tion and premeditation, and then all the elements constituting murder in the first degree are established, but in this case all we know and all the jury could know concerning the circumstances of the shooting is what Harris, the accomplice, says that some one of the party admitted to him after it took place, and that was that the party, when walking in the street, came upon the policeman suddenly and unexpectedly and he commenced to fire at them and then they fired at him and the fusillade resulted in the death of the deceased. The responsibility of the whole party of six men for the death of the person killed is, upon the facts, the same as to each one of them. If this defendant is guilty of murder in the first degree, so are all the others. No intent, deliberation or premeditation can be imputed to the defendant that is not to be imputed to the whole body. The proof must show that at some appreciable space of time prior to the firing of the fatal shot the defendant and his associates, confederating together, and acting in concert, formed a deliberate and premeditated design to effect the death of the person killed, or some human being: *People v. Wilson*, 145 N. Y. 628, 40 N. E. 392. Considering all the circumstances of this case from the interview between the parties in Albany, the journey on the freight train, the arrival at Cobleskill, the condition that the party were in, the alleged separation of two of them from the rest when the crowbar was left behind, the firing when the deceased was standing on a platform in front of a store upon which it is not claimed they had any design, or intended to enter, it cannot, I think, be said that there was such proof of all these elements of murder in the first degree as to sustain the verdict. The identity of the person who fired the first shot is an important element in the determination of the question. The only direct proof on that point is to be found in the testimony of the accomplice as to the statement of the party that the policeman fired first, when they refused to stop and then they returned the fire. It is suggested that the jury could have rejected these statements as untrue, and assuming that they could, the question arises what could they have substituted in its place. Nothing except the theory which seems to me to be without any support in the proof at all, and that is that the defendant or some one in the party of which he was one fired the first shot. That proposition must be made out, if at all, by pure conjecture and speculation. Certainly no one can say that it is established beyond a reasonable doubt. What the accomplice testified to on this point is quite as reasonable and probable as anything else that he said, and to reject it without anything but inference or presumption to substitute in its place is rather an extreme principle to apply in a capital case. If the conviction must rest upon the fact that the party of which the defendant was one were engaged in an attempt to commit a felony, namely, the burglary of the postoffice, that proposition is not free from doubt. In order

to establish it within the meaning of the statute, there must be proof of something more than the intent or the possession of some of the tools, such as the chisel and hatchet, but there must be some overt act, such as an actual physical interference with the person where robbery and larceny from the person is intended, or some physical interference with the house or building when burglary is the subject: *People v. Moran*, 123 N. Y. 256, 20 Am. St. Rep. 732, 25 N. E. 412; *Mulligan v. People*, 5 Park. C. C. 105; *Cox v. People*, 80 N. Y. 511, 517; *People v. Stites*, 75 Cal. 570, 17 Pac. 693; *People v. Phelps*, 61 Hun, 115, 15 N. Y. Supp. 440.

"In this case there is proof of the intention, and proof that the party had in their possession some of the instrumentalities for the commission of burglary, even after the crowbar had been dropped out, but they had not yet arrived at the building and had made no physical attack upon it, or committed any overt act toward entering it. Aside from the fact that they were near to the building, they were practically in the same position that they were when they started from the coalhouse, or the shanty near the railroad track, On the whole it seems to me that the case is too close and doubtful to warrant us in affirming the conviction upon the record now before us. If we are to believe the accomplice, he and another of the party threw away the crowbar, the most formidable instrument that the party had to break into a building, and separated from the rest. There is no proof of any act on the part of the defendant or the others constituting an attempt to break into the postoffice. Whatever may have been said among themselves by any of the party as to their purpose or intentions, there is no proof that the deceased heard or knew anything about it. The elements that constitute murder in the first degree have to be supplied by inferences and presumptions that are scarcely permissible in a capital case. Aside from the testimony of the accomplice as to the admission by some one that the deceased commenced to fire first and that the party or some of them fired in return, there is no proof of the facts and circumstances under which the crime was committed. Whether it was preceded by the intent to kill and by deliberation and premeditation, those essential elements in the crime of murder in the first degree, is a matter of mere inference, which in this case is little better than speculation. These elements of the crime were not established beyond a reasonable doubt in my opinion, and hence there should be a new trial."

An Unintentional Homicide in the commission of a felony may amount to murder in the first degree: See the monographic note to *Johnson v. State*, 90 Am. St. Rep. 571-583. And if an indictment for murder in the first degree simply charges the offense as willful, deliberate, and premeditated evidence is admissible to show that the homicide was committed in the perpetration of a felony: *State v. King*, 24 Utah, 482, 91 Am. St. Rep. 808, 68 Pac. 418.

What Amounts to an Attempt to Commit a Crime is the subject of a monographic note to *People v. Moran*, 20 Am. St. Rep. 741-748. See, also, *State v. Lung*, 21 Nev. 209, 37 Am. St. Rep. 505, 28 Pac. 235; *People v. Gleason*, 29 Cal. 359, 37 Am. St. Rep. 56, 33 Pac. 1111; *People v. Lee Kong*, 95 Cal. 666, 29 Am. St. Rep. 165, 30 Pac. 800. An attempt has been made when the opportunity occurs, and the intending perpetrator has done some act tending to accomplish his purpose, though he is baffled by an unexpected circumstance or condition: *People v. Gardner*, 144 N. Y. 119, 43 Am. St. Rep. 741, 38 N. E. 1003.

Counts may be Joined in an Indictment to meet the various aspects in which the evidence may present itself; and, if it appear that only one criminal transaction is involved, the court need not restrict the prosecution to a particular count: *Dill v. State*, 35 Tex. Cr. Rep. 240, 60 Am. St. Rep. 37, 33 S. W. 126; *Porath v. State*, 90 Wis. 527, 48 Am. St. Rep. 954, 63 N. W. 1061; *People v. Seaman*, 107 Mich. 343, 61 Am. St. Rep. 326, 65 N. W. 303.

LIVINGSTON v. LIVINGSTON.

[173 N. Y. 377, 66 N. E. 123.]

DIVORCE—Appealable Order.—An order changing a judgment of divorce, by reducing the amount of alimony, is appealable. (p. 601.)

CONSTITUTIONAL LAW—Impairing Contract.—A Judgment is not a contract in the ordinary sense of an agreement reached between persons, and it is in that sense that the word is used in the federal constitution. (p. 603.)

CONSTITUTIONAL LAW—Vested Right.—A Judgment for Alimony, as a vested interest, is property, of which the legislature cannot divest the plaintiff by a subsequent statute authorizing the courts to annul or modify such judgments upon the application of either party. (p. 604.)

J. Van Vechten Olcott, for the appellant.

Benjamin Steinhardt, for the respondent.

379 GRAY, J. This was an application by the defendant for an order modifying and varying the direction as to alimony contained in a judgment which had dissolved the marriage of the parties. The application was granted and an order was made changing the provisions of the judgment of divorce, by reducing the amount of alimony ordered to be paid by the defendant to the plaintiff from four thousand dollars to three thousand dollars a year. This order was reversed by the appellate division, and the motion for the modification of the judgment was denied; whereupon the defendant appealed to this court.

Within the authority of *Wetmore v. Wetmore*, 162 N. Y. 503, 56 N. E. 997, the order is appealable and this court has jurisdiction to review the determination of the appellate division. The appeal presents a question of law as to the validity of chapter 742 of the Laws of 1900, in so far as it has amended section 1759 of the Code of Civil Procedure by permitting the court, upon the application of either party to an action, in which a final judgment has been granted dissolving the marriage of the parties and requiring "the defendant to provide suitably for the education and maintenance of the children of the marriage, and for the support of plaintiff, . . . at any time after final judgment, whether heretofore or hereafter rendered," to annul, vary or modify such a direction. The amendment was in making the statute apply to judgments theretofore rendered. It was decided below that such legislation violated the constitutional provision that no person shall ³⁸⁰ be deprived of property without due process of law (Const., art. 1, sec. 6), in the attempt to confer a power upon the court to annul, or vary, valid and final judgments theretofore rendered.

The judgment divorcing these parties was rendered in 1892; it decreed the custody of their children to the wife, who was plaintiff in the action, and it ordered the defendant to pay her, during her lifetime, the sum of four thousand dollars a year, in equal monthly payments in advance, for her support and that of the children. No appeal from the decree was prosecuted by the defendant, and it contained no provision reserving to the court the right thereafter to alter it; nor did the statute, then in force, confer any such power, although it existed where the action was for a separation: Code Civ. Proc., sec. 1771.

What jurisdiction the courts of this state acquired to entertain actions of divorce was conferred wholly, by statute and their powers are confined to such as are expressed, or as may be incidental to the exercise of the jurisdiction conferred: *Walker v. Walker*, 155 N. Y. 77, 49 N. E. 663. Concededly, prior to this amendment, the jurisdiction of the court terminated with the final judgment in divorce actions, and there was neither inherent power in, nor authority conferred by the code upon, the court to modify the judgment: *Kamp v. Kamp*, 59 N. Y. 220; *Erkenbrach v. Erkenbrach*, 96 N. Y. 456. In *Walker v. Walker*, 155 N. Y. 77, 49 N. E. 663, the order increased the amount of alimony awarded by a final judgment of divorce, which was lacking in any provision reserving the power to change it, and the discussion in this case related to the eff.

fect of the section of the code, at that time (1897), in permitting the court, after a final judgment, to annul, vary, or modify it, in its direction for the payment of alimony. The argument was that the statute was remedial and, therefore, should be given a liberal and retroactive effect, and, while the denial of the contention was placed upon the ground that nothing indicated a legislative intent to affect judgments already entered, Judge Martin, in his opinion, added the significant remark that "if the doctrine ³⁸¹ contended for was sustained, it would apply to the reduction of alimony in judgments existing when the amendments were adopted, as well as to its increase. If such an effect was given to them, their constitutionality might well be doubted, as they might affect the vested rights of a party."

The argument now made is that the provision for alimony "does not constitute a vested right belonging to the wife"; because, as I understand the contention, alimony, being incidental to the granting of a divorce, is within the discretionary power of the court to vary, according to the altered circumstances of the parties, and is but the wife's "mere potential expectant right" to the particular payments as they become due. It seems to me that, in such an argument, sight is utterly lost of the nature of a decree awarding alimony, or of the right, which accrues to the wife, as the result of an adjudication by the court, when, in divorcing the parties from their respective marital obligations, it fixes the alimony to be paid by the husband. The marriage relation has been terminated by the decree. The wife has no future rights, and the husband is under no future obligations, such as are founded upon, or spring out of, the marriage relation. Judge Finch observed in *Matter of Ensign*, 103 N. Y. 284, 57 Am. Rep. 717, 8 N. E. 544, that, "the court is authorized to give by its decree, in the form of an allowance, a just and adequate substitute for the right of the innocent wife, which the decree cuts off and forbids in the future." By the decree, in this action, the obligation, before resting upon the husband for the support and education of the children and for the support of his wife, was changed. It, thereafter, was made to rest upon the wife and the decree adjudged that the husband should pay to her a certain fixed sum of money in a certain manner, in lieu of his previous obligation. The judgment defined and created a new obligation on his part, and as the amendment of the statute necessarily affected the wife's right to compel exact performance and bore upon the obligation, to her possible injury, it was obnoxious to the constitutional prohibi-

tion. It would be absurd to call it remedial as affecting merely a ³⁸² remedy upon the decree. Even then, it would violate a substantial right of the plaintiff. It was, however, in fact, the impairment of, or interference with, a vested right conferred by a final judgment. The plaintiff's protection in the enjoyment of her right under the decree is not, necessarily, referable to the prohibition in the federal constitution against the impairment of the obligations of contracts. It is not at all necessary, for the plaintiff's purposes, that the judgment of divorce should be deemed a contract. A judgment is not a contract, in the ordinary sense of an agreement reached between persons, to whose terms their mutual assent has been given, and it is in that sense that the word is used in the federal constitution: *Louisiana v. Mayor of New Orleans*, 109 U. S. 285, 3 Sup. Ct. Rep. 211. A judgment creates an obligation of the highest nature known to the law, and it is enforceable against the judgment debtor, as upon his promise to perform it; but that promise is only implied by law. The obligation is imposed; it is not assumed voluntarily. But a final judgment creates and vests substantial rights, and, if the statute were allowed this retroactive effect, a new stipulation would be imported into it, in effect, that the defendant's obligation might be changed upon showing subsequently occurring facts.

In *Louisiana v. Mayor of New Orleans*, 109 U. S. 285, 3 Sup. Ct. Rep. 211, where it was held that a judgment of damages recovered for a tort was not a contract in the constitutional sense, Mr. Justice Bradley, in his opinion, takes occasion to say of it, that "it is founded upon an absolute right and is as much an article of property as anything else that a party owns, and the legislature can no more violate it, without due process of law, than it can other property." In *Gilman v. Tucker*, 128 N. Y. 190, 26 Am. St. Rep. 464, 28 N. E. 1040, Chief Judge Ruger, delivering the opinion of this court, said: "We must bear in mind that a judgment has here been rendered and the rights flowing from it have passed beyond the legislative power, either directly or indirectly, to reach or destroy. After adjudication the fruits of the judgment become rights of property. These rights became vested by the action of the court and were thereby placed beyond the ³⁸³ reach of legislative power to affect." So fixed and so inviolate are the rights secured by a judgment that any legislation which attempts to deprive a party of their absolute enjoyment must be condemned. It has been quite recently held, in accordance with a line of authorities, that legislation

conferring a right to appeal from a judgment, which, according to existing law, had become final, was violative of section 6 of article 1 of the state constitution, as depriving a party of his property in a vested right conferred by the judgment: *Germania Sav. Bank v. Village of Suspension Bridge*, 159 N. Y. 362, 54 N. E. 33; and see *Burch v. Newbury*, 10 N. Y. 374. It is the peculiar privilege enjoyed by the citizens of this country that the legislative body is not above the law and that its powers are prescribed and limited by a written constitution. Their lawful contracts are beyond legislative interference, and they may not be deprived of their vested rights without due process of law. They are secure against an arbitrary exercise of governmental power, which is unrestrained by the established principles of private rights. The judgment in this case, in determining that, for cause, the marriage should be dissolved, also determined with equal finality that the defendant, while released from the general duty, or liability, which he had been under, should pay a fixed sum during the plaintiff's life. Can it reasonably be doubted that a right was vested in the plaintiff to the receipt of the annual sums, which the judgment adjudged the defendant should pay? As Judge Cullen well expressed it, in his dissenting opinion at the appellate division, in *Walker v. Walker*, 21 App. Div. 226, 47 N. Y. Supp. 518, "the plaintiff, prior to the decree, had a right of support; by her divorce she lost that right, and in substitution for it acquired a new right, a judgment requiring the payment to her of a specific sum of money." That right, as a vested interest, is property, which the legislature is powerless to divest her of. If the interest is, as it is claimed, an expectant one, in the sense that the obligation of the defendant was a continuing one to pay alimony in the future, nevertheless, the interest was one fixed by the judgment and was not a mere contingency. ³²⁴ It was not a capacity to acquire a right to the payment of money; it was a right fixed by the judgment, and hence vested in the plaintiff. I think enough has been said, in connection with the careful and elaborate opinion of Mr. Justice Ingraham, at the appellate division, to warrant me in advising the affirmance of the order appealed from, with costs.

O'Brien, J., Dissented. The substance of his opinion is here given. The statute in question "reads as follows: 'The court may, in the final judgment dissolving the marriage, require the defendant to provide suitably for the education and maintenance of the children of the marriage, and for the support of the plaintiff, as justice re-

quires, having regard to the circumstances of the respective parties; and may, by order, upon the application of either party to the action, and after due notice to the other, to be given in such manner as the court shall prescribe, at any time after final judgment, whether heretofore or hereafter rendered, annul, vary or modify such a direction. But no such applications shall be made by a defendant unless leave to make the same shall have been previously granted by the court by order made upon or without notice as the court in its discretion may deem proper, after presentation to the court of satisfactory proof that justice requires that such an application should be entertained.' The precise question is whether the legislature has the power to authorize the courts to review and readjust provisions in a judgment for divorce, entered prior to the amendment, concerning the amount of alimony when it appears that the circumstances and financial condition of the parties have changed so that the wants of the wife are less and the ability of the husband to pay has been reduced from twelve thousand dollars to a little over four thousand dollars. The plaintiff has remarried and has a husband able and willing to support her, and the defendant remarried in another state and now has his second wife and four children to support in the city of New York. . . .

"We have before us the case of a woman who is entitled to be supported by two husbands and a man who is bound to support two wives, and it has been solemnly decided that there is no power in any department of the government under which the parties live, nor in all of its departments together, to change, mitigate or modify this situation in the slightest particular."

There are only two constitutional provisions that can apply to the case. The first is that part of the federal constitution which forbids any law impairing the obligation of contracts. "The mind is at once set upon the inquiry to find out what contract had been impaired in this case, who the parties are that made it, and how it is evidenced. Of course, there can be no contract without parties, and if any contract was made at all it must have been made between the plaintiff and the defendant, and the only evidence of it is the provision in the decree of divorce whereby it is said the defendant contracted to pay to the plaintiff four thousand dollars annually during her life. That, of course, is nothing but a pure fiction. The parties certainly did enter into a contract of marriage with each other, and while that is admitted to be the most important and binding of all contracts, no one ever claimed that the legislature or the court violated any provision of the constitution in dissolving it. The contention is that the court, in dissolving the marriage with one breath, in the next created a new contract which is indissoluble, and that is the obligation of the defendant to pay to the plaintiff a reasonable sum out of his estate, and that sum was found to be at that time four thousand dollars a year. Alimony is the support which the court decrees in favor of the wife as a

substitute for the common-law right of marital support. No one denies the power to deprive the wife of that common-law right for any fault on her part that the legislature may judge to be sufficient, but it seems that the substitute under the decree is more sacred and unchangeable than the original right which she acquired by the marriage, since the latter may be affected by legislation, while the former cannot be": Citing and reviewing *O'Brien v. Young*, 95 N. Y. 428, 47 Am. Rep. 64; *Remington Paper Co. v. O'Dougherty*, 32 Hun, 255, affirmed in 96 N. Y. 666; *Gutta Percha etc. Mfg. Co. v. Mayor of Houston*, 108 N. Y. 276, 2 Am. St. Rep. 412, 15 N. E. 402; *Louisiana v. Mayor of New Orleans*, 109 U. S. 285, 3 Sup. Ct. Rep. 211; *Chase v. Curtis*, 113 U. S. 464, 5 Sup. Ct. Rep. 554; *Maynard v. Hill*, 125 U. S. 195, 8 Sup. Ct. Rep. 723; *Hunt v. Hunt*, 131 U. S., Appendix, 165. Dismissing the contention that the provision for alimony was a contract, Judge O'Brien continued:

"The only other conceivable ground that the statute in question can be assailed as violative of the constitution must be that it deprives the plaintiff of her property without due process of law. That contention implies that this incidental provision in a judgment of divorce which the law and the courts might grant or deny at pleasure is property. It cannot be sold or transferred or bequeathed by will or pass to next of kin in case of intestacy. It has no more of the attributes of property than the common-law right to marital support, for which it is an imperfect substitute. It must be apparent that from the general nature and character of alimony and its limitations that it is taken out of the general law of property. It is a creation of equity, and a statute that empowers courts of equity to administer it or reduce or modify it as to amount or other wise as changed conditions and circumstances may require in order to do equity between the parties, violates none of the guaranties of the constitution for the protection of property. Will it be contended for a moment that a woman who has procured a divorce with a large allowance of alimony and who thereafter conducts herself morally so as to become a public scandal, has secured such a property right in the allowance that no power on earth can modify it, simply because the decree was entered prior to the enactment of the statute in question? Has she acquired such an absolute right to the allowance that the husband must keep on paying it, although he has lost all his property and the judgment virtually sends him to the poorhouse? To argue that there is no human power capable of mitigating or modifying such a situation is to my mind a most astonishing proposition, and yet it is the logical result of the plaintiff's contention in this case. It is true that no one charges the plaintiff with even the slightest impropriety, but it is quite conceivable that such a case may arise, and it is mentioned here only to test an argument that seems to me to be infected with a fundamental error. The truth is that neither a marriage nor a judgment of

divorce or any of its incidents is property within the meaning of the constitution: Bishop on Marriage, Divorce, and Separation, secs. 1430, 1434. Nothing would seem to be more reasonable than the proposition that the state, which once exercised the power to grant divorces, with or without alimony, by special acts, a power which it could again resume, has still power enough left to enact the section of the code referred to as it now stands. It may take the property of the citizen by the taxing power to any extent. It may surround him with police regulations by day and by night that restrict his liberty and affect his property, but it seems, from the argument of the learned counsel for the plaintiff, that there is one thing that the state cannot touch, even to promote justice, and that is a woman's alimony when the judgment is more than three years old. It has been often held that the courts have inherent power to open judgments and grant new trials for newly discovered evidence, and this is done long after the judgment has been entered and even after it had been affirmed in this court and become final. The limit of time within which this may be done is a matter that rests in the discretion of the court. It has never been held or seriously suggested that the exercise of this power invaded any constitutional immunity or disturbed any vested right, and yet it is a much broader power than that expressly conferred upon the court by the statute in question since the latter permits the court only to modify the judgment with respect to the alimony and then only upon new facts and conditions arising subsequent to the entry of the judgment. It is, I think, quite safe to say that it has never been held that a provision in a judgment of divorce granting alimony was either a contract or property within the meaning of the constitution."

Parker, C. J., Martin and Cullen, JJ., concur with Gray, J.; Haight and Vann, JJ., concur with O'Brien, J.

Alimony.—On the authority of courts to modify decrees of alimony, see *Reinhard v. Reinhard*, 96 Wis. 555, 65 Am. St. Rep. 66, 71 N. W. 803; *Bassett v. Bassett*, 99 Wis. 344, 67 Am. St. Rep. 863, 74 N. W. 780; *Howell v. Howell*, 104 Cal. 45, 43 Am. St. Rep. 70, 37 Pac. 770; *Cole v. Cole*, 142 Ill. 19, 34 Am. St. Rep. 56, 31 N. E. 109; *Stillman v. Stillman*, 99 Ill. 196, 39 Am. Rep. 21; *Bauman v. Bauman*, 18 Ark. 320, 68 Am. Dec. 171.

Contracts, within the meaning of the constitutional provision prohibiting the impairment of contracts, are voluntary agreements of minds upon sufficient consideration to do or not to do certain things: *Ladd v. Portland*, 32 Or. 271, 67 Am. St. Rep. 526, 51 Pac. 654. A judgment is not a contract in the sense of any engagement of the parties with each other: *Anglo-American Prov. Co. v. Davis Prov. Co.*, 169 N. Y. 506, 88 Am. St. Rep. 608, 62 N. E. 587.

GATES v. DUDGEON.

[173 N. Y. 426, 66 N. E. 116.]

EXECUTOR'S DELEGATION OF POWER under a Will.—An executor or trustee, to whom a power has been given by a will, may not delegate his judgment and discretion in the execution of the power, but having exercised his judgment and discretion, he may delegate the performance of his determination. (p. 609.)

CONTRACT BY LETTER for Sale of Land.—Where an attorney of the purchaser of real estate, at the latter's request, writes to the trustee of the property, offering to take it at the price fixed by him at previous interviews with the purchaser, and pay cash upon delivery of the trustee's deed, without warranty, title to be taken in the name of an agent, which letter the attorney for the trustee answers at his request, stating that the property is held by adverse possession only, but that if the purchaser is satisfied with the title he will make the usual trustee's deed without warranty, to which letter the attorney of the purchaser replies that those terms the purchaser wishes him to accept, and that, assuming the consideration, as to which the letter was silent, is the same as previously named, the terms as to it are accepted on behalf of the purchaser, the contract is complete, and cannot be revoked by a subsequent letter of the trustee. (p. 614.)

David C. Bennett, Jr., for the appellant.

Daniel P. Hays and Ralph Wolf, for the respondent.

HAIGHT, J. The order of reversal does not state that the reversal was upon the facts. We must, therefore, assume that the facts as found by the trial court remain undisturbed and that the reversal was upon the law: Code Civ. Proc., sec. 1338.

This action was brought to compel the specific performance of a contract for the sale of real estate. The trial court has found as facts that Messrs. Hays, Greenbaum & Hershfield were the duly authorized attorneys for the defendant and that the defendant authorized his said attorneys to execute a contract for the sale of the property in question. It was further found as a fact that the said attorneys, on behalf of the defendant, "promised and agreed to sell to the plaintiff, the said real property described in the complaint herein for the sum of three thousand dollars, and, in consideration of the said promise by the said defendant, the said plaintiff promised and agreed to purchase the said premises at the said sum of three thousand dollars. And it was mutually promised and agreed by and between the said plaintiff and the said defendant that the deed for said premises should be delivered and possession of the said premises be given by the said defendant and the consideration paid by

the said plaintiff as soon as the arrangements could be made thereto by the attorneys for the respective parties." It was further found as a fact that, after the making of the above-mentioned contract, the defendant gave notice to the plaintiff that he would not fulfill said agreement and would not deliver the deed nor the possession of the premises. The court found, as conclusions of law, that the agreement set forth constitutes a good and valid contract for the purchase and sale of the real property described in the complaint; that there was a note or memorandum of the contract in writing expressing the consideration, subscribed by the lawfully authorized agent of the grantor, sufficient to prevent the contract from being void under the provisions of section 234 of the Real Property Law, or any other similar provision of law, and that there was a breach of the contract on the part of the defendant. Judgment was directed in favor of the plaintiff for the specific performance of the contract.

429 It is now contended on behalf of the respondent that the order of reversal should be sustained, for the reason that the defendant, who was contracting as the executor under a power given by the will of Richard Dudgeon, deceased, could not delegate the personal trust and confidence imposed upon him by the testator, and that, therefore, the contract made by his attorneys was void. The case relied upon to sustain his contention is that of *Newton v. Bronson*, 13 N. Y. 587, 593, 67 Am. Dec. 89. The rule, doubtless, is correctly stated by Denio, chief judge, in that case. An executor or trustee, to whom a power has been given by a will, may not delegate his judgment and discretion in the execution of the power, but having exercised the judgment and discretion with which he has been invested, we know of no authority which prohibits him from delegating to others the performance of his determination in regard thereto. The power of executors and trustees to delegate to this extent seems to be sanctioned by Chief Judge Denio in the case alluded to. In the discussion of this question he says: "It is urged by the defendant's counsel that the contract of sale is void, for the reason that it was made by an agent of the defendant, according to the maxim '*Delegatus non potest delegare*.'" The rule of law, no doubt, is that a power of this kind is a personal trust and confidence, which cannot be committed to any other than the grantee or donee of the power: *Berger v. Duff*, 4 Johns. Ch. 369. Besides this difficulty the defendant, in his

answer, denies that the agents who executed in his name the contract which the plaintiff seeks to enforce, had any authority in fact from him to execute it, and the plaintiff has failed to show any power of attorney or other express authority from him to them. The last objection is fully overcome by the ample and repeated acts of acknowledgment and ratification by the defendant of the contract in question in writing as well as by parol. The evidence upon this point was quite sufficient to enable the court to decide that the agents were authorized by parol to execute the contract and the parol authority under our statute and under the statute of Illinois, which is identical ⁴³⁰ in its provisions, would be sufficient. The contract must be in writing, but where it is signed by an agent, the power to execute may be by parol," citing numerous authorities. Again he says: "The reason of the maxim 'Delegatus non potest delegare,' however, is that in the case to which it applies the first constituent is a right to the personal judgment, care and skill of his agent. . . . In determining upon one or the other course he brought into exercise those personal qualifications on account of which he is presumed to have been selected by the testator. The law does not allow him to commit the power with which he is intrusted to another, for, perhaps, that other would bind the estate to a transaction which the former might not have considered advantageous and safe if he had acted directly upon it. The reason fails where the person actually intrusted with the authority has with the full knowledge of the facts ratified the act of one who assumed to act as his agent." It would seem, therefore, that if the executor or trustee, with full knowledge of the facts, should ratify the act of his agent or of the person acting for him as agent, he could in the first instance after exercising his own judgment and discretion upon the proposed contract authorize an agent to carry it into execution. That is precisely what was done in this case. The plaintiff, through his attorney, under date of May 3, 1901, addressed a letter to the defendant, in which he offered to purchase the property in question for a sum specified. The defendant concedes that he received that letter and that he took it to his attorney and told him that his title rested on adverse possession, and on being advised by his attorney that he should ascertain whether the proposed purchaser would take that kind of a title, he left the letter with his attorney, directing him to make answer thereto. Other evidence was produced on behalf of the plaintiff tending to show that the defendant had himself exercised his own judgment in determining the amount for which the premises should

be sold, and that he had authorized his attorneys, Messrs. Hays, Greenbaum & Hershfield, to close the transaction. We, therefore, conclude that the power delegated to his attorneys did not ⁴³¹ involve his judgment and discretion and that, therefore, the contract entered into by them for him was valid.

It is further contended on behalf of the respondent that there was no valid contract entered into by him or his attorneys to sell the property described in the complaint. There was no formal written contract. What there is of the transaction is disclosed by the letters that passed between the parties. The first of these letters, as we have seen bears date May 3, 1901, and was written by Mr. Tappan, the attorney for the plaintiff, and is addressed to Mr. Dudgeon, the defendant. From it it appears that the plaintiff and defendant had had previous oral conversations with reference to the purchase of this property. In it he says:

"Mr. Charles O. Gates has asked me to write you and say that he accepts your terms for the sale of the meadow and beach property which you hold as trustee, west of Peacock lane and east of the Jacob property, or in other words, without going into a full description, the premises which you and he have been talking about for the past few months. I understand and Mr. Gates understands that your terms are three thousand dollars, cash on delivery of deed; said deed to be a usual trustee's deed without warranty. We shall take the deed quite soon, but if you would like to have us sign a regular contract in regular form, we shall be glad to do so. Mr. Gates wishes the title to be held temporarily for him by someone in this office, and when the deed is made it may as well be made out to Edward R. Finch, whose residence is New York city.

"Very truly yours,

(Signed) "J. B. C. TAPPAN."

This letter was, as we have already seen, received by the defendant and taken to his attorneys to be answered, and they answered as follows:

"New York, May 4, 1901.

"J. B. Coles Tappan, Esq., No. 51 Wall St., New York City.

"Dear Sir: Your letter of the 3d inst., addressed to our client, Mr. William M. Dudgeon, has been handed to us for reply. The salt meadow and beach property at Peacock's Point, L. I., referred to in your letter, forms a part of the estate of Richard Dudgeon, deceased, and Mr. William M. Dudgeon, as the executor and trustee of this estate, is desirous ⁴³² of disposing of

this property. We have not examined the title to the property in question, but understand that it rests on adverse possession and that there is no documentary title to it. We therefore beg to suggest that you look into the title, and if your client is satisfied to take it, Mr. Dudgeon is ready to give him the usual trustee's deed, without warranty. Kindly let us hear from you as soon as possible, and oblige,

"Very truly yours,

"HAYS, GREENBAUM & HERSHFIELD."

Thereupon the plaintiff's attorney answered under date of May 6, 1901:

"Gentlemen: I have your letter of May 4th in reference to the Dudgeon meadow and beach at Peacock's Point, Long Island. Your letter states the matter just as Mr. Gates and I understand it, and the terms therein stated are the terms which Mr. Gates wished me to accept on his behalf. Your suggestion as to my looking into the title is also accepted. Your omission to state the consideration, three thousand dollars, was, I presume, an inadvertence, and assuming this to be the case, the terms as to consideration also are accepted on behalf of my client. I assume that you will have no objection to Mr. Gates designating some person other than himself to take title in the first instance, as stated in my letter to Mr. Dudgeon.

"Very truly yours,

(Signed) "J. B. C. TAPPAN."

No answer was made to this letter until May 13th, 1901, at which time Hays, Greenbaum & Hershfield addressed a letter to Mr. Tappan as follows: "Your letter of the 6th inst. in reference to the Dudgeon meadow and beach at Peacock's Point, received. We shall be pleased to have you confer with our Mr. Hershfield on the subject generally, at your convenience."

Thereupon and under date of May 23, 1901, Mr. Tappan inclosed a form of deed with the following letter:

"H. Hershfield, Esq., 141 Broadway, New York.

"Dear Sir: I inclose for your examination a draft of the proposed deed from Mr. William M. Dudgeon to Mr. Gates' representative, which I have drawn as I am familiar with the description and locality of the premises.

"Very truly yours,

(Signed) "J. B. C. TAPPAN."

And underneath the signature the following: "I think you may find my draft useful in ⁴³³ some way. We can close any time on short notice. J. B. C. T." Here the matter appears to have rested until the 3d day of June, at which time the plaintiff himself wrote the following letter to the defendant:

"Lawyers are, as we well know, proverbially slow, and it does seem quite impossible for me to get any reply to my letter of May 23d, accepting your proposition regarding the sale of the three-acre piece of beach at Glen Cove. I am quite sure if you knew how much this delay hinders me in carrying out some plans you would see to it that the proper papers were signed at once. I should be pleased to see you if necessary and go over the matter, though I suppose everything is practically settled excepting the mere formal part of it. If you think it well to talk it over, I shall be glad to make an appointment with you any day by telephone to this office, where I am most of the day. I trust that the sickness in your family has all departed and that you and your good wife are quite recovered from the anxiety incident upon such serious illness. With kind regards to Mrs. Dudgeon and yourself, I am

"Very sincerely yours,
(Signed) "C. O. GATES."

To this the defendant answered, under date of June 4, 1901:

"Your letter of the 3d inst. is at hand. After a full consideration of the matter, I have come to the conclusion not to sell the property for some time to come. You will appreciate the fact that I am acting in the matter in a representative capacity, having but a fractional interest of my own therein, and that I have not the sole voice therefore.

"I trust you have not been greatly inconvenienced by any delay in obtaining this, my final answer.

"Our little one is well on the road to recovery, and Mrs. Dudgeon joins me in thanking you for kind inquiries, and with our best wishes I am

"Yours very truly,
(Signed) "WM. M. DUDGEON."

"Mr. C. O. Gates, 100 William Street, New York."

The trial court has found that these letters constituted a complete and valid contract. The learned appellate division appears to have reached a different conclusion. It is undoubtedly true that the courts must take into considera-

tion ⁴³⁴ all of the correspondence upon the subject in determining the question as to whether the minds of the parties had met upon the essential terms of the contract. The first letter of the plaintiff, under date of May 3, 1901, contains a specific offer on the part of the plaintiff to pay three thousand dollars cash on the delivery of a deed of the property without warranty. It expresses the wish of the plaintiff to take the title in the name of one Edward R. Finch. The answer of the defendant, through his attorneys, calls attention to the title of the property, and then concludes to the effect that if Mr. Gates is satisfied to take such a title, "Mr. Dudgeon is ready to give him the usual trustee deed without warranty." This letter was written in answer to that of the plaintiff. No objection is made to the expressed wish of Mr. Gates that the title be taken in the name of Finch. If, therefore, this was an essential feature of the contract, we think that the defendant acquiesced in the request. It is true that the purchase price was not mentioned in this letter. It was, however, stated in the preceding letter, and the answer indicates that if the plaintiff is willing to accept such a title as the defendant has to convey, the defendant is willing to give it to him, and we think the letter clearly implies for the consideration named in the previous letter. The question, however, at this point was left open, as to whether the plaintiff was willing to accept the title and to this he, through his attorney, replies on May 6th, that "Your letter states the matter just as Mr. Gates and I understand it, and the terms therein stated are the terms which Mr. Gates wished me to accept on his behalf." Here we have a full acceptance of the terms on behalf of the plaintiff, and it appears to us that it concluded a complete contract in all of its essential details, and from that time became binding upon the parties. We have looked into the correspondence which followed, but find nothing that indicates that the minds of the parties had not met upon the propositions under consideration at the time that the letter of May 6th was sent until the final letter of the defendant under date of June 4th, in which he declines to sell or convey ⁴³⁵ the property, and, therefore, are of the opinion that the conclusions reached by the trial court were correct.

The order of the appellate division should be reversed, and judgment of the trial court affirmed, with costs to the plaintiff in this court and the appellate division.

Parker, C. J., Bartlett, Martin, Vann, Cullen and Werner, JJ., concur.

Order reversed, etc.

WHEN A TRUSTEE MAY ACT BY HIS AGENT.**I. In Matters Involving Discretion.****II. In the Performance of Ministerial Duties.****III. In the Ordinary Course of Business.****IV. Ratification of Agent's Acts.**

I. In Matters Involving Discretion.—The office and duties of a trustee, being matters of personal trust and confidence, cannot be delegated to another, unless authority therefor is expressly conferred in the instrument creating the trust: *Skipwith v. Robinson*, 24 Miss. 688; *Wodrop v. Weed*, 154 Pa. St. 307, 35 Am. St. Rep. 832, 26 Atl. 375; *Fuller v. O'Neill*, 69 Tex. 349, 5 Am. St. Rep. 59, 6 S. W. 181; notes to *May v. Frazee*, 14 Am. Dec. 170-172; *Tyler v. Herring*, 19 Am. St. Rep. 276-278. A trustee in a deed of trust cannot delegate his power, and a sale made by one to whom he has attempted to delegate it is void: *North American Trust Co. v. Chappell*, 70 Ark. 507, 69 S. W. 546. And an executor cannot delegate to an agent a discretionary power to sell property: *Neal v. Patten*, 47 Ga. 73; *Atkinson v. Central Georgia etc. Co.*, 58 Ga. 227; *Newton v. Bronson*, 13 N. Y. 587, 67 Am. Dec. 89.

While a trustee cannot delegate his judgment and discretion in the execution of his authority, he may, having exercised the judgment and discretion with which he has been invested, commit the performance of his determination to others. After exercising his judgment and discretion upon a proposed transaction, he may authorize an agent to carry it into execution. The judgment and discretion must be his, although in accomplishing what his judgment has approved he may call others to his aid: See the principal case, ante, p. 608; note to *Tyler v. Herring*, 19 Am. St. Rep. 276, 277.

II. In the Performance of Ministerial Duties.—The performance of ministerial duties may be committed by a trustee to another. Thus, the mere mechanical acts connected with making a sale, such as advertising, posting notices, receiving bids, and acting as auctioneer, may be performed by agents of the trustee: *Gibson's Case*, 1 Bland (Md.) 138, 17 Am. Dec. 257; *Swan v. Smith*, 58 Miss. 877; notes to *Tyler v. Herring*, 19 Am. St. Rep. 277; *Houston v. National etc. Loan Assn.*, 92 Am. St. Rep. 595, 596.

III. In the Ordinary Course of Business.—A trustee may employ brokers and agents in cases where they are employed in the ordinary course of business. When he does so, he is not answerable for losses, though he is bound to act with the prudence that men of business ordinarily exercise in conducting their own affairs: Note to *Seawell v. Greenway*, 75 Am. Dec. 801, 802.

IV. Ratification of Agent's Acts.—It seems, according to some authorities, that a trustee may ratify the acts of his agent by subsequently executing conveyances or otherwise, although in the first instance he had no right to delegate their performance: *Singleton*

v. Scott, 11 Iowa, 589; Newton v. Bronson, 13 N. Y. 587, 67 Am. Dec. 89; Parker v. Banks, 79 N. C. 480. Compare the note to Tyler v. Herring, 19 Am. St. Rep. 277. In the New York case, the contract held to be validated by ratification was a contract for the sale of lands made by one assuming to act for an executor. Commenting on this decision, Justice Denman, in Terrell v. McCown, 91 Tex. 231, 43 S. W. 2, says: "We think it inaccurate to characterize the subsequent approval of the terms of the contract by the executor as a ratification, for it is a mere exercise by him of discretionary powers which he could not delegate. So, in the case before us, if the executor, after Tarver executed the deed or deeds, upon being fully informed of all the facts, approved of the terms of the sale or sales, such approval was not, accurately speaking, a ratification of the act of execution of the deed or deeds, but was a performance by him of the discretionary acts necessary, in addition to the execution of the deed by Tarver, to a complete execution of the power of sale conferred by the will."

SCHLERETH v. SCHLERETH.

[173 N. Y. 444, 66 N. E. 130.]

PERPETUITIES.—A Will of personal and real property, working an equitable conversion of the latter, and directing the executor to pay the income of the estate to the daughter of the testator for life and after her death to her issue until the youngest attains the age of twenty-one, then to divide the estate among the issue, but in case none of such issue reaches such age, to distribute the estate among certain other persons, is void, save as to the provision for the daughter, because it creates a suspension of the absolute ownership of personal property for more than two lives in being at the testator's death. (p. 620.)

Anthony B. Porter and John B. Pannes, for the appellants.

Isaac Moss, David B. Luckey, and John J. Schwartz, for the respondents.

⁴⁴⁷ **MARTIN, J.** This action was to procure a construction of certain portions of the will of Peter Fuchs, deceased. He died December 29, 1898, leaving no widow, but leaving a daughter, the plaintiff in this action, who is his only next of kin and heir at law.

The testator's estate consisted of both real and personal property. After bequeathing certain specific personal property to the plaintiff, the rest and residue of the personal, and all his

real, property was given by his will to his executors and trustees, in trust, to sell and dispose of the residuary estate, real and personal, retaining as investments such as may consist of mortgages, and after the payment of his debts to hold the proceeds derived from such sale and the mortgages retained, in trust, for the following purposes:

1. (VI) To pay the income thereof to the plaintiff during her life;

2. (VII) After her death leaving issue, to pay over said income to such issue in equal shares until the youngest of such issue shall have attained the age of twenty-one years, and then to divide and distribute the whole trust fund so held among such issue in equal shares, each share and share alike;

3. (VIII) In case the plaintiff dies without leaving issue, ⁴⁴⁸ to pay over the whole trust fund to the children of his brother in law and sister, share and share alike;

4. (IX) In case the plaintiff dies leaving issue, but none should reach the age of twenty-one years, to divide and distribute the whole trust fund among the children of his said brother in law and sister.

After the testator's death all the real property, except one lot was sold, and the proceeds thereof became a part of the trust fund. The defendant, Lydia Mathilda Schlereth, is a daughter of the plaintiff and her only living issue. She was born in lawful wedlock on the thirteenth day of February, 1899, was *en ventre sa mere* at the death of the testator, and is now an infant about four years of age. The testator's will was duly admitted to probate on the twenty-sixth day of January, 1899. The United States Trust Company, Max F. Keller and the plaintiff were named as executors and trustees therein, but the plaintiff alone qualified and was and still is the sole acting executrix and trustee. She was married November 17, 1895, to Dr. William Schlereth, by whom she had three children: Irene, born April 16, 1897, and died September 16, 1898; Edgar, born February 3, 1901, and died August 24, 1901, and Lydia Mathilda, born February 13, 1899, and who is still living.

On the trial the plaintiff contended that the trust attempted to be created by the testator's will, with the exception of that contained in the sixth clause, was illegal and void because it created a suspension of the absolute ownership of the testator's personal property for more than two lives in being at his death; that a valid trust was created for the life of the plaintiff, but otherwise he died intestate, and that the property of the testa-

tor vested at his death in the plaintiff as his sole heir at law and next of kin, subject only to the trust for her life. From this claim the defendant, Lydia Mathilda, did not dissent. The other defendants, however, insist that the trust for the issue of the plaintiff with a contingent remainder for themselves was valid, and also that the latter was valid even though the former was void.

⁴⁴⁹ The trial court held that the testator died intestate as to all his estate except as to the trust for the life of the plaintiff, and that she, as sole heir and next of kin, was entitled to the absolute ownership of all his property, subject only to the trust for her life. The defendants, other than the defendant, Lydia Mathilda, appealed to the appellate division, where the judgment was affirmed. They then appealed to this court.

Upon the argument it was conceded by the defendant Lydia Mathilda that the seventh, eighth and ninth clauses of the will are invalid. The appellants, however, without denying that the seventh and ninth clauses are invalid, contend that in any event the eighth is valid, as it is not dependent upon any invalid clause in the will, or in itself repugnant to the statute, and, hence, that it should be retained and read with the sixth clause, which is concededly valid.

It is practically admitted by all parties that the will under consideration worked an equitable conversion of the testator's real property into personalty. Such is the obvious effect of the provisions of the will, and hence it is to be construed by the rules applicable to wills of personal property. Although the defendant, Lydia Mathilda, is to be regarded as in being at the death of the testator, it makes no difference in the determination of the question whether there was an illegal suspension of absolute ownership or as to the validity of the seventh, eighth and ninth provisions of the will.

The seventh clause provides that after the death of the plaintiff leaving issue the trustees are to pay over the income to such issue, share and share alike, until the youngest shall have attained the age of twenty-one years, and then they are to divide the whole estate among such issue in equal shares. From this provision it is obvious that the testator intended to make a future and not a present gift. There are no words of gift therein except by a direction to the trustees to pay or divide at a future time. That under such circumstances the vesting in the beneficiaries will not take place or the future executory limitations

take effect until such future time arrives, ⁴⁵⁰ is fully established by the decisions of this court: Warner v. Durant, 76 N. Y. 133, 136; Smith v. Edwards, 88 N. Y. 92, 103; Delaney v. McCormack, 88 N. Y. 174, 183; Delafield v. Shipman, 103 N. Y. 463, 467, 9 N. E. 184; Shipman v. Rollins, 98 N. Y. 311; Matter of Crane, 164 N. Y. 71, 58 N. E. 47.

Thus it is obvious that the income and corpus of the estate was, by the testator, intended to be applied and divided among the persons answering the description contained in the seventh clause of the will at the time when such application or division was to be made. As the gift was not a present one, but in the future, it is not to be ranked with those where the payment or division only is deferred, but is one where time is of the essence of the gift. The income being payable over in equal shares to the issue of the plaintiff surviving her until the youngest should have attained the age of twenty-one years, and then the corpus of the estate being divisible between them, manifestly the purpose of the testator was not only to provide for the child of the plaintiff then en ventre sa mere, but also to provide for any and all of her children that should be living at the time of her death. Thus the time during which the absolute ownership of the estate was to be suspended was not measured by two lives in being at the death of the testator, but by the life of the plaintiff, and then by the majority of the youngest child that should have been born to her and living at the time of her death. If this provision of the will is to be thus interpreted, then plainly absolute ownership might be suspended during the life or majority of a person not in being at the death of the testator, and is clearly in contravention of the statute.

That such was the purpose of the testator is obvious from the provisions of the seventh clause, as the trust fund was not to be divided until the youngest of the issue left by the plaintiff at her death attained the age of twenty-one years. Until that time it was not only to remain undivided, but it was likewise impossible to determine between whom the division was to be made, or in whom he intended the title to vest. Moreover, that the time when it was to be determined between ⁴⁵¹ whom the trust estate was to be divided was, when such youngest child should attain its majority, is rendered more manifest by the ninth clause, which provides that if none of her issue should reach that age the property should be divided between the defendants other than Lydia Mathilda. Therefore, before it could be determined to whom the corpus was to pass, the youngest, and,

consequently, all of the plaintiff's children must have attained their majority unless they had previously died. If the will be not thus interpreted, upon the death of Lydia Mathilda and the subsequent death of the plaintiff, leaving other children who have not attained their majority, the absolute ownership would be suspended during their minority or until their death, and this would be true as to each, though there were several. Therefore, when we consider the whole will, the only conclusion that seems permissible is that it was the intent of the testator that the absolute ownership of the trust fund should not vest during the minority of the youngest child that should be born to the plaintiff during her wedlock, and, consequently, was in contravention of the statute relating to the subject.

Section 2 of the personal property law (Laws 1897, c. 417), declares: "The absolute ownership of personal property shall not be suspended by any limitation or condition for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition; or, if such instrument be a will, for not more than two lives in being at the death of the testator; in other respects limitations of future or contingent interests in personal property are subject to the rules prescribed in relation to future estates in real property." The real property law (Laws 1896, c. 547), relating to future estates, provides: "Where a remainder shall be limited to take effect on the death of any person without heirs, or heirs of his body, or without issue, the words 'heirs' or 'issue' shall be construed to mean heirs or issue living at the death of the person named as ancestor": Sec. 38. If the provisions contained in section two of the personal property law are subject to the ~~488~~ rule prescribed by section 38 in relation to future estates in real property, it would seem that the issue referred to in the seventh clause of the will should be interpreted to mean the issue of the plaintiff living at her death. Moreover, the decisions of this court seem to be to the same effect. In *Matter of Baer*, 147 N. Y. 348, 354, 41 N. E. 702, this court held that, where final division and distribution is to be made among a class, the benefits of the will must be confined to those persons who come within the appropriate category at the date when the distribution is directed to be made: *Bisson v. West Shore R. R. Co.*, 143 N. Y. 125, 38 N. E. 104; *Goebel v. Wolf*, 113 N. Y. 405, 411, 10 Am. St. Rep. 464, 21 N. E. 388; *Teed v. Morton*, 60 N. Y. 502, 506; *Matter of Smith*, 131 N. Y. 239, 247, 27 Am.

St. Rep. 586, 30 N. E. 130. In the Baer case the court said: "While this rule is sometimes made to yield to indications of a contrary intent in the will, yet it may be said to be a general rule": *McGillis v. McGillis*, 154 N. Y. 532, 49 N. E. 145; *Clark v. Cammann*, 160 N. Y. 315, 54 N. E. 709; *Rudd v. Cornell*, 171 N. Y. 114, 122, 66 N. E. 823; *Matter of Crane*, 164 N. Y. 71, 58 N. E. 47.

Thus far we have considered this question independently of the decisions in *Greenland v. Waddell*, 116 N. Y. 234, 244, 15 Am. St. Rep. 400, 22 N. E. 367, and *Adams v. Berger*, 18 N. Y. Supp. 33, upon which the courts below relied and based their decision in the case at bar. In *Greenland v. Waddell*, 116 N. Y. 234, 15 Am. St. Rep. 400, 22 N. E. 367, one B. died seised of the premises in question, leaving her surviving a brother and two sisters, S. and A., her only heirs at law, and leaving a will by which she gave her entire estate, real and personal, to her executors in trust, with power and directions to sell and distribute the proceeds to her brother and sister S., each one-third, the income of the other one-third to be paid to A. during the joint lives of herself and husband. If she survived him she was to take the corpus of the fund; if she died before him leaving lawful issue, the income to be paid for their benefit until the youngest should reach the age of twenty-one years, and then the principal to be paid to them; in case of the death of A. without leaving issue, or if all of said issue died before reaching the age of twenty-one, the fund to go to the brother and S. At the time of the death of the testatrix ⁴⁵³ A. had no children living. It was held that by the will there was an equitable conversion of the real estate into personalty; that the provision therein as to the children of A. was void, being in contravention of the statute forbidding the suspension of the absolute ownership of personal property for more than two lives in being, and that the testatrix died intestate as to that part of her estate. In discussing that case, Bradley, J., said: "At the time of the death of the testatrix Mrs. Bush had no children living, and she never has had any. But assuming that she does not survive her husband, and that on her death, she leaves children surviving her under the age of twenty-one years, the inquiry arises whether the limitation over to them is valid, and that depends upon the determination of the further question whether the absolute ownership would then vest in such children. If it would there would be no unlawful suspension. Otherwise it is difficult to see how the provision

made for them by the will can be supported. The will does not in terms give the fund to the children, but directs the executors, in the events mentioned, to pay it to them. The postponement of the time of payment of a gift is not important, that alone will not qualify the absolute character of the ownership. The vesting of it is suspended if some period in the future is annexed to the substance of the gift. In the present case the conditions upon which the right of the children to take the fund depend are to or may arise in the future, beyond the time of the death of the mother, and the contingency is uncertain. The children must reach the age of twenty-one years, and if they do not, the fact that the direction is that the fund go to Mr. Boerum and Mrs. Vandever is not consistent with the vesting of the absolute ownership in the children on the death of their mother. It is, therefore, clear that, in the case supposed and which may arise if Mrs. Bush should leave children her surviving, the observance of the direction of the will will operate to suspend the absolute ownership of the fund for some period of time after her death: *Batford v. Kebbell*, 3 Ves. 363; *Patterson v. Ellis*, 11 Wend. 259; *Warner v. Durant*, 76 N. Y. 133; ⁴⁵⁴ *Delaney v. McCormack*, 88 N. Y. 174, 183. Such suspension being for a time not dependent upon lives and not more than two in being at the time of the death of the testatrix renders the limitation over void unless it is saved by some provision of the statute. We find none in its support. While the suspension of the absolute power of alienation of real estate may be extended beyond two lives limited so as to embrace the period of minority of a child to whom the remainder is limited, and such suspension may be created by a contingent limitation of the fee, our attention is called to no statute qualifying in that or any manner the effect of the provision before referred to limiting the time of suspension of the absolute ownership of personal property. The consequence seems to be that the direction of the testatrix by her will to pay the fund to such children in the event mentioned or on their failure to arrive at the age of majority to pay it to Mr. Boerum and Mrs. Vandever was in contravention of the statute and void: *Manice v. Manice*, 43 N. Y. 303; *Woodgate v. Fleet*, 64 N. Y. 566, 572; *Beardsley v. Hotchkiss*, 96 N. Y. 201. The case of *Adams v. Berger*, 18 N. Y. Supp. 33, is to the same effect.

Thus, we see that the *Greenland* case was in all essential respects identical with the case at bar. As it seems to have

never been questioned or disapproved, but to have been in principle sustained by many other cases, I think it is decisive of this case, that the decisions of the courts below were correct and should be affirmed, with costs to all parties payable out of the trust fund.

Parker, C. J., Bartlett, Haight, Vann and Werner, JJ., concur.

Gray, J., absent.

Judgment affirmed.

The Rule Against Perpetuities is the subject of a monographic note to *In re Wakerley*, 49 Am. St. Rep. 117-138. See, also, the recent cases of *Blakeman v. Miller*, 136 Cal. 138, 89 Am. St. Rep. 120, 68 Pac. 587; *Missionary Soc. v. Humphreys*, 91 Md. 131, 80 Am. St. Rep. 432, 46 Atl. 320; *Gates v. Seibert*, 157 Mo. 254, 80 Am. St. Rep. 625, 57 S. W. 1065; *Eldred v. Meek*, 183 Ill. 26, 75 Am. St. Rep. 86, 55 N. E. 536.

GILBERT v. FINCH.

[178 N. Y. 455, 66 N. E. 133.]

DIRECTORS OF CORPORATION—Waste of Funds.—Directors of an insurance company, who use its funds to purchase the interest of the incorporators of another company, the latter having no interest that the purchasing company could buy, and the thing accomplished being the resignation of the officers of the second company and the substitution of the directors of the first, are joint tort-feasors, and liable for wasting the corporate funds. (p. 625.)

SUBROGATION.—Among Wrongdoers, equity will not enforce subrogation. (p. 626.)

JOINT TORT-FEASORS—Release of One.—If a release of one or more joint tort-feasors contains no reservation, it operates to discharge all; but if the instrument expressly reserves the right to pursue the others, it is not technically a release, but a covenant not to sue, and they are not discharged. (p. 630.)

Michael H. Cardozo and George Wilcox, for the appellants.

Henry D. Hotchkiss, for the respondent.

458 HAIGHT, J. This action was brought by the plaintiff, as receiver of the Commercial Alliance Insurance Company, against the defendants, as directors of that company, to recover the sum of ten thousand dollars and interest.

The Commercial Alliance Insurance Company was incorporated under the laws of this state and continued in business until October, 1894, when the plaintiff was appointed receiver ⁴⁵⁹ in an action brought for that purpose by the attorney general of the state. The evidence taken upon the trial tends to show that prior to the bringing of the action by the attorney general the defendants, and other persons beyond the jurisdiction of the court, were acting as directors of the company, and that they entered into negotiations with the ten surviving incorporators of the Maine and New Brunswick Insurance Company, a corporation organized under the laws of the state of Maine, for the purchase and control of that company; that such negotiations were finally consummated on the third day of May, 1893, by the president of the Commercial Alliance Company who, acting in pursuance of the direction of the defendants and their associates, took from the funds of the company thirty-five thousand dollars and paid the same to the ten surviving incorporators of the Maine and New Brunswick Company, giving to each the sum of three thousand five hundred dollars, and taking from them a paper in which they purported to transfer and assign "all their right, title and interest as corporators, associates or otherwise in said Maine and New Brunswick Insurance Company." Simultaneously with the execution and delivery of this paper and in pursuance of that agreement, all of the officers and directors of the Maine company resigned their places and the same were filled by the defendants or persons acting for or on their behalf. Shortly thereafter, and on the twenty-second day of July, 1893, the Maine and New Brunswick Company was judicially declared by the supreme judicial court of Maine to be insolvent and a receiver was appointed to wind up its affairs. After the plaintiff was appointed receiver of the Commercial Alliance Company he brought an action against the ten surviving incorporators of the Maine and New Brunswick Company in the United States circuit court for the district of Maine to recover back the thirty-five thousand dollars which had been paid to them under the direction of the defendants. Subsequently, this action was compromised under the direction of the court, the plaintiff receiving from such surviving incorporators the sum of twenty-five thousand dollars, and he ⁴⁶⁰ thereupon executed and delivered to them an instrument in which he released and discharged all of the defendants in that action "from all claims or demands arising from said suit or the subject matter thereof,

and also from all claims, demands, actions and causes of action whatsoever in favor of said Commercial Alliance Insurance Company or of myself as receiver of said company to date. The execution of this instrument shall not affect any cause of action of the receiver against any person not named herein." It also appeared upon the trial that the defendant Miller had brought an action against the Commercial Alliance Company prior to the appointment of the plaintiff as receiver, in which he claimed that a large sum of money was due and owing to him from the company. This action was settled upon the payment to him of the sum of eight thousand dollars, and thereupon mutual releases were exchanged between him and the company upon the consideration expressed therein of one dollar.

We fully concur in the conclusions reached by the appellate division, to the effect that the transaction by which thirty-five thousand dollars were taken from the treasury of the Commercial Alliance Company and paid over to the incorporators of the Maine and New Brunswick Company was ultra vires and constituted a waste of the funds of the Commercial company, and that the defendants, who authorized such appropriation of the moneys, became liable to respond to the plaintiff in damages. We also are of opinion that the appellate division properly disposed of the claim of the defendant Miller under his release.

There is but one question upon which we deem further discussion necessary. That arises out of the release given by the plaintiff to the Maine incorporators upon the settlement of the action against them for twenty-five thousand dollars. It is contended by the defendants in the first place that, if they are required to return to the plaintiff the thirty-five thousand dollars which they paid or caused to be paid to the Maine incorporators, they would become in equity entitled to subrogation to the rights of the plaintiff and entitled to recover the ⁴⁶¹ money which they had paid to the Maine incorporators and that the release would operate to deprive them of this right. In the second place, they contend that the release was a settlement of the entire claim and that its effect was to discharge them upon the theory that they were joint tort-feasors.

It is not our purpose to question the character or the motive of the defendants in carrying out the transaction. We may readily concede that they thought they were acting for the best interests of the company which they represented. They,

doubtless, thought that by getting control of the Maine company and getting themselves installed as officers they could get the policy-holders in that company to transfer their insurance into the Commercial Alliance Company; but good motives and good intentions do not render the transaction valid or relieve them from liability for the wrong which they have committed. The Maine incorporation was not a stock company. Its officers had no stock in the company which they could sell or transfer, and consequently there was nothing that the Commercial Alliance Company could purchase. The thing accomplished by the transaction was the resignation of the officers of the Maine company and the substitution of the defendants or their representatives. It was, therefore, a misappropriation of the moneys of the Commercial Alliance Company by the defendants and their associates which operated to waste the funds of the company and they thereby became wrongdoers, and among themselves joint tort-feasors. We are also of the opinion that the officers of the Maine company also committed a wrong. If they, as officers of the Maine company, could transfer any of the property of that company to the Commercial Alliance Company they had no right, as such officers, to divide up the thirty-five thousand dollars among themselves and put it into their own pockets. If they had no property rights which they could transfer to the Commercial Alliance Company then they had no right to take the money of that company and convert it to their own use, so that, as among themselves, they were joint tort-feasors. As to whether they were joint ⁴⁶² tort-feasors with the defendants we do not deem it necessary to now determine, for it is our purpose to consider the question in both aspects.

If the defendants had paid the Maine incorporators thirty-five thousand dollars of their own money to resign their position in that company and have the defendants substituted in their places, we are aware of no equitable or legal principle upon which they could recover the money. They got what they purchased. They understood fully what the Maine officers had to transfer. In using the money of the Commercial Alliance Company they committed, as we have seen, a wrong upon that company, and our attention has been called to no case in which equity has enforced the right of subrogation in such a case. Indeed, we had supposed the policy of the law to be to leave wrongdoers without aid in equity from the burdens of the position in which they have placed themselves. The

rule is well settled that, as among themselves, equity would not compel contribution or enforce subrogation: *Peck v. Ellis*, 2 Johns. Ch. 131; *Miller v. Fenton*, 11 Paige, 18; *Thorp v. Amos*, 1 Sand. Ch. 26, 34; *Pierson v. Thompson*, 1 Edw. Ch. 212, 218; *Wehle v. Haviland*, 42 How. Pr. 399, 410; *North v. Sergeant*, 33 Barb. 350, 354; *Weidman v. Sibley*, 16 App. Div. 616, 619, 44 N. Y. Supp. 1057. We, consequently, conclude that the principles of subrogation do not apply to the defendants in this case.

In considering the effect of the release we shall assume that the defendants were joint tort-feasors with the Maine incorporators, and that the release, under seal, of a claim given to one joint tort-feasor operates as a release of all: *Barrett v. Third Ave. R. R. Co.*, 45 N. Y. 628, 635, and cases there cited. This rule is founded upon the theory that a party is entitled to but one satisfaction for the injury sustained by him. The claim of the plaintiff, as we have seen, was for thirty-five thousand dollars; the settlement was for twenty-five thousand dollars, leaving ten thousand dollars of the original claim unpaid and unsatisfied. The instrument given to the Maine incorporators upon the settlement of the plaintiff's ⁴⁶³ suit against them released and discharged them from all further claims or demands, so far as the plaintiff was concerned, but it was expressly provided in the instrument that it should not affect any cause of action on behalf of the receiver against any other person. The purpose of this reservation is very evident. The receiver, doubtless, intended to pursue the defendants for the balance of the claim. The instrument, therefore, does not purport, neither was it intended, to be a full and complete settlement of the plaintiff's entire claim. Reservations of this character in releases are not uncommon, and their effect has been the subject of frequent adjudication by the courts. It is quite true that the courts of our sister states have reached different conclusions upon the question, and that a sharp conflict exists in the courts of our own state, as, for instance, *Matthews v. Chicopee Mfg. Co.*, 3 Rob. (N. Y.) 712, *Commercial Nat. Bank v. Taylor*, 64 Hun, 499, 19 N. Y. Supp. 533, on one side, and *Mitchell v. Allen*, 25 Hun, 543, *Delong v. Curtis*, 35 Hun, 94, and *Brogan v. Hanan*, 55 App. Div. 92, 66 N. Y. Supp. 917, upon the other side.

In England the modern authorities appear to be quite uniform upon the question. They are to the effect that, as between

joint debtors and joint tort-feasors, a release given to one releases all; but if the instrument contains a reservation of a right to sue the other joint debtor or tort-feasors, it is not a release, but in effect is a covenant not to sue the person released, and a covenant not to sue does not release a joint debtor or a joint tort-feasor.

In the case of *Duck v. Mayeu* (1892), L. R. 2 Q. B. 511, the question was as to whether the plaintiff had released a joint tort-feasor. He had accepted from one a sum of money, but without prejudice to his claim against the other. Smith, L. J., in delivering the opinion of the court, said with reference thereto: "In determining whether the document be a release or a covenant not to sue, the intention of the parties was to be carried out, and, if it were clear that the right against a joint debtor was intended to be preserved, inasmuch as such right would not be preserved if the document were ⁴⁶⁴ held to be a release, the proper construction, where this was sought to be done, was that it was a covenant not to sue, and not a release. In the case of *Bateson v. Gosling*, at nisi prius, the same canon of construction was applied, and it was held that, the release being, as it was, limited by a proviso reserving rights against the surety, it must be taken that it was a covenant not to sue, and not a release; and this ruling was unanimously upheld by the court of common pleas, as reported in L. R. 7 C. P. 9."

In *Price v. Barker*, 4 El. & B. 760, Coleridge, J., says: "With regard to the first question, two modes of construction are for consideration. One, that, according to the earlier authorities, the primary intention of releasing the debt is to be carried out, and the subsequent provision for reserving remedies against co-obligors and co-contractors should be rejected as inconsistent with the intention to release and destroy the debt evinced by the general words of the release, and as something which the law will not allow, as being repugnant to such release and extinguishment of the debt. The other that, according to the modern authorities, we are to mould and limit the general words of the release by construing it to be a covenant not to sue, and thereby allow the parties to carry out the whole of their intentions by preserving the rights against parties jointly liable. We quite agree with the doctrine laid down by Lord Denman in *Nicholson v. Revill*, 4 Ad. & E. 675, as explained by Baron Parke in *Kearsley v. Cole*, 16 Mees. & W.

136, that, if the deed is taken to operate as a release, the right against a party jointly liable cannot be preserved; and we think that we are bound by modern authorities (see *Solly v. Forbes*, 2 Brod. & B. 38; *Thompson v. Lack*, 3 Com. B. 540, and *Payler v. Homersham*, 4 Maule & S. 423) to carry out the whole intention of the parties as far as possible, by holding the present to be a covenant not to sue, and not a release": See, also, *Currey v. Armitage*, 6 Week. Rep. (Eng.) 516.

In the case of *McCrillis v. Hawes*, 38 Me. 566, one Lewis ⁴⁶³ and the defendant were charged as joint trespassers upon the plaintiff's premises. They had taken one hundred sticks of pine timber. The plaintiff settled with Lewis for one-half of the property taken and brought action against the defendant for the other half. It was held that the action could be maintained and that the settlement was not a release as to the whole claim.

In the case of *Ellis v. Esson*, 50 Wis. 138, 36 Am. Rep. 830, 6 N. W. 518, it was held that the instrument given to one of several joint wrongdoers is not a technical release if it appears from the paper that it was not the intention of the injured person to release his cause of action against all the wrongdoers and that the sum received was not in fact a full compensation for his injury nor intended to be such by the parties to the agreement.

In *Sloan v. Herrick*, 49 Vt. 327, it was held that the release of one joint tort-feasor on payment of part satisfaction, when it is expressed in the release that the sum paid is received only in part satisfaction, will not operate to bar the injured party from pursuing the other joint tort-feasor for so much of the tort as remains unsatisfied.

We have thus called attention to the English authorities and those of some of our sister states. We have also referred to some of the conflicting cases in our own courts. The question appears to have first received attention here in *Kirby v. Taylor*, 6 Johns. Ch. 250, 253, in which it was held that a release is to be construed according to the clear intention of the parties, and where it contains a reservation, the other obligee was not discharged.

In the case of *Irvine v. Millbank*, 56 N. Y. 635, more fully reported in 15 Abb. Pr., N. S., 378, the release was, by its terms, to be without prejudice to the rights of the plaintiff as against the other defendants. Folger, J., in delivering the opinion of the court, said that this instrument was not a

technical release, which it must be to operate as a discharge of a joint tort-feasor.

And finally, in the case of *Whittemore v. Judd Linseed etc. Oil Co.*, 124 N. Y. 565, 21 Am. St. Rep. 708, 27 N. E. 244, the question was examined ⁴⁶⁶ by Brown, J., and the conclusion reached that where a release of one of two joint debtors contains an express provision that it shall not affect or impair the claim of the creditor against the other debtor, the latter is not discharged.

It thus appears that the decisions of this court are in accord with the English rule and in harmony with our statute in reference to joint debtors: Code Civ. Proc., secs. 1942, 1944. They give force and effect to the intention of the parties to the instrument, which, we think, is more just and the wiser and safer rule. Where the release contains no reservation it operates to discharge all the joint tort-feasors; but where the instrument expressly reserves the right to pursue the others it is not technically a release but a covenant not to sue, and they are not discharged. It follows that the release, so called, did not operate to discharge the defendants.

The order of the appellate division should be affirmed and judgment absolute ordered in favor of the plaintiff upon the stipulation, with costs.

Parker, C. J., Gray, Bartlett, Cullen and Werner, JJ., concur.

O'Brien, J., absent.

Order affirmed.

The Effect of the Consolidation of corporations is the subject of a monographic note to Morrison v. American Snuff Co., 89 Am. St. Rep. 604-655.

The Effect of the Release of one joint tort-feasor on the liability of the others is the subject of a monographic note to Abb v. Northern Pac. Ry. Co., 92 Am. St. Rep. 872-888.

Subrogation is an equitable, not a legal, right: *Makeel v. Hotchkiss*, 190 Ill. 311, 83 Am. St. Rep. 131, 60 N. E. 524; *Sands v. Durham*, 99 Va. 263, 86 Am. St. Rep. 884, 38 S. E. 145. It is not applied to relieve one of the consequences of his own wrongful or illegal act: *Boe v. Kiser*, 62 Ark. 92, 54 Am. St. Rep. 288, 34 S. W. 534.

STARBUCK v. STARBUCK.

[173 N. Y. 503, 66 N. E. 193.]

DIVORCE—Estoppel to Attack.—A decree of divorce obtained by a wife in Massachusetts in an action against her husband in New York, in which he was personally served with the papers, but did not appear or submit to the jurisdiction of the court, is competent evidence as tending to defeat her claim that she is his widow, and entitled to dower in real estate acquired after the decree, since, having invoked the jurisdiction of the Massachusetts court and submitted thereto, she cannot question the validity of its decree. (p. 632.)

JUDGMENT.—A Party Cannot be Heard to Impeach a judgment which he himself has procured to be entered in his own favor. (p. 633.)

Artemas H. Holmes and William N. Dykman, for the appellants.

Robert D. Benedict and James Emerson Carpenter, for the respondent.

⁵⁰⁵ **HAIGHT, J.** This action was brought by the plaintiff as the widow of William H. Starbuck, deceased, to recover dower in the real estate of which he died seised.

The decedent and the plaintiff were married in the commonwealth of Massachusetts on the fourteenth day of October, 1857, he being a resident of this state where he continued to reside until his death, which occurred on the twenty-ninth day of March, 1896. In the year 1868 the plaintiff left her husband's residence and returned to her parents' home in Massachusetts, taking her daughter with her, where she resided until after his death. She then removed to this state and brought this action. Upon the trial the defendants offered in ⁵⁰⁶ evidence an exemplified record of a decree of divorce obtained by the plaintiff from her husband in the state of Massachusetts on the fourth day of May, 1874, upon the ground of extreme cruelty. The papers in that action were served upon the decedent personally in this state, but he did not appear in the action either personally or by attorney and did not submit himself to the jurisdiction of the Massachusetts court. This decree was excluded from evidence upon the objection of the plaintiff's attorney, and exceptions were taken to such exclusion by the defendants. After the divorce Starbuck contracted a marriage with the defendant, Matilda Eliza Starbuck, in the

state of Pennsylvania, and the minor defendants are children of that union. The real estate in which the plaintiff seeks to recover dower is all situated in this state, and was acquired by Starbuck after the divorce.

We are of the opinion that the Massachusetts decree was competent and that the defendants had the right to have it received in evidence. True, the plaintiff could not avail herself of a void decree, which she had procured to be entered, any more than she could of her own declarations, but it is different with the defendants. They have the right to avail themselves of the declarations, acts and decrees obtained by their opponent, and the principle is well established that, where a party has procured a judgment or decree to be entered, submitting himself to the jurisdiction of the court, he cannot thereafter be heard to question the jurisdiction of the court which entered the judgment or decree. The decree, therefore, if it had been received in evidence, would have operated to defeat her claim that she is now the widow of the decedent and entitled to dower in the real estate acquired by him after the decree. We have recently had under consideration a similar question in *Matter of Swales*, 60 App. Div. 599, 70 N. Y. Supp. 220, affirmed upon the opinion of the appellate division: 172 N. Y. 651, 65 N. E. 1122. In that case Mary E. Swales petitioned the surrogate's court for letters of administration upon the estate of William H. Swales, deceased, claiming to be his widow. It appeared that they were married on the third day of May, 1869, ⁵⁰⁷ at Sodus, in this state, and that in December, 1873, they separated; that in the year 1883 the petitioner obtained a decree of divorce from him in the state of Illinois, which purported to dissolve the marriage between the parties upon grounds which are not recognized by the laws of this state as sufficient for that purpose. The summons or process by which the action was commenced was served by publication only, and the decedent did not appear in the action either in person or by counsel. After obtaining the divorce, the petitioner married one David Trobridge, with whom she has since cohabited and resided in this state, and by whom she has a daughter. After the death of Swales she petitioned for letters of administration, as we have seen, claiming to be his widow. In that case *Adams, P. J.*, in delivering the opinion of the court, says: "We think the case justifies the application of a principle which is, that where a party has

invoked the jurisdiction of any court and submitted himself thereto, he cannot thereafter be heard to question such jurisdiction."

In *Matter of Morrison*, 52 Hun, 102, 5 N. Y. Supp. 90, the decedent's personal estate was claimed by the legal representatives of her deceased husband, Henry Feyh. He had previously obtained a divorce from her in the state of Ohio while she was domiciled in this state. It was claimed on behalf of the personal representatives of Henry Feyh that the decree of the Ohio court was void in this state. It was held that they were not entitled to the estate. Van Brunt, P. J., in delivering the opinion of the court, said: "Henry Feyh, having invoked the jurisdiction of the court of Ohio and submitted himself thereto, cannot now be heard to question such jurisdiction. And the claimants here occupy precisely the same position that Feyh would have occupied had he been living. This position does not rest upon the doctrine of estoppel, as such term is ordinarily used, but upon a principle which has been repeatedly recognized by the courts, that where a party has gone into a court and invoked its jurisdiction he cannot subsequently attack the decree of the court obtained at his ⁵⁰⁸ instance because of the want of jurisdiction of somebody else." This decision was affirmed in this court: *In re Morrison*, 117 N. Y. 638, 22 N. E. 1130. See, also, *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. Rep. 132; *Coddington v. Coddington*, 10 Abb. Pr. 450; *Kirrigan v. Kirrigan*, 15 N. J. Eq. 146; *Hunter v. Hunter*, 111 Cal. 261, 52 Am. St. Rep. 180, 43 Pac. 756; *Hewitt v. Northrup*, 75 N. Y. 506; *Matter of Ellis' Estate*, 55 Minn. 401, 43 Am. St. Rep. 514, 56 N. W. 1056; *Ellis v. White*, 61 Iowa, 644, 17 N. W. 28; and *Van Koughnet v. Dennie*, 68 Hun, 179, 22 N. Y. Supp. 823.

There are a number of cases in which the courts of this state have refused to recognize the validity of divorces obtained in other states upon grounds insufficient for that purpose in this state when the defendant resided here and was not personally served with process and did not appear in the action: *Matter of Kimball*, 155 N. Y. 62, 49 N. E. 331; *Williams v. Williams*, 130 N. Y. 193, 27 Am. St. Rep. 517, 29 N. E. 98; *de Meli v. de Meli*, 120 N. Y. 485, 17 Am. St. Rep. 652, 24 N. E. 996; *Cross v. Cross*, 108 N. Y. 628, 15 N. E. 333; *O'Dea v. O'Dea*, 101 N. Y. 23, 4 N. E. 110. But in none of

these cases did the party procuring the decree seek a benefit by having it held invalid. A party cannot avail himself of a defense or of a right to recover by means of an invalid decree or judgment obtained by him; but, on the other hand, he may not be heard to impeach a decree or judgment which he himself has procured to be entered in his own favor.

We think the case under consideration cannot be distinguished from that of Swales or Morrison. It is true that in the Swales case the petitioner was seeking administration instead of dower, but if she was the widow of the decedent she had a statutory right to administer the estate and the plaintiff in her action for dower has no greater right. In the Swales case the petitioner after procuring her decree of divorce had remarried. In this case the plaintiff procured her divorce, but did not remarry; but it does not appear to us that this distinction affects the legal proposition involved.

It is said in the Swales case that the action of the plaintiff in procuring the decree of divorce in Illinois does not constitute an estoppel within the ordinary acceptation of that term; for the reason that it did not influence the decedent to do anything ⁵⁰⁹ which he could not otherwise have done. That may be true in that case; and yet in other cases the decree may influence parties to do that which they otherwise would not have done. The statute of the state of Massachusetts, upon certain conditions, permits both parties to marry again. If Starbuck had gone to that state and had contracted a marriage with a woman there, who acted upon the faith of the decree that the plaintiff had obtained, it may be that a question of estoppel would have been presented: *Moore v. Hegeman*, 92 N. Y. 521, 44 Am. Rep. 408. But we do not deem it necessary to determine that question at this time. We prefer to rest our decision upon the principle that the plaintiff, having invoked the jurisdiction of the Massachusetts court and submitted herself thereto, cannot now be heard to question the validity of its decree.

The judgment of the appellate division and that of the trial court should be reversed and the plaintiff's complaint dismissed with costs.

Parker, C. J., Gray, Bartlett, Cullen and Werner, JJ., concur.

O'Brien, J., absent.

Judgment reversed, etc.

Divorce.—If the parties in an action for divorce in the court of another state submit to its jurisdiction, they are bound by its judgment, and cannot avoid it in a collateral proceeding in this state by proof that neither of them was a resident of that state when the action was brought and the judgment rendered: *In re Ellis' Estate*, 55 Minn. 401, 43 Am. St. Rep. 514, 56 N. W. 1056.

CASES
IN THE
SUPREME COURT
OF
OHIO.

STATE v. TOWNLEY.

[67 Ohio St. 21, 65 N. E. 149.]

COURTS—Implied Power of.—Every court has inherent power to do all things reasonably necessary for the administration of justice within the scope of its jurisdiction. (p. 637.)

COURTS have Power to Administer Oaths in the Trial of a Cause, though no statute purporting to confer such power exists. (p. 637.)

PERJURY—Defense That Person Administering Oath on the Trial was not Authorized to do so.—If, during the progress of a trial before a court of competent jurisdiction, an oath is administered by a person then acting as a deputy clerk, it is not material that he is neither an officer *de jure* nor *de facto*, if his act takes place in the presence of the court, and apparently by its sanction. (p. 638.)

Prosecution and conviction for perjury. The defendant moved to arrest the testimony and direct a verdict of not guilty, on the ground that the clerk who administered the oath to the defendant, on which the prosecution was grounded, did not have authority, under the laws of the state, to administer it. The motion was granted, and the district attorney excepted and subsequently moved for a new trial, which was granted.

Fred E. Guthery, prosecuting attorney, for the plaintiff in error.

G. E. Mouser, for the defendant in error.

26 DAVIS, J. It is clearly established by the testimony shown in the record in this case that the oath usually administered to witnesses was administered to the person charged

with perjury in this indictment; that the oath was administered in open court upon the trial of a case in the county of Marion; that the testimony given by the accused under the sanction of that oath was false; that the oath was administered by one W. H. Folk, acting as deputy clerk of the court; and that said Folk was not deputy clerk de jure. Whether or not Folk was deputy clerk de facto is perhaps a debatable question; but it is one which we do not find it necessary to decide. He had been duly appointed to the office or public trust of deputy clerk, if it is an office or public trust, and continued therein without having been discharged by the officer appointing him, at any time during the first or second term of the latter: Rev. Stats., secs. 8, 9. Whether this constituted him an officer de facto we leave undetermined. The facts remain, however, that he had been legally appointed and qualified as deputy during the first term of his principal, and had performed the duties of a deputy clerk during such term and continued to do so, under a verbal appointment and without objection from anybody during the second term of his principal. While so acting, he, in open court, presumably with the sanction of the court, if not by its express direction, administered to the accused the oath which is the foundation of this prosecution. It certainly was so much within the knowledge and approval of the court that the testimony given by the accused under that oath was material in obtaining the divorce which he was seeking in the case then on trial. It is fundamental that every court has inherent power to do all things which are reasonably necessary for ²⁷ the administration of justice within the scope of its jurisdiction: *State v. Caywood*, 96 Iowa, 367, 65 N. W. 385. Therefore, it is not necessary that there should be a statute empowering the courts to administer oaths in the trial of cases. The power is implied in the jurisdiction to try cases and to receive the testimony of witnesses under oath. It was upon this principle, apparently, that the supreme court of Tennessee held that "the judge himself may administer the oath, or he may direct anyone in his presence, in open court, to administer it, and the oath will be valid": *Stephens v. State*, 1 Swan (Tenn.), 157. In that case the court continues: "The oath does not derive its sanction and validity from the circumstance merely that it was administered by the clerk, but, from the circumstance that it was duly administered in open court, with the approval and under the control of the judge presiding. It was not, there-

fore, necessary that the person who administered the oath, under these circumstances, should have been a legally appointed deputy." A similar ruling was made in *Oaks v. Rodgers*, 48 Cal. 197. In delivering the opinion of this court in *Staight v. State*, 39 Ohio St. 496, Okey, J., noted these cases in Tennessee and California, and pointed out the distinction between them and the case then under consideration. The same distinction applies here. The oath was administered by Folk in a judicial proceeding by the court and in the presence of the judge presiding therein. It was necessarily under the supervision of the judge. It was the performance of a mere ministerial act for the court. Being in other respects strictly legal, and being administered in open court with the assent and under the supervision of the court, it could work no prejudice to the accused ²⁸ whether the oath was administered by the judge, or by an officer of the court, or by anyone not an officer who performed that duty for the court. In addition to the authorities already cited the views here expressed are supported by the following cases: *Server v. State*, 2 Blackf. (Ind.) 35; *State v. Knight*, 84 N. C. 789, *State v. Dreifus*, 38 La. Ann. 877; *State v. Polke*, 7 Blackf. (Ind.) 27, 29; *Keator v. People*, 32 Mich. 484; *Masterson v. State*, 144 Ind. 240, 43 N. E. 138.

Exceptions sustained.

Burket, C. J., Spear, Shauck, Price and Crew, JJ., concur.

To Sustain a Charge of Perjury, the oath, if nonjudicial, must have been taken before an officer having authority to administer it; or, if judicial, before a court having jurisdiction of the proceedings. The administration of the oath, however, may be done by anyone in the presence and by the direction of the court. It is sufficient to show that it was administered, in open court, by one acting as deputy clerk: See the monographic note to *State v. Shupe*, 85 Am. Dec. 490.

GILLETTE v. TUCKER.

[67 Ohio St. 106, 65 N. E. 865.]

PHYSICIANS AND SURGEONS Assume to Exercise the Ordinary Skill and Care of Their Profession in the light of modern advancement and learning on the subject, and become liable for injuries resulting from their failure to do so. (p. 643.)

PHYSICIANS AND SURGEONS Must, After Performing an Operation, exercise the same care and skill in the subsequent necessary treatment as in performing the operation, unless the terms of employment otherwise limit the services, or the patient gives notice that he cannot or will not afford the subsequent treatment. (p. 643.)

STATUTE OF LIMITATIONS in Actions Against Physicians and Surgeons for Malpractice, When Commences to Run.—In an action against a physician and surgeon for malpractice, consisting of negligently leaving a sponge in the abdomen of the plaintiff after performing an operation, where it remained for many months, and until after the relation of patient and surgeon ceased, the statute of limitations does not commence to run in favor of the surgeon until the termination of such relation, because, until that time, it was his constant duty to remove such sponge. (p. 648.)

Action by Mrs. James H. Tucker against Dr. William G. Gillette for malpractice. The jury was instructed to return a verdict for the defendant on the ground that the plaintiff's cause of action was barred by the statute of limitations. Such verdict having been returned, the plaintiff moved for a new trial and after the denial of the motion and the entry of judgment in favor of the defendant, the plaintiff appealed to the circuit court, which reversed the judgment, and the defendant thereafter prosecuted a writ of error to the supreme court.

D. R. Austin, M. A. Norris, and George F. Wells, for the plaintiff in error.

James M. and Walter F. Brown, for the defendant in error.

¹¹⁷ PRICE, J. When the plaintiff below rested her case, the court sustained a motion to direct a verdict for the defendant, solely on the ground that the testimony introduced to support the plaintiff's case, showed that her cause of action was barred by the one year statute of limitations. The circuit court reversed the judgment rendered on the verdict so directed, and it becomes necessary that we first consider the material facts which the plaintiff's evidence tends to establish, and we find that on or about November 1, 1897, the plaintiff in error was engaged, as he had been for several years prior to that date, in the practice of medicine and surgery, and that

he held himself out as competent to practice in surgery and medicine. At that time the plaintiff below was suffering severe pain in her right side, and accompanied by her husband, called at the office of Dr. Gillette, plaintiff in error, to consult with him as to the cause of the pain and its treatment. After some inquiries and external examination, the doctor pronounced her ailment appendicitis, and that an operation would be necessary to relieve her suffering and its cause. For this purpose she would have to go to a hospital. The cost of the operation and treatment was then discussed, and the ability of the husband to pay was inquired into, and he being a teamster and not earning large wages, it was agreed that the charges for the operation and subsequent necessary treatment would be twenty-five dollars, which might be paid as he was able, or as the husband claims, soon as his wife was cured; and ¹¹⁸ as the wife states it: "I will take your case and attend to your wife for twenty-five dollars." The hospital charges were not included in this price.

An understanding as to compensation having been reached, it was arranged that the woman should go to the hospital, which she did on November 2, 1897, and on the next day, the plaintiff in error performed an operation for appendicitis, after and while the patient was under the influence of an anesthetic.

After the abdomen had been opened in the region of the appendix, for the purpose of absorbing liberated blood, plaintiff in error placed in the cavity a cheese-cloth sponge, which consisted of seven or eight layers of cheese-cloth, each two by four inches. After an examination of the appendix it was found in a healthy condition, but there were indications that required an examination of the pelvic region. The incision made to reach the appendix was then closed, leaving the cheese-cloth sponge in the cavity. In closing the incision the peritoneum was stitched with kangaroo tendons, and the muscles and skin with silkworm gut. There was no drainage made for the wound. Next, an incision was made in the median line between the umbilicus and pubes, in the abdominal cavity. This was two and a half to three inches from the place of the first incision, and there was found a tumor, or more accurately speaking, a hematoma, resulting from an extra uterine pregnancy. This was removed and cavity cleansed and closed, and the patient put to bed in the hospital where she remained about five weeks. She was not conscious during either operation, and did not know of the second until several days thereafter.

About the tenth day she felt a severe pain in her side, and a sensation like the bursting of the closed ¹¹⁹ incision. The plaintiff in error was called and informed of what had occurred. The wound was discharging pus so as to saturate layers of cotton; he said he had been looking for that, and that it came from the tendon used to sew up the wound; that the tendons would soon run out and then the incision would heal. She was visited at the hospital daily, perhaps, while there, and on December 5, 1897, she was removed from the hospital to her home. The pus continued to run from the first incision, and in about two weeks the doctor was called to the residence of plaintiff, because of her suffering, and looked at the side and saw its condition, and stated to her, "that it [the wound] was coming along all right; just as soon as that tendon is absorbed it will heal up—that is what is doing it."

This conversation occurred about December 20, 1897. The doctor did not call again until the following March, 1898. During this interval, the discharge of pus continued, and increased so that it would saturate several thick cloths each day. On the visit in March, 1898, the following conversation is said to have occurred, when he asked the patient as to her condition: "Well, doctor, I don't seem to get any better; it runs just the same as it did. How soon will it run out?" to which he replied: "That I can't tell. Sometimes it takes longer than others, sometimes that tendon is absorbed in three months, and sometimes it takes longer. If you will just have patience it will run out, and it will heal up, and you will be all right."

In April following, the woman, with her husband, called at the office of the doctor, where she informed him that her side was no better—was still discharging; at which he expressed some surprise, but advised patience again, and said that the tendon would ¹²⁰ run out. He then said to the husband that he ought to pay him some money for his services, and the husband replied that he would get his money when the wife got well. The doctor proposed that he would take the tendon out, and the wound would then heal, and to this end they were requested to meet him at the hospital the next day, which they did. He advised them he could probe for the tendons without the use of anesthetics, and that she need not remain at the hospital. An attempt was made to remove the tendon by probing, but without success, and he then assured them that it would run out if left alone, and that it was not necessary to open the old incision; and assured them again, that if they would but have

patience the tendon would run out. This was near April 15, 1898. The evidence tends to show that the patient relied upon these assurances and went home, and the discharge continued unabated during the summer, with increased suffering. The wound was dressed twice a day, the thick, greenish discharge saturating the cloths applied to it.

In the early part of November, 1898, the plaintiff, in company with a neighbor lady, went to the office of plaintiff in error. He inquired as to how she was getting along, to which she replied: "Well, doctor, I am not getting along very well." He said: "Is not that healed up yet?" I said: "No, sir, it is not." He remarked: "You take a chair and I will be at leisure in a minute." After that he called Mrs. Tucker into his private office, and said: "Isn't there any change in that?" She answered that it was about the same, when he rejoined: "It is funny that it don't get better." At this point Mrs. Tucker said to him that if he had done his work right, she would have been well. This remark angered him, and he ¹²¹ said: "Well, if that is the way you feel about it, Mrs. Tucker, you can get right out of my office; I wouldn't do any more for you if I could." He ordered both Mrs. Tucker and her companion from his office, and they left under a threat that an officer would be called to eject them.

The language in the foregoing interview clearly shows that up to that time the doctor recognized Mrs. Tucker as his patient, and entitled to his treatment and advice.

The discharge of purulent pus increased, and the condition grew worse. In January, 1899, Mrs. Tucker called another physician. After some treatment, without apparent benefit, the second physician decided that some foreign substance had been left in the cavity at the first operation, and on April 12, 1899, he operated by opening up the old incision, and there found the cheese-cloth sponge, which plaintiff in error had left within when he closed it.

This demonstrated that the kangaroo tendon had not been the source of the trouble, as the doctor had assured them. We therefore find from the facts stated and kindred facts found in the record, that the relation of physician and surgeon existed between these parties from November 2, 1897, until he dismissed her from his office early in November, 1898. The patient during all that time sustained toward the surgeon a relation of peculiar trust and confidence, and when appealed to for relief and encouragement, he assured her and assuaged her doubts by saying that only patience was needed to bring an entire recovery

from the effects, not of appendicitis, but from the results of the incision vainly made for its treatment. There was an agreed consideration for not only the operation itself, but for ¹²² such treatment, skill and care as might be necessary thereafter, and the engagement was such that the law implies a promise on the part of the surgeon, the plaintiff in error, that for the operation and subsequent necessary treatment, he would use due care and diligence, to the end that a recovery might be had. This obligation arose in the contract of employment, and as a matter of law, and the obligation existed as long as the relation of patient and physician and surgeon continued. In the engagement of the plaintiff in error, as a surgeon, he assumed to exercise the ordinary care and skill of his profession, in the light of the modern advancement and learning on the subject, and became liable for the injuries resulting from his failure to do so: See *Geiselman v. Scott*, 25 Ohio St. 86. And the rule is stated in *Craig v. Chambers*, 17 Ohio St. 254, in the following form: "The implied liability of a surgeon, retained to treat a case professionally, extends no further, in the absence of a special agreement, than that he will indemnify his patient against any injurious consequences resulting from his want of the proper degree of skill, care or diligence in the execution of his employment."

No promise to effect a cure is implied, but due diligence, care and ordinary skill are implied undertakings: See *Grindie v. Rush*, 7 Ohio, Pt. 2, 123-125. Moreover, we hold the proposition to be sound that this degree of skill and care is to be exercised, not only in performing the operation, but also in the subsequent necessary treatment following such operation, unless the terms of employment otherwise limit the service, or the surgeon give the patient notice that he will not or cannot afford the subsequent treatment. ¹²³ We think this proposition needs no argument for its support.

However, we find a pointed authority in the case of *Williams v. Gilman*, 71 Me. 21. While that case involved the conduct or misconduct of a veterinary surgeon, we have no doubt its doctrine may be applied to the conduct of surgeons practicing their profession upon a human being. The syllabus of that case is: "In an action to recover damages caused by the alleged negligence and unskillfulness of a veterinary surgeon in gelding a colt, held, that instructions to the jury, that it was the duty of the defendant to give the colt such continued further attention, after the operation, as the necessity of the case required, in the

absence of special agreement, or reasonable notice to the contrary, were correct, though the declaration only alleged want of care and skill with reference to the operation itself."

In the opinion found on pages 22 and 23, the court say: "It is true, the declaration only alleges a want of care and skill on the part of the defendant with reference to the operation itself; but an allegation of negligence in this respect would be sustained by proof that the defendant failed to use such appliances or prescribe such treatment as to one who exercised reasonable skill and care in his calling were obviously necessary to preserve the colt from injury resulting from the operation. Without some order from the plaintiff to the contrary, or some notice from the defendant, or agreement of parties, limiting the defendant's liability and specifying to what extent his services were to be required and rendered, it was a part of the duty of such a practitioner, incident to the performance of the operation itself, to direct what should be done to prevent injurious results that might ¹²⁴ naturally follow, and to give his personal attention to such matters, so far as they fell within the ordinary scope of a veterinary surgeon's calling. Proof that he failed in these respects would sustain the allegation that he was guilty of negligence in his conduct with reference to the operation which he had been employed to perform."

In an earlier case, *Ballou v. Prescott*, 64 Me. 305, we find another decision on the physician's duty to a patient. The syllabus says: "Though the language used and the effect of it, are questions of fact for the jury, in controversies relating to a contract by parol, yet it is also true that in many cases, the law will infer a definite, though perhaps implied contract from certain admitted facts. At least it will infer certain elements as belonging to particular contracts, or impose specific duties in connection with, and growing out of special undertakings, although these are entered into by parol. Especially is this true of contracts growing out of an employment quasi public in nature, like that of a professional man. Thus, the care and skill which a professional man guarantees to his employer, are elements of the contract into which he enters by accepting a professional engagement. So, continued attention to the undertakings, so long as attention is required, in the absence of any stipulation to the contrary, is equally an inference of the law, . . . and he is bound to use ordinary care and skill, not only in his attendance, but in determining when it may be safely and properly discontinued."

This, we believe, is a sound and salutary rule to govern the relation existing between the patient and the surgeon, who practices his profession and undertakes the serious operation described in this record. If such care is due to a dumb animal, it is surely due ¹²⁵ to a human being. There was no limitation in the services proffered and engaged, and no notice of an intended limitation given the patient, and indeed, none is claimed in this case, until the surrender of the case at the surgeon's office in November, 1898.

The action of Mrs. Tucker, which is now before us, was commenced in the lower court on June 27, 1899—not eight months from the day on which plaintiff in error severed his connection with the case.

In view of these facts, and the nature of the engagement and duties of plaintiff in error, when did the statute of limitations begin to run against the cause of action of Mrs. Tucker? From the day when the incision was closed leaving the cheese-cloth sponge within the cavity? Or, from the day when the relation of patient and surgeon ceased, the sponge still being in the cavity? If from the date of closing the wound, which was November 3, 1897, the trial court was right in telling the jury the plaintiff's right of action was barred, when her suit was commenced. If from the date when the surgeon dissolved his connection with the case, her suit was in ample time.

The statute applied by the trial court is section 4983 of the Revised Statutes, which is: "Within one year: An action for libel, slander, assault, battery, malicious prosecution, false imprisonment or malpractice." This section is to be read with section 4979 which is: "Civil actions other than for the recovery of real property, can only be brought within the following periods, after the cause of the action accrues."

So, the other form of the inquiry is, When did the cause of action of Mrs. Tucker accrue? The plaintiff in error contends it accrued, if at all, on November 3, 1897, and so the court instructed the jury.

If the foregoing views which we have expressed, as ¹²⁶ to the nature of the surgeon's engagement and obligation are sound, it would seem that the court was wrong in its application of the above statute to the facts of the case. We do not agree with counsel for defendant in error that the case made in the petition was an action on the contract, and therefore governed by the six year limitation. Rather, it was an action to recover for breach of contract, for negligence in the performance of the

contract, or a breach of the terms of the contract which the law implies. It is contended for plaintiff in error that the action sounds in tort and not on contract, and that the surgeon being charged with a tort or wrong, the cause of action accrued when the tort or wrongful act was committed.

We believe that the situation is covered by Addison on Torts, 13, where it is said: "A tort may be dependent upon, or independent of contract. If a contract imposes a legal duty upon a person, the neglect of that duty is a tort founded on contract; so that an action *ex contractu* for the breach of contract or an action *ex delicto* for the breach of duty may be brought at the option of the plaintiff": See *Staley v. Jameson*, 46 Ind. 159, 15 Am. Rep. 285.

Therefore, if we call malpractice a tort in this case, it is a tort growing out of a breach of contract which the law implies from the surgeon's employment and undertaking to perform the operation. We have seen that it was a continuous obligation and recognized by the law, and it was alive and binding so long as the relation of physician and patient subsisted. If so, it was the ever present duty of the surgeon to remove the sponge from the body of the patient. It was a constant and daily obligation to use ordinary skill and care, and if by omission or negligence he had left a foreign substance within the walls of the incision¹²⁷ at the operation, it behooved him to afford timely relief. Neglect of this duty imposed by a continuous obligation was a continuous and daily breach of the same, and, as the facts show, caused continuous, increasing, daily and uninterrupted injury.

Should she have brought her action immediately following the sewing up the walls enclosing the sponge? If she had done so, there were as yet no injurious consequences, and but nominal, if any, damages, could have been recovered. The injury consisted not so much in leaving the sponge within the cavity, as negligently, continuing it there, or, allowing it to remain there from day to day for about a year, and until he dismissed her from his attentions. The grievance of the plaintiff was not alone confined to the negligence in the operation, but also in the painful consequences which followed, and which, as he repeatedly assured her, would soon disappear, if she would but patiently wait.

In what we have said and now say, it is wholly immaterial whether the patient knew of the true source of her trouble or not. We do not, in any degree, place our conclusions on the fact that for more than a year the plaintiff was in ignorance as to

the sponge remaining in the wound. On the contrary, we are dealing with her rights under the contract, for the breach of which she has sued, and the cause of action did not so much accrue of the date of the negligent operation, as on account of the continuous breach of duty which inflicted the injurious consequences. In other words, that the statute will run from the date of the injuries, rather than from the date of an event which resulted in the injuries.

¹²⁸ At this point we again refer to the case of *Craig v. Chambers*, 17 Ohio St. 254. In that case, Chambers and his wife Jane brought suit against Craig, a surgeon, for negligently and unskillfully setting the dislocated shoulder of the wife, and for negligent treatment of the injury.

The plaintiff in that case excepted to the court charging the jury "that the plaintiff would not be entitled to a verdict, unless the evidence satisfied the jury that some portion of the injury of which plaintiff complains was the result of some want of proper skill, diligence, or attention of the defendant, or that the plaintiff was in some way damaged by such negligence."

Speaking of this and other instructions, White, J., on page 260, says: "Her action is founded on the breach by the defendant of the duty which he owed her, or of the contract to be implied between them arising from the employment. But the implied liability on the part of a professional man, in our opinion, goes no further than that he will indemnify his employer against any injurious consequences resulting from his want of proper skill, care or diligence in the execution of his employment. Therefore, where there is no injury, there is no breach; and the evidence must warrant the jury in inferring injury before they can find a breach. And this conclusion we believe to be supported by the authorities."

On page 261 of the same opinion, it is said of the charge concerning plaintiff's injuries: "But in view of one part of the argument of the counsel of the defendant in error, it is proper to say, that we suppose that any want of the proper degree of skill or care which diminishes the chances of the patient's recovery, prolongs his illness, increases his suffering, or, ¹²⁹ in short, makes his condition worse than it would have been, if due skill and care had been used, would, in a legal sense, constitute injury."

See, also, *Bank v. Waterman*, 26 Conn. 324, where it is held that "when an injury, however slight, is complete as a legal injury at the time of the act, the period of limitation at once

commences, but that the act is not legally injurious until certain consequences occur, the period takes date from the consequential injury": See Shearman and Redfield on Negligence, sec. 613.

If the doctrine is sound, and we think it is, the mere closing of the incision in question over the sponge was not the plaintiff's cause of action, if no injurious consequences followed. But if evil consequences followed, and plaintiff was injured, her cause of action accrues when her injuries occurred; and if these injuries blended and extended during the entire period the surgeon was in charge of the case, her right of action became complete when the surgeon gave up the case without performing his duty.

Indeed, it would be inconsistent to say, that the plaintiff might sue for her injuries while the surgeon was still in charge of the case and advising and assuring her that proper patience would witness a complete recovery. It would be trifling with the law and the courts to exact compliance with such a rule, in order to have a standing in court for the vindication of her rights. It would impose upon her an improper burden to hold that in order to prevent the statute from running against her right of action, she must sue while she was following the advice of the surgeon and upon which she all the time relied.

We are cited to certain cases and text-books by plaintiff in error, which are supposed to be in conflict with these views. Among these cases are *Kerns v. Schoonmaker*, 4 Ohio, 331, 22 Am. Dec. 757; *Fee v. Fee*, 10 Ohio, 470, 36 Am. Dec. 103; *Williams v. Pomeroy Coal Co.*, 37 Ohio St. 583. But we think an examination and comparison of those cases, with facts and principles involved in the case at bar, will readily show that they are not opposed to our position here. *Kerns v. Schoonmaker*, 4 Ohio, 331, 22 Am. Dec. 757, is a case where an action was brought to recover damages against the defendant for negligence and omission of duty as a justice of the peace. The negligence alleged in the declaration was, that on April 25, 1825, Stewart confessed a judgment in favor of Kerns before the justice. On April 28th, Stewart offered one Elliott as bail for stay of execution, who was accepted as such by the justice; but the entry on the docket was so carelessly and informally made that Elliott was not legally bound thereby. The judgment debtor died insolvent before the supposed stay of execution expired, and when Elliott was prosecuted on the stay bond the court held it invalid, and he was discharged. In the

suit against the justice the amount of the judgment, interest, costs and expenses were demanded. The justice plead not guilty and the one year bar of the statute of limitations. As to when the statute began to run, the court say on page 333 of 4 Ohio, and page 757 of 22 Am. Dec.: "It is unnecessary to determine the precise moment when the statute did attach, for we entertain the opinion that no later period can be selected than the institution of the suit against Elliott. Admitting that the plaintiff might reasonably expect Elliott to fulfill his supposed recognition and pay the debt, yet when he evinced his intention not to be bound, the plaintiff's remedy against the justice was complete."

It is seen from this case that the statute in bar did not necessarily commence with the negligent act of the justice in making entry of the stay bond, but that ¹³¹ it might be counted as commencing with the resistance of Elliott when sued on the invalid bond.

In *Fee v. Fee*, 10 Ohio, 470, 36 Am. Dec. 103, it was decided that "a fraudulent concealment by which the plaintiff has been delayed will not enlarge the time for bringing an action under the statute of limitations."

As before stated, ignorance or concealment of the source of the injury of Mrs. Tucker is not the ground of our opinion, and hence *Fee v. Fee*, 10 Ohio, 470, 36 Am. Dec. 103, is of no weight here. The same observation may be made as to part of the decision in *Williams v. Pomeroy Coal Co.*, 37 Ohio St. 583. That was an action for trespass committed by defendant in making an excavation on land under lease, which he wrongfully extended under the land or lot adjoining, and the salient facts decisive of that case are stated by White, J., on page 589, as follows: "The defendant in the present case had no estate or interest in lot 1222, further than the right to mine the coal therefrom. This he accomplished in 1862, and surrendered the premises. He had no authority from the owner of the fee, nor from Horton, his immediate lessor, to mine over into lot 1223; and at the time of the flowage of water from the abandoned mine into the mine of the plaintiff, he had for more than five years ceased to have any interest in lot 1222, or any right of entry thereon." Then the court proceeds to say the action of trespass could not be maintained, because the plaintiff at the date of the commission of the trespass was not the owner of the land upon which it was committed, and had he been such owner, the action would have been barred. But in previous language of

the opinion, the learned judge draws a distinction between a single trespass and the continuing of something wrongful upon the premises of the plaintiff; and the authorities which he cites more ¹³² properly reinforce our position than the contention of plaintiff in error.

Counsel for plaintiff in error cite also from text-writers, among others, Wood on Limitations, section 177, to the effect "that in cases of tort, the statute usually commences to run from the date of the tort, and not from the occurrence of actual damage." This as to a single tort or wrong. But it is well to note that in section 178 the same author has more to say, and it is this: "A breach of public duty may not inflict any direct immediate wrong on an individual; but neither his right to a remedy nor his liability to be precluded by time from its prosecution, will commence till he has suffered some actual inconvenience. But it is otherwise where there is a private relation between the parties where the wrongdoing of one at once creates a right of action in the other, and it may be stated as an invariable rule that when the injury, however slight, is complete at the time of the act, the statutory period then commences; but when the act is not legally injurious until certain consequences occur, the time commences to run from the consequential damage, whether the party injured is ignorant of the circumstances from which the injury results or not." To sustain and illustrate this proposition the author cites important cases.

A careful perusal of Buswell on Limitations and Angell on same subject, also cited, will find the same distinction made. In most, if not all, of the authorities cited and relied on to support views adverse to ours, the tort or wrongful act was complete as a single transaction.

This court has spoken as to the application of the statutory bar in *Perry County v. Railroad Co.*, 43 Ohio St. 451, 2 N. E. 854. The action was brought by the county ¹³³ to recover of the railroad company the cost of constructing a new bridge in lieu of one which has been destroyed by the railroad company in 1871. Full restoration was made by the county in 1878. Concerning the plea of the statute of limitations by the company, Owen, J., on page 455, says: "The plea of the statute of limitations which the demurrer interposed to the petition is untenable. From the time the injuries complained of were committed, and at least to the time the commissioners made full restoration, the duty of defendant to restore the bridge to its former condition of usefulness and safety was a continuing

and subsisting obligation, and each day's failure to make full restoration was a fresh breach of such obligation; and lapse of time cannot avail to interpose a bar to recovery." We here call attention, without quoting, to *Railway Co. v. Franz*, 43 Ohio St. 623, 4 N. E. 88.

These two cases, and the authorities therein cited, generously support the conclusion we have reached. The facts in the case at bar show a continuous obligation upon the plaintiff in error, so long as the relation or employment continued, and each day's failure to remove the sponge was a fresh breach of the contract implied by the law. The removal of the sponge was a part of the operation, and in this respect the surgeon left the operation uncompleted: See *Akridge v. Noble*, 114 Ga. 649, 41 S. E. 78, where this is expressly held.

Another trial will afford plaintiff in error another opportunity to introduce all his evidence.

We have not been able to reach a unanimous judgment in this case, but our number is sufficient to affirm what we regard as sound judgment.

Judgment affirmed.

Burket, C. J. and Spear, J., concur.

This Affirmance of the Judgment of the circuit court in the principal case was dissented from by three members of the supreme court, in number equal to those concurring in the opinion for affirmance. The dissenting opinion was written by Judge Davis. After referring to the facts and to the statute of limitations prescribing the time within which an action might be brought for malpractice, he said:

"The circuit court seems to have taken the view that it was the duty of the defendant to follow up the plaintiff and to see that the incision made in the operation had healed, and that because 'the wound was not healed she was still his patient, and he still owed her the duty of a physician and surgeon who had performed an operation'; and hence the conclusion that 'her cause of action was not complete and the statute did not begin to run until such relation ceased at his office in November, 1898': *Tucker v. Gillette*, 12 Ohio Cir. Dec. 401; 22 Ohio C. C. 664. In order to sustain this strained conclusion the court calls attention to the failure of the defendant to discover and remove the foreign substance which he had left in the wound at the time of the operation, and designates it as a continuing act of negligence on his part, 'a continuing act of negligence, which increased rather than diminished as time went on, and it became more evident that there was some foreign substance in the wound which should be removed.' But the ground of this

action was not, and could not be, negligence in the after-treatment. If leaving the sponge in the body of the patient at the time of the operation was harmless, and injury resulted to the patient only through such negligence in the after-treatment, then an action might be grounded on such negligence. Such were *Ballou v. Prescott*, 64 Me. 305, and *Williams v. Gillman*, 71 Me. 21, cited in the foregoing opinion by Price, J., although the statute of limitations was not involved in either of those cases. But the line of authority is unbroken that if the original act of negligence causes damage, although only nominal in extent, a cause of action accrues *eo instanti*, and that consequential damages may be recovered thereon up to the time of the trial. Of course it follows that the statute of limitations begins to run the moment a right of action accrues, and it is so expressly provided by our statute; and it cannot be deferred or held in abeyance because the full extent of the injury is not at once apparent, nor because the plaintiff was ignorant of the negligent act which caused the injury. This principle applies equally to cases *quasi ex contractu* and cases purely *ex delicto*. Upon these well-established principles it is obvious that in cases in which an act of negligence causes damage, the cause of action cannot be split up into two or more causes of action, and therefore when suit is brought to recover damages upon an act of negligence which is barred by the statute of limitations, it cannot be taken out of the statute by a subsequent act of negligence which merely aggravates the damage already accrued.

"See, generally, on the propositions above stated, Angell on Limitations, secs. 136, 141, 298, 299; Wood on Limitations, secs. 122, 178, 179; 2 Greenleaf on Evidence, sec. 433; *Lattin v. Gillette*, 95 Cal. 317, 29 Am. St. Rep. 115, 30 Pac. 545; *Raynor v. Mintzer*, 72 Cal. 585, 18 Pac. 82; *Schade v. Gehner*, 133 Mo. 252, 84 S. W. 576; *Gustin v. County of Jefferson*, 15 Iowa, 158; *Kerns v. Schoonmaker*, 4 Ohio, 331, 22 Am. Dec. 757; *Fee v. Fee*, 10 Ohio, 470, 471, 36 Am. Dec. 103; *Lathrop v. Snellbaker*, 6 Ohio St. 276. These Ohio decisions have in no sense been qualified or departed from.

"There are several cases which so clearly illustrate the views which I have expressed above, that I call especial attention to them. In *Lattin v. Gillette*, 95 Cal. 317, 29 Am. St. Rep. 115, 30 Pac. 545, cited above, and which was an action for negligence in abstracting a title, the court says (page 320): 'The running of the statute was not suspended by the fact that the plaintiff did not ascertain the error in the certificate, or by the fact that the existence of the error was not determined by the superior court until more than two years had expired, and it was held that the statute of limitations begins to run in an action for misconduct or negligence from the date when the misconduct or negligence was completed, and that it is immaterial whether the negligence out of which the cause of action arises is the breach of an implied contract, or the affirmative disregard of some

positive duty.' It was also held in that case that although the entire damage resulting from such negligence may not have been known until the right to a recovery is barred, yet the time within which an action may be brought is not thereby prolonged.

"The leading case of *Wilcox v. Plummer*, 4 Pet. 172, is strongly in point. The plaintiff placed a promissory note in the hands of Plummer for collection. He instituted a suit against the maker, but neglected to sue the indorser. The maker was insolvent, and Plummer afterward sued the indorser, but ineffectually, by reason of another act of negligence, a fatal misnomer of the plaintiff. A judgment of nonsuit was finally rendered in this action, and in the meantime the action against the indorser was barred by the statute of limitations. The question was whether the statute of limitations commenced to run when the error was committed in the commencement of the suit against the indorser, or whether it commenced from the time the plaintiffs were nonsuited in their action. It was held that the statute began to run from the time of the committing of the error by misnomer in the action against the indorser. Mr. Justice Johnson, in delivering the opinion of the court, said: 'The only question in the case is, whether the statute runs from the time the action accrued, or from the time that the damage is developed, or becomes definite. And this we hardly feel at liberty to treat as an open question. . . . Nor is it analogous to the case of a nuisance, since the nuisance of to-day is a substantive cause of action, and not the same with the nuisance of yesterday, any more than an assault and battery. . . . When the attorney was chargeable with negligence or unskillfulness, his contract was violated and the action might have been sustained immediately. Perhaps, in that event, no more than nominal damages may be proved, and no more recovered; but on the other hand, it is perfectly clear that the proof of actual damage may extend to facts that occur and grow out of the injury, even up to the day of the verdict. If so, it is clear that the damage is not the cause of action.'

"*Coady v. Reins*, 1 Mont. 424, was, like the present case, an action against a surgeon for malpractice in setting and treating the plaintiff's dislocated and fractured arm and elbow, on February 28, 1868. The 'continuing negligence' in the after-treatment of the case seems to have made no impression on the court, which said: 'The gist of the action in this instance is the negligence and unskillfulness of breach of duty as laid in the complaint, and not the injury or damage consequent thereon. If such actions were commenced immediately upon a person becoming chargeable in such a case, it is probably true that no more than nominal damages could be recovered, yet it is clear that proof of actual damages may extend and embrace facts occurring and growing out of the injury even up to the verdict itself. But the statute in cases of this nature begins to run, regardless of the form of action, whether case or assumpsit, from the time of the negligence or breach of duty. And in this case,

under the act in force at the time of said negligence or breach of duty, it must be held to have commenced to run from February 23, 1868,' which was the time when the operation was performed.

"In *Moore v. Juvenal*, 92 Pa. St. 484, it was held that when the declaration in an action against an attorney for malpractice, alleges a breach of duty and a special consequential damage, the breach of duty, and not the consequential damage, is the cause of action, and the statute runs from the time of the former, and not from the time the special damage is revealed or becomes definite. It was also held that the fact that the defendant continued to act as attorney for the plaintiffs after he had violated his implied contract with them, does not suspend the operation of the statute.

"In view of these well-settled principles, it would be impossible to sustain the judgment of the circuit court, and impossible to reach any other conclusion than that at which the court of common pleas arrived. Hence the circuit court was driven to its invention of 'a continuing act of negligence,' which, for its novelty, would be patentable if it were not entirely useless. I have diligently sought for authority for this strange doctrine, and have not found any, and have carefully examined all the cases cited in the foregoing opinion with no better result. The nearest approach to it which has come under my observation is in the class of cases represented by *Board of Commrs. v. Pearson*, 120 Ind. 426, 16 Am. St. Rep. 325, 22 N. E. 134, and *Bank of Hartford Co. v. Waterman*, 26 Conn. 324; but these cases are broadly distinguishable from this theory of 'a continuing negligence.' They hold that although the negligence complained of had been committed long enough before the suit to be barred by the statute of limitations, yet if no damage whatever ensued until a time within the statute, no cause of action accrued against which the statute might run. *Board of Commrs. v. Pearson*, 120 Ind. 426, 16 Am. St. Rep. 325, 22 N. E. 134, was a case where a bridge was negligently constructed, but no accident happened therefrom for thirteen years thereafter. In *Bank of Hartford Co. v. Waterman*, 26 Conn. 324, an officer who had undertaken to attach real estate and made return that he had done so, in fact failed to do so. The error was not discovered until the debtor had failed, and no property could be found upon which to levy. In an action on the case against the officer, the statute of limitation was pleaded, and it was held that the cause of action did not accrue until, by failure to obtain satisfaction of his execution, he had sustained actual damage. In neither of these cases does there appear even a hint of this theory of 'a continuing negligence,' and in the latter case, even the conclusion which was announced was combatted by Ellsworth, J., in a most vigorous and impressive dissenting opinion.

"As was said by the supreme court of the United States, in *Wilcox v. Plummer*, 4 Pet. (U. S.) 172, there is no analogy between an action for malpractice and an action for a nuisance, 'since the nuisance

of to-day is a substantive cause of action, and not the same with the nuisance of yesterday, any more than an assault and battery.' Hence the doctrine of a continuing trespass or nuisance cannot be invoked here. The doctrine that every continuance is a new nuisance for which a separate action will lie, applies only to nuisances of a transient rather than of a permanent character. 'But while this is the rule, . . . yet, when the original nuisance is of a permanent character so that the damage inflicted thereby is of a permanent character, and goes to the entire destruction of the estate affected thereby, or will be likely to continue for an indefinite period, and during its existence deprive the land owner of any beneficial use of that portion of his estate, a recovery not only may, but must, be had for the entire damage in one action, as the damage is deemed to be original; and as the entire damage accrues from the time the nuisance is created, and only one recovery can be had, the statute of limitations begins to run from the time of its erection against the owner of the estate or estates affected thereby': Wood on Limitations, sec. 180. It was on this principle that *Valley Ry. Co. v. Franz*, 43 Ohio St. 623, 4 N. E. 88, *Perry Co. v. Railroad Co.*, 43 Ohio St. 451, 2 N. E. 854, and *Williams v. Coal Co.*, 37 Ohio St. 583, cited in the foregoing opinion, were decided. If there is any real analogy between cases of nuisance or trespass and cases of malpractice, it seems to me perfectly clear that a discriminating analysis would require the application here of the rule last stated; for the gist of this action is the allegation in plaintiff's petition that the defendant negligently and without the knowledge of plaintiff closed the opening made in performing the operation, without removing the cheese-cloth sponge therefrom. It is true that it is also alleged that the defendant for more than twelve months thereafter negligently permitted the cheese-cloth sponge to remain in the plaintiff's abdomen; but the injury was complete so far as concerns the defendant when he closed the wound, and did not remove the sponge. If the defendant had never seen the plaintiff after the operation, the injury was permanent and complete, so far as the defendant's agency and liability was involved. If any injury whatever ensued from delay in discovering and removing the sponge, it was merely incidental and consequential to the principal act of leaving the sponge in the abdomen when the operation was completed. Stated in slightly different language, but the same in effect, the charge is that the defendant permitted the sponge to remain in the abdomen when he closed the incision, and he permitted it to remain afterward as long as he attended her. In this way of stating the case, it is clear that the wrong inflicted by the defendant was complete on the day of the operation, and the cause of action then accrued on the principles hereinbefore stated, unless the defendant is to be held liable in another cause of action for not knowing or not discovering that the sponge was there. But this could not be, for whatever injury the plaintiff sustained was the result of, or consequential to,

the wrong inflicted in the beginning, and hence a recovery for that would be a bar to a recovery for the other. Further analysis, it seems to me, would not make the case any plainer. A perfect cause of action accrued at once on the day of the operation, November 3, 1897.

"The argument that the defendant had entered into a contract by which it became his duty to continue to attend the plaintiff until she should be well, or until the plaintiff discharged him, and that therefore the statute would not begin to run in his favor until his service was ended is equally fallacious. The rule is the same whether the action sounds in contract or in tort, that is, the statute of limitations begins to run in the instant that a cause of action accrues, and a cause of action accrues in the instant that damage is incurred, although at first the damage is only nominal: Angell on Limitations, secs. 136, 298; Wood on Limitations, secs. 177-179. And in *Craig v. Chambers*, 17 Ohio St. 261, Judge White, delivering the opinion of the court, said: 'It is proper to say, that we suppose that any want of the proper degree of skill or care which diminishes the chances of the patient's recovery, prolongs his illness, increases his suffering, or, in short, makes his condition worse than it would have been if due skill and care had been used, would, in a legal sense, constitute injury.' However, it seems to be a mere waste of time to discuss the question whether this action is *ex contractu*, quasi *ex contractu*, or *ex delicto*, for the statute provides that malpractice, whether it belong to one or another of these classes, is barred in one year from the time the cause of action accrues. If the surgical operation was skillfully and properly performed in all respects and no injury resulted therefrom, the statute would run from the time of a subsequent negligence and injury, for then, and then only, would a cause of action accrue; but the case we are now considering is not such a case. It is true that it is said in Angell on Limitations, section 120, that 'when there is an undertaking which requires a continuation of services, the statute does not commence running until they can be completed'; but that remark was not intended to apply to actions to recover damages for negligence whether the negligence be the breach of a contractual duty or any other duty. It applies only to actions purely *ex contractu*, and all of the cases cited by the author on this point are cases in which the suit was for compensation for services, and in which the statute was used as a defense.

"*Wilcox v. Plummer*, 4 Pet. (U. S.) 172, and *Moore v. Juvenal*, 92 Pa. St. 484, were cases in which the services contracted for were not complete at the time of the injury. The theory involved in the misleading phrases 'a continuing negligence,' 'a continuing wrong,' 'a continuing obligation,' 'a continuous contract,' is not only contrary to all authority, but from my point of view it is utterly absurd when tested in the light of established principles."

LIABILITY OF PHYSICIANS AND SURGEONS FOR NEGLIGENCE AND MALPRACTICE.*

I. Degree of Skill and Care Exacted of Physicians.

- a. General Rules of Duty and Liability.
- b. As Determined by Particular Circumstances.
 1. Present State of Medical Science.
 2. Locality or Place of Practice.
 3. School of Medicine.
 4. Established Mode of Treatment.
 5. Compensation—Gratuitous Services.
 6. Contributory Fault of Patient.
- c. Skill Required of Specialists.
- d. Burden of Proving Want of Care or Skill.

II. Liability for Acts of Others.

- a. Mismanagement by Those in Charge.
- b. Negligence of Druggist.
- c. Treatment of Other Physicians.
- d. Negligence of Partner.

III. Duration of the Relation of Physician and Patient.

- a. Commencement and Continuance—Abandonment of Case.

IV. Duty and Liability of Other Practitioners.

- a. Dentists.
- b. Veterinarians.
- c. Persons not Physicians.
- d. Clairvoyants.

V. Miscellaneous Cases of Liability.

- a. Communication of Infectious Diseases.
- b. Reporting a Venereal Disease.
- c. Promising to Procure Another Physician.
- d. Failure to Obtain Husband's Consent.

I. Degree of Skill and Care Exacted of Physicians.

a. General Rules of Duty and Liability.—The contract of a physician or surgeon when he assumes charge of a patient, as implied by law, is, that he possesses that reasonable degree of learning, skill, and experience which ordinarily is possessed by others of his profession; that he will exercise reasonable and ordinary care and diligence in the exertion of his skill and the application of his knowledge; and that he will exert his best judgment as to the treatment of the case intrusted to him: *McDonald v. Harris*, 131 Ala. 359, 31 South. 548; *Force v. Gregory*, 63 Conn. 167, 38 Am. St. Rep. 371, 27 Atl. 1116; *Akridge v. Noble*, 114 Ga. 949, 41 S. E. 78; *Uteley v. Barnes*, 70 Ill. 162; *Kendall v. Brown*, 74 Ill. 232; *Jones v. Angell*, 93 Ind. 376; *Tefft v. Wilcox*, 6 Kan. 46; *Branner v. Stormont*, 9 Kan. 51; *O'Hara v. Wells*, 14 Neb. 403, 15 N. W. 722; *Hewitt v. Eisenbart*, 36 Neb. 794, 55 N. W. 252; *Leighton v. Sargent*, 27 N. H. 460, 57 Am. Dec. 388; *Winner v. Lathrop*, 67 Hun, 511, 22 N. Y. Supp. 516; *McCandless v. McWha*, 22 Pa. St. 261; *Hathorn v. Richmond*, 48 Vt. 557.

*REFERENCE TO MONOGRAPHIC NOTES.

Liability of physicians and surgeons for negligence: 48 Am. Dec. 481-487.
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The law holds him answerable for an injury to his patient resulting from want of the requisite knowledge and skill, or the omission to use reasonable care and diligence, or the failure to exercise his best judgment: *Landon v. Humphrey*, 9 Conn. 209, 23 Am. Dec. 333; *Moon v. McRae*, 111 Ga. 206, 36 S. E. 635; *Barnes v. Means*, 82 Ill. 379, 25 Am. Rep. 328; *Morris v. Despain*, 104 Ill. App. 452; *Aspy v. Botkins* (Ind.), 66 N. E. 462; *Beck v. German Klinik*, 78 Iowa, 696, 43 N. W. 617; *Schoonover v. Holden* (Iowa), 87 N. W. 737; *Alexander v. Menefee*, 23 Ky. Law Rep. 1151, 64 S. W. 855; *Lewis v. Dwinell*, 84 Me. 497, 24 Atl. 945; *Ramsdale v. Grady*, 97 Me. 319, 54 Atl. 763; *Moratzky v. Wirth*, 67 Minn. 46, 69 N. W. 480; *West v. Martin*, 31 Mo. 375, 80 Am. Dec. 107; *Miller v. Frey*, 49 Neb. 472, 68 N. W. 630; *Challis v. Lake*, 71 N. H. 90, 51 Atl. 260; *Gray v. Little*, 126 N. C. 385, 35 S. E. 611; *Wood v. Clapp*, 36 Tenn. (4 Sneed) 65; *Brooke v. Clark*, 57 Tex. 105; *Mullin v. Flanders*, 73 Vt. 95, 50 Atl. 813; *Kuhn v. Brownfield*, 34 W. Va. 252, 12 S. E. 519; *Crowty v. Stewart*, 95 Wis. 490, 70 N. W. 558; *Allen v. Voje*, 114 Wis. 1, 89 N. W. 924. And it is not necessary in an action against a physician or surgeon for unskillfulness or negligence, to prove gross culpability on his part; proof of any failure to exercise proper care or any neglect in the discharge of the duty assumed is sufficient: *Carpenter v. Blake*, 75 N. Y. 12; *Link v. Sheldon*, 136 N. Y. 1, 32 N. E. 696. Nor does the question of his liability depend upon the skill he possesses, but upon the fact whether he has applied that reasonable skill and diligence ordinarily used in the profession: *Cayford v. Wilbur*, 86 Me. 414, 29 Atl. 117. And whether the injury results from want of skill, or the want of its application, he is, in either case, equally responsible: *Ritchey v. West*, 23 Ill. 385; *Long v. Morrison*, 14 Ind. 595, 77 Am. Dec. 72; *Carpenter v. Blake*, 60 Barb. 488. However, mere negligence or lack of skill, not causing injury, gives no right of action, even to recover nominal damages: *Ewing v. Goode*, 78 Fed. 442.

But the law exacts of physicians and surgeons while in the practice of their vocation only that they possess and exercise that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of their profession under similar circumstances. While, by virtue of the relation assumed by them toward their patients, they impliedly engage that they possess ordinary skill, and that they will, in the course of their employment, exercise such necessary and proper care and attention as reasonably may be expected from others in the practice, the law does not exact from them the utmost degree of care and skill attainable or known to the profession. Unless they contract to do more, they are held only to a reasonable amount of diligence and skill, and are liable only for injuries resulting from his neglect to exercise that degree of diligence and skill: *Sims v. Parker*, 41 Ill. App. 284; *Hickerson v. Neely*, 21 Ky. Law Rep. 1257, 54 S. W. 842; *Howard v. Grover*, 28 Me. 97, 48 Am.

Dec. 478; Getchell v. Hill, 21 Minn. 464; Griswold v. Hutchinson, 47 Neb. 727, 66 N. W. 819; Van Skike v. Potter, 53 Neb. 28, 73 N. W. 295; Langford v. Jones, 18 Or. 307, 22 Pac. 1064.

Nor does the law raise from the fact of the employment of a physician or surgeon an implied undertaking to cure, but only an undertaking to use ordinary skill and care: Bliss v. Long, Wright (Ohio), 351; Craig v. Chambers, 17 Ohio St. 253. In the absence of an express contract, he does not warrant or insure a cure: Quinn v. Donovan, 85 Ill. 194; McKee v. Allen, 94 Ill. App. 147; Grindle v. Rush, 7 Ohio, 123; Graham v. Gautier, 21 Tex. 111. He is not to be tried by the result of his remedies. But if, by the exercise of reasonable care and skill, he ought to discover that an ailment is incurable or will not yield to the usual treatment, or that the patient will not be benefited, and fails to do so, or, making the discovery, fails to so advise the patient, he is guilty of negligence: Logan v. Field, 75 Mo. App. 594, citing Lewis v. Dwinnell, 84 Mo. 497, 24 Atl. 945; Harriott v. Plimpton, 166 Mass. 585, 44 N. E. 992; Moratzky v. Wirth (Minn.), 62 N. W. 480.

A physician or surgeon is not answerable for mere errors of judgment: Pepke v. Grace Hospital (Mich.), 90 N. W. 278; Williams v. Poppleton, 3 Or. 139; Barker v. Lane, 23 R. I. 224, 49 Atl. 963. But his judgment must be founded on his intelligence. He engages to bring to his patient care, skill, and knowledge. If, for example, he waits too long before undertaking a necessary amputation, he must be held to have known the probable consequences of such delay, and is liable for the resulting damages: Du Bois v. Decker, 130 N. Y. 325, 27 Am. St. Rep. 529, 29 N. E. 313. Whether errors of judgment will or will not make a physician or surgeon liable in a given case depends, not merely upon the fact that he may be ordinarily skillful, but whether he has treated the case skillfully, or has exercised such reasonable skill and diligence as ordinarily is exercised in his profession. For there may be responsibility where there is no neglect, if the error of judgment is so gross as to be inconsistent with that degree of skill which it is the duty of every physician or surgeon to bring to the treatment of a case: West v. Martin, 81 Mo. 375, 80 Am. Dec. 107; Johnson v. Winston (Neb.), 94 N. W. 607.

As summarized in Pike v. Honsinger, 155 N. Y. 201, 63 Am. St. Rep. 655, 49 N. E. 760, upon consenting to treat a patient, it becomes the duty of a physician and surgeon "to use reasonable care and diligence in the exercise of his skill and the application of his learning to accomplish the purpose for which he was employed. He is under the further obligation to use his best judgment in exercising his skill and applying his knowledge. The law holds him liable for an injury to his patient resulting from want of the requisite knowledge and skill, or the omission to exercise reasonable care, or the failure to use his best judgment. The rule in relation to learning

and skill does not require the surgeon to possess that extraordinary learning and skill which belong only to a few men of rare endowments, but such as is possessed by the average member of the medical profession in good standing. Still, he is bound to keep abreast of the times, and a departure from approved methods in general use, if it injures the patient, will render him liable, however good his intentions may have been. The rule of reasonable care and diligence does not require the exercise of the highest possible degree of care, and to render a physician and surgeon liable it is not enough that there has been a less degree of care than some other medical man might have shown, or less than even himself might have bestowed, but there must be a want of ordinary and reasonable care, leading to a bad result. This includes not only the diagnosis and treatment, but also the giving of proper instructions to his patient in relation to conduct, exercise, and the use of the injured limb. The rule requiring him to use his best judgment does not hold him liable for a mere error of judgment, provided he does what he thinks is best after careful examination. His implied engagement with his patient does not guarantee a good result, but he promises by implication to use the skill and learning of the average physician, to exercise reasonable care, and to exert his best judgment in the effort to bring about a good result."

b. As Determined by Particular Circumstances.

1. **Present State of Medical Science.**—In determining the degree of care and skill which the law exacts of physicians and surgeons, regard must be had to the advanced state of the profession at the time of the treatment. They are held to exercise the ordinary care and skill of their profession in the light of modern learning and enlightenment on the subject. Their treatment is measured by the standard existing at the time they practice, and not that which may have existed at some time in the past: *Force v. Gregory*, 63 Conn. 167, 38 Am. St. Rep. 371, 27 Atl. 1116; *Almond v. Nugent*, 31 Iowa, 300, 11 Am. Rep. 147; *McCracken v. Smathers*, 122 N. C. 799, 29 S. E. 354; *Gillette v. Tucker* (the principal case), ante, p. 637; *Gates v. Fleischer*, 67 Wis. 504, 30 N. W. 874.

2. **Locality or Place of Practice.**—The character of the locality or neighborhood in which a physician or surgeon practices has an important bearing upon the requisite degree of skill: *Pelky v. Palmer*, 109 Mich. 561, 67 N. W. 561. Thus, a country physician and surgeon is not bound to the exercise of that high degree of art and skill possessed by eminent surgeons living in large cities and making a specialty of the practice of surgery, but only to that reasonable degree of learning and skill ordinarily possessed by other learned in his profession: *Small v. Howard*, 128 Mass. 131, 35 Am. Rep. 363.

From the language of some decisions it may be inferred that a physician and surgeon is held only to that degree of diligence, learn-

ing, and skill possessed by physicians and surgeons of the particular locality where he practices: See *Pike v. Honsinger*, 155 N. Y. 201, 63 Am. St. Rep. 655, 49 N. E. 760; *Gates v. Fleischer*, 67 Wis. 504, 30 N. W. 674. It is more accurate to say that he is required to exercise that degree of diligence, learning, and skill which physicians and surgeons practicing in similar localities or communities ordinarily possess: *Baker v. Hancock* (Ind App.), 63 N. E. 323; *Whitesell v. Hill*, 101 Iowa, 629, 70 N. W. 750, overruling *Smother v. Hanks*, 34 Iowa, 287, 11 Am. Rep. 141; *Dunbault v. Thompson*, 109 Iowa, 199, 80 N. W. 324; *McCracken v. Smathers*, 122 N. C. 799, 29 S. E. 354. "It seems to us," remarks Justice Worden, "that physicians and surgeons practicing in small towns or rural or sparsely populated districts are bound to possess and exercise at least the average degree of skill possessed and exercised by the profession in such localities generally. It will not do, as we think, to say that if a surgeon or physician has exercised such a degree of skill as is ordinarily exercised in the particular locality in which he practices, it will be sufficient. There might be but few practicing in the given locality, all of whom might be quacks, ignorant pretenders to knowledge not possessed by them, and it would not do to say that because one possessed and exercised as much skill as the others, he could not be chargeable with the want of reasonable skill"; *Gramm v. Boener*, 56 Ind. 497. To the same effect are the well-considered cases of *Burk v. Foster*, 24 Ky. Law Rep. 791, 69 S. W. 1096; *McCracken v. Smathers*, 122 N. C. 799, 29 S. E. 354.

3. *School of Medicine.*—In an action for malpractice a physician and surgeon is entitled to have his treatment of his patient tested by the rules and principles of the school of medicine to which he belongs, and not by those of some other school: *Force v. Gregory*, 63 Conn. 167, 38 Am. St. Rep. 371, 27 Atl. 1116; *Patten v. Wiggin*, 51 Me. 594, 81 Am. Dec. 593; *Martin v. Courtney*, 75 Minn. 255, 77 N. W. 813; *Martin v. Courtney* (Minn.), 91 N. W. 487. A person professing to follow one system or school of medicine cannot be expected by his employer to practice any other. And if he performs the treatment with ordinary skill and care in accordance with his system, he is not answerable for bad results: *Bowman v. Woods*, 1 G. Greene (Iowa), 441.

4. *Established Mode of Treatment.*—It is incumbent on a physician and surgeon to conform to the established mode of treatment of a given case, and if he departs therefrom he does so at his peril: *Carpenter v. Blake*, 66 Barb. 488. Where but one course of treatment would be suggested by physicians of ordinary skill, the adoption of any other course is evidence of want of ordinary knowledge, skill, or care: *Patten v. Wiggin*, 51 Me. 594, 81 Am. Dec. 593. To illustrate, if a patient is suffering with phimosis, and the ordinary method adopted by the medical profession in the treatment of such cases is to slit the prepuce or foreskin, a physician adopting a differ-

ent remedy, which aggravates the malady and results in a loss of the member, renders himself liable regardless of skill: *Jackson v. Burnham*, 20 Colo. 532, 39 Pac. 577.

It may be argued that this doctrine makes a physician liable in case he adopts new methods, although improved ones, and that progress in medical science is impossible if the profession must adhere to ancient methods. Such is not intended to be the effect of the rule. When this argument was made in *Allen v. Voje*, 114 Wis. 1, 89 N. W. 924, it was met by the court with the following observation made in *Carpenter v. Blake*, 60 Barb. 488, 523: "Some standard by which to determine the propriety of treatment must be adopted; otherwise experiments will take the place of skill, and the reckless experimentalists the place of the educated, experienced practitioner. . . . But when the case is one as to which a system of treatment has been followed for a long time, there should be no departure from it, unless the surgeon who does it is prepared to take the risk of establishing by his success the propriety and safety of his experiment. The rule protects the community against reckless experiments, while it admits the adoption of new remedies and modes of treatment only when their benefits have been demonstrated, or when, from the necessity of the case, the surgeon or physician must be left to the exercise of his own skill and experience."

5. **Compensation—Gratuitous Services.**—The same degree of care and skill are exacted of a physician and surgeon whether he serves gratuitously or for compensation: *McNeveins v. Lowe*, 40 Ill. 209; *Peck v. Hutchinson*, 88 Iowa, 820, 55 N. W. 511. We quote from the instruction to the jury by Justice Pryor in *Becker v. Janinski*, 27 Abb. N. C. 45, 15 N. Y. Supp. 675: "It appears that the plaintiff was a charity patient; that the defendant was treating her gratuitously. But I charge you that this fact in no respect qualifies the liability of the defendant. Whether the patient be a pauper or a millionaire, whether he be treated gratuitously or for reward, the physician owes him precisely the same measure of duty, and the same degree of skill and care. He may decline to respond to the call of a patient unable to compensate him; but if he undertake the treatment of such a patient, he cannot defeat a suit for malpractice, nor mitigate a recovery against him, upon the principle that the skill and care required of a physician are proportioned to his expectation of pecuniary recompense. Such a rule would be of the most mischievous consequence; would make the health and life of the indigent the sport of reckless experiment and cruel indifference."

6. **Contributory Fault of Patient.**—It is the duty of a patient to follow the reasonable instructions and submit to the reasonable treatment prescribed by his physician or surgeon. If he fails in his duty, and his negligence directly contributes to the injury, he cannot maintain an action for malpractice against his physician or surgeon, who is also negligent in treating the case: *Lower v. Franks*,

115 Ind. 334, 17 N. E. 630; *Young v. Mason*, 8 Ind. App. 264, 35 N. E. 521; *Whitesell v. Hill* (Iowa), 66 N. W. 894; *Hitchcock v. Burgett*, 38 Mich. 501; *Chamberlain v. Porter*, 9 Minn. 260; *Davis v. Spicer*, 27 Mo. App. 279; *Becker v. Janinski*, 27 Abb. N. C. 45, 15 N. Y. Supp. 675; *Geiselman v. Scott*, 25 Ohio St. 86; *Richards v. Willard*, 176 Pa. St. 181, 35 Atl. 114. But the conduct of the patient will not defeat his right of action unless it substantially contributes to the injury: *West v. Martin*, 31 Mo. 375, 80 Am. Dec. 107. And if the physician has failed to exercise reasonable care or skill he is responsible for damages resulting from his own acts alone. The fact that the patient disregards his instructions and so aggravates the injury does not discharge the liability, but simply goes in mitigation of damages: *Du Bois v. Decker*, 130 N. Y. 325, 27 Am. St. Rep. 529, 29 N. E. 313; *McCracken v. Smathers*, 122 N. C. 799, 29 S. E. 354.

On this question, the judge, in *Hibbard v. Thompson*, 109 Mass. 286, first instructed the jury that, "if it be impossible to separate the injury occasioned by the neglect of the plaintiff from that occasioned by the neglect of the defendant, the plaintiff cannot recover"; and then added: "If, however, they can be separated, for such injury as the plaintiff may show thus proceeded solely from the want of ordinary skill or ordinary care of the defendant he may recover." This instruction was approved on appeal to the supreme court, Chief Justice Chapman saying: "The first part states the ordinary rule as to the negligence of the plaintiff; the second states the proper limitation of the rule. It is an important limitation; for a physician may be called to prescribe for cases which originated in the carelessness of the patient; and though such carelessness would remotely contribute to the injury sued for, it would not relieve the physician from liability for his distinct negligence, and the separate injury occasioned thereby. The patient may also, while he is under treatment, injure himself by his own carelessness; yet he may recover from his physician if he carelessly or unskillfully treats him afterward, and thus does him a distinct injury. In such cases, the plaintiff's fault does not directly contribute to produce the injury sued for."

A patient is bound to submit to such treatment as his surgeon prescribes, provided the treatment is such as a surgeon of ordinary skill would adopt or sanction; but if it is painful, injurious, and unskillful, he is not bound to peril his health, and perhaps his life, by submission to it. "It follows, that before the surgeon can shift the responsibility from himself to the patient, on the ground that the latter did not submit to the course recommended, it must be shown that the prescriptions were proper and adapted to the end in view. It is incumbent on the surgeon to satisfy the jury on this point, and in doing so he has the right to call to his aid the science and experience of his professional brethren. It will not do to cover his

own want of skill by raising a mist out of the refractory disposition of the patient": *Du Bois v. Decker*, 130 N. Y. 325, 27 Am. St. Rep. 529, 29 N. E. 313; *McCandless v. McWha*, 22 Pa. St. 261.

If a patient is delirious and cannot be made to understand the necessity of the treatment proposed, the physician or surgeon may co-operate with the patient's immediate family and resort to reasonable force. But when the patient is in that condition, and the members of the family having him in charge refuse to allow the treatment, then the physician is not required to use force: *Littlejohn v. Arbogast*, 95 Ill. App. 605. In case a surgeon requests the needed assistance of another surgeon in the treatment of a case, and the patient refuses or neglects to procure it, the surgeon cannot be held liable in damages for a permanent injury when the employment of assistance would have rendered the injury only temporary: *Haering v. Spicer*, 92 Ill. App. 449.

The doctrine is advanced in *Gramm v. Boener*, 56 Ind. 497, that when a surgeon is called upon to perform an operation by a person of mature years and sound mind, and he advises against the operation as unnecessary and improper, but the patient insists upon its performance, in compliance with which the surgeon performs it, the surgeon cannot be held liable in damages if the operation proves improper and injurious. "In such case," says the court, "the patient relies upon his own judgment, and not that of the surgeon, as to the propriety of the operation; and he cannot complain of an operation performed at his own instance and upon his own judgment, and not upon that of the surgeon. The maxim, '*Volenti non fit injuria*,' we think, well applies to such a case. The principle is quite analogous to that which prevents a recovery for injuries consequent upon unskillful or negligent treatment by a physician, if the plaintiff's own negligence directly contributed to them." We cannot lend our approval to this doctrine. To our mind, the duty of a surgeon in such a case is clear. He should refuse to perform the operation. If he does operate, relying upon his patient's judgment, he should be held answerable for the consequences. There can hardly be a more flagrant violation of his duty than to proceed contrary to the dictates of his own judgment. He has no right to rely on the judgment of his patient. A layman cannot be expected to know anything of matters of surgery, or be a judge of the propriety of an operation."

The fault or negligence of others than the patient contributing to the injury complained of is considered in a subsequent portion of this note: See post, p. 663.

c. **Skill Required of Specialists.**—A physician who holds himself out as having special knowledge and skill in the treatment of a particular organ or disease is bound to bring to the discharge of his duty to patients employing him as a specialist that degree of skill and learning ordinarily possessed by physicians who devote special

attention and study to such organ or disease, having regard to the present state of scientific knowledge. Being employed because of his peculiar learning and skill in the specialty practiced by him, it follows that his duty to patients cannot be measured by the average skill of general practitioners: *Baker v. Hancock* (Ind. App.), 63 N. E. 323; *McMurdock v. Kimberlin*, 23 Mo. App. 523. An oculist, in treating a patient, must exercise the care and skill usually exercised by oculists in good standing: *Stern v. Langg*, 106 La. 738, 31 South. 303; *Feeney v. Spalding*, 89 Me. 111, 35 Atl. 1027.

d. **Burden of Proving Want of Care or Skill.**—The law accords the medical practitioner the presumption that he has done his duty. In a suit for injuries caused by alleged malpractice, the burden is on the plaintiff to prove the want of reasonable and ordinary care or skill, and also that the injury complained of resulted from such want of care or skill: *Styles v. Tyler*, 64 Conn. 432, 30 Atl. 165; *Georgia Northern Ry. Co. v. Ingram*, 114 Ga. 639, 40 S. E. 708; *Holtzman v. Hoy*, 118 Ill. 534, 59 Am. Rep. 390, 8 N. E. 832; *McKee v. Allen*, 94 Ill. App. 147; *Pettigrew v. Lewis*, 46 Kan. 78, 26 Pac. 458; *State v. Housekeeper*, 70 Md. 162, 14 Am. St. Rep. 340, 16 Atl. 382; *Martin v. Courtney* (Minn.), 91 N. W. 487; *Leighton v. Sargent*, 81 N. H. 119, 64 Am. Dec. 323; *Bellinger v. Graigue*, 31 Barb. 534.

II. Liability for Acts of Others.

a. **Mismanagement by Those in Charge.**—If the contributory fault of a patient unites with the want of skill or care of the physician or surgeon, in producing the injury complained of, this, as we have seen, may constitute a defense to an action for malpractice: See *Contributory Fault of Patient*, ante, p. 660. So, if parents or others in charge of a patient, by careless treatment or disregard of the physician's instructions, directly contribute to injuries ascribed to malpractice, the physician is not answerable: *Sanderson v. Holland*, 39 Mo. App. 233; *Potter v. Warner*, 91 Pa. St. 362, 36 Am. Rep. 668. But where the original treatment of a broken arm by a surgeon was such that the limb must have inevitably been injured, the mismanagement of those having the patient in charge, whereby the injury is aggravated, goes only to the measure of damages, and not to the right of action against the surgeon: *Wilmot v. Howard*, 39 Vt. 447, 94 Am. Dec. 338.

b. **Negligence of Druggist.**—In case a prescription is improperly written, as a result of which the patient dies, the fact that the druggist who filled it may have been negligent is no defense to the physician who wrote it in an action against him for malpractice: *Murdock v. Walker*, 43 Ill. App. 590.

c. **Treatment of Other Physicians.**—If a physician, on leaving town, recommends, in case of need, another physician, or leaves another physician in charge of his practice while he is absent, he cannot be held answerable for the negligent or unskillful acts of such

physician: *Keller v. Lewis*, 65 Ark. 578, 47 S. W. 755; *Hitchcock v. Burgett*, 38 Mich. 501; *Myers v. Holborn*, 58 N. J. L. 193, 55 Am. St. Rep. 606, 33 Atl. 389. This is true, according to the New Jersey case, although the negligent physician was employed by the one sought to be held liable to attend the patient.

d. *Negligence of Partner*.—When physicians and surgeons are in partnership, all are liable in damages for the professional negligence of one of the firm. The act of one, within the scope of the partnership business, is the act of each and all, as fully as if each is present participating in all that is done; and each partner guarantees that the one in charge will display reasonable care and skill: *Hyrne v. Erwin*, 23 S. C. 226, 55 Am. Rep. 15. If, during the pendency of an action against two physicians, as partners, one of them dies, the action may be prosecuted to judgment against the other: *Hess v. Lowrey*, 122 Ind. 225, 17 Am. St. Rep. 355, 23 N. E. 156.

III. Duration of the Relation of Physician and Patient.

a. *Commencement and Continuance—Abandonment of Case*.—A physician or surgeon is not bound to render professional services to everyone who applies, and is not, therefore, liable for the death of a person caused by his refusal to render medical assistance: *Hurley v. Eddingfield*, 156 Ind. 416, 83 Am. St. Rep. 198, 59 N. E. 1058. But when he takes charge of a case and is employed to attend a patient, his employment, as well as the relation of physician and patient, continues until ended by the consent of the parties, or revoked by the dismissal of the physician, or until his services are no longer needed. And he must exercise reasonable care and judgment in determining when his attendance may properly and safely be discontinued. If he does not he is liable for the consequences: *Mucci v. Houghton*, 89 Iowa, 608, 57 N. W. 305; *Ballou v. Prescott*, 64 Me. 305; *Dashiell v. Griffith*, 84 Md. 363, 35 Atl. 1094; *Becker v. Janinski*, 27 Abb. N. C. 45, 15 N. Y. Supp. 675; *Gerken v. Plimpton*, 70 N. Y. Supp. 793, 62 App. Div. 35; *Lawson v. Conaway*, 37 W. Va. 159, 38 Am. St. Rep. 17, 16 S. E. 564.

But if a patient has received careful and skillful treatment at the office of a physician or surgeon, and fails to return to the office for further treatment, in consequence of which he suffers injury, he is not entitled to maintain an action against the physician: *Dashiell v. Griffith*, 84 Md. 363, 35 Atl. 1094. And of course a patient may at any time discharge or dismiss his physician, from which moment the latter's responsibility ceases, if he has given the case proper attention till then: *Kendall v. Brown*, 74 Ill. 232; *Lawson v. Conaway*, 37 W. Va. 159, 38 Am. St. Rep. 17, 16 S. E. 564.

When a surgeon performs an operation, not only must he use reasonable and ordinary care and skill in its performance, but also in the subsequent treatment of the case. It is his duty to give the patient such attention after the operation as the necessity of the

case demands, in the absence of any special agreement limiting the service or reasonable notice to the patient: See the principal case, ante, p. 637. In *Akridge v. Noble*, 114 Ga. 949, 41 S. E. 78, a case involving facts very similar to those in the principal case, it was alleged that a surgeon, who had made an incision in the abdomen of his patient, and placed sponges in her body to absorb the blood and pus, failed to remove one of the sponges before closing up the opening. The argument was made that the time when the skill of the surgeon is expected to become active in performing such an operation is when the opening is made in the body, and continues while the sponges are being put in place, but that when the affected portion of the body has been removed and precautions taken to prevent hemorrhage, and the moment arrives for the sponges to be removed, the operation is at an end, and no longer is the surgeon in a position where the knowledge which makes him a man of skill is required to be exercised, and that when the sponges are being removed he is no longer the man of skill exercising skill, but simply the ordinary man and required to exercise due care and diligence only. But the court very properly ruled that the removal of the sponges was a part of the operation; a part which required not only the exercise of due care, but due skill as well.

A physician who leaves a patient at a critical stage of the case, without good reason or giving an opportunity to procure the attendance of another doctor is guilty of a culpable dereliction of duty. and may be made to respond for all damages resulting from his conduct: *Latrobe v. Flood*, 135 Cal. 458, 63 Pac. 1007; *Barbour v. Martin*, 62 Me. 536. The conduct of the physician in the California case was peculiarly reprehensible. He had assumed charge of a confinement case. The time came when he deemed it proper to use instruments to aid in delivering the child. When he used them, the patient, who was going through woman's martyrdom for the first time, shrank back and screamed, compelling him to let go the instruments. He threatened to quit the case if she did not stop screaming. Upon a second or third unsuccessful attempt to use the instruments, he abruptly left the house in the dead of night. It was an hour before the presence of another physician was secured. A verdict of two thousand dollars against the physician was held not excessive for the abandonment of the case and the mental suffering of the patient.

IV. Duty and Liability of Other Practitioners.

a. *Dentists.*—The rules governing the duty and liability of physicians and surgeons in the performance of professional services are applicable to dentists. In the absence of an express agreement they do not insure or warrant the result of their work, nor do they engage to bring to it the highest skill known to the profession. And they are not answerable for mere mistakes of judgment: *Simonds v. Henry*, 39 Me. 165, 63 Am. Dec. 611; *Wilkins v. Ferrell*, 10 Tex. Civ. App. 231, 30 S.

W. 450. But the law does place upon them the duty, and holds them liable for a want thereof, of possessing and exercising that reasonable degree of diligence, learning and skill ordinarily possessed by dentists in similar localities, and of keeping abreast of the times, and of exerting their best judgment: *McCracken v. Smathers*, 122 N. C. 799, 29 S. E. 354.

b. **Veterinarians.**—A veterinary surgeon impliedly engages and is bound to use, in performing the duties of his employment, such reasonable skill, diligence, and attention as may ordinarily be expected of careful, skillful and trustworthy persons in his profession. If he does not possess and exercise these qualities, he is answerable for the result of his want of skill or care. He does not, however, impliedly contract to use the highest degree of skill, nor an extraordinary amount of diligence, nor to effect a cure; and negligence cannot be implied from his failure to do so: *Connor v. Winton*, 8 Ind. 315, 65 Am. Dec. 761; *Williams v. Gilman*, 71 Me. 21; *Barney v. Pinkham*, 29 Neb. 350, 26 Am. St. Rep. 389, 45 N. W. 694.

c. **Persons not Physicians.**—A physician or surgeon must apply the skill and learning that belongs to his profession. But if a person without special qualifications and without professing to be a physician, volunteers to attend the sick, he can at most be required to exercise the skill and diligence usually bestowed by persons of like qualifications under like circumstances. To hold otherwise would be to charge responsibility in damages upon all who make errors and mistakes in the performance of kindly offices for the sick: *McNevin v. Lowe*, 40 Ill. 209; *Higgins v. McCabe*, 126 Mass. 13, 30 Am. Rep. 642. But if one not a physician holds himself out as a doctor to persons employing him, and they believe him to be such, then he is chargeable in that character: *Matthei v. Wooley*, 69 Ill. App. 654; *Musser v. Chase*, 29 Ohio St. 577. In the first of these cases the party charged with malpractice was a druggist; in the Ohio case he was a farmer by general occupation, but held himself out as a cancer doctor having skill and experience in the treatment of cancers, and claiming to have a recipe or prescription from a certain cancer specialist.

d. **Clairvoyants.**—Clairvoyant physicians, pursuing peculiar methods of diagnosis and treatment, have been held to take the risk thereof. They are bound to treat patients with the ordinary skill and knowledge of physicians, although, not having any fixed principles or formulated rules for the treatment of diseases, they cannot be considered as constituting a school of medicine: *Nelson v. Harrington*, 72 Wis. 591, 7 Am. St. Rep. 900, 40 N. W. 228.

V. Miscellaneous Cases of Liability.

a. **Communication of Infectious Diseases.**—A physician attending patients afflicted with infectious diseases is bound to take all such precautions as experience has found to be necessary to prevent

the communication of such diseases to his other patients: *Piper v. Menifée*, 12 B. Mon. 465, 54 Am. Dec. 547. And he owes this duty to one whom he calls to his assistance in treating a case. Thus, if a surgeon directs the wife of his patient to assist in dressing a wound, knowing there is danger of infection, but assuring her there is not, and she, relying on his advice, becomes infected with poison, he is liable: *Edwards v. Lamb*, 69 N. H. 599, 45 Atl. 480. On the liability generally for communicating contagious diseases, see the note to *Missouri etc. Ry. Co. v. Wood*, post, p. 834.

b. **Reporting a Venereal Disease.**—Where a man is said to be afflicted with a venereal disease, and the father of the woman to whom he is engaged to be married requests a physician to examine him, the physician is liable if he mistakenly pronounces the disease venereal. "Having undertaken for compensation to be paid by another to examine the plaintiff, and to report whether he was diseased, the defendant was bound to have the ordinary skill and learning of a physician, and exercise ordinary diligence and care; and if he failed, and the plaintiff was injured because of his want of such skill and learning, or his want of such care, the defendant was answerable to him in damages. In our opinion the fact that the purpose of the examination was information, and not medical treatment, is immaterial, and the breaking of the plaintiff's marriage engagement in consequence of the wrong diagnosis was not too remote a damage to sustain the action": *Harriott v. Plimpton*, 166 Mass. 585, 44 N. E. 992.

c. **Promising to Procure Another Physician.**—If a physician in treating a patient for typhoid fever finds her eye affected, and she requests him to send her an oculist, which he promises but fails to do, he is not answerable for the loss of the eye, there being no evidence that the injury to that organ was a result of the fever, and the fever being successfully treated: *Jones v. Vroom*, 8 Colo. App. 143, 45 Pac. 234.

d. **Failure to Obtain Husband's Consent.**—A surgeon is justified in performing an operation upon a married woman, with her consent, if he deems it necessary to the preservation or prolongation of her life, without obtaining her husband's consent thereto: *State v. Housekeeper*, 70 Md. 162, 14 Am. St. Rep. 340, 16 Atl. 382. A physician under whose care a man places his wife, some distance from his own residence, is presumed to have authority to do all such acts, and adopt such course of treatment and operations as in his opinion are necessary, without previously notifying the husband of an intended operation; nor need he prove to the satisfaction of the jury that the operation was necessary or that it would be dangerous to wait until the husband was notified: *McClallen v. Adams*, 129 Pick. 333, 81 Am. Dec. 140.

CITY OF CLEVELAND v. CLEMENTS BROS. CONSTRUCTION COMPANY.

[67 Ohio St. 197, 65 N. E. 835.]

MUNICIPAL CORPORATIONS—Authority of the Legislature Over the Contracts of.—The authority of the legislature over a municipal corporation is not so absolute and arbitrary that it may direct the terms upon which it may contract, and may prescribe what stipulations and conditions its contracts must contain, where such contracts relate to matters purely of local improvement. (p. 672.)

CONSTITUTIONAL LAW—Contracts and Hours of Employment—Power of the Legislature to Control.—What the terms and stipulations of a contract shall be is a matter to be determined by the contracting parties, and the right has not been delegated to, nor is it within the general power of, the assembly, by mandatory laws, to prescribe the terms and provisions which shall be inserted in contracts made between persons legally competent to contract. The number of hours of labor that shall be performed in a day is an important feature and constitutes an essential part of every contract of service, and to deny effect to an agreement between employer and employes touching the number of hours the employes shall labor each day is, in effect, to impair the obligation of the contract and to deny them the right of contract touching that matter. (p. 677.)

CONSTITUTIONAL LAW—Statutes Providing Hours Each Day for Which Labor may be Contracted for on Public Works.—A statute undertaking to limit the hours of daily service of employes upon public works, or work done for the state, or any political subdivision thereof, and making it unlawful for any contractor to require or permit his workmen to labor more than eight hours in any one calendar day is unconstitutional, because it interferes with the liberty of contract. (p. 680.)

CONSTITUTIONAL LAW.—Provisions inserted in contracts in obedience to an unconstitutional statute demanding their insertion must be disregarded. (p. 679.)

M. W. Beacom and Babcock, Payer, Gage & Carey, for the plaintiff in error.

Weed & Miller and Wilcox, Collister, Hogan & Parmley, for the defendant in error.

206 CREW, J. In this case the city of Cleveland, defendant in the court below, for answer to the claim made against it by plaintiff below, the Clements Bros. Construction Company, pleaded by way of justification, and as its only defense, the provisions of an act of the Ohio legislature, passed April 16, 1900, and entitled: "An act to provide for limiting the hours of daily service of laborers, workmen and mechanics employed upon public works, or of work done for the state of Ohio, or any political

subdivision thereof, providing for the insertion of certain stipulations in contracts of public works; imposing penalties for violations of the provisions of this act, and providing for the enforcement thereof." The sufficiency of this answer, as a defense was challenged by a demurrer filed ²⁰⁷ thereto by plaintiff. Whether such answer was and is sufficient, and the matter so pleaded defensive, depends entirely upon whether said act of April 16, 1900, is a valid and constitutional enactment. The provisions of this law are as follows:

"Section 1. The service of all laborers, workmen and mechanics employed upon any public works of, or work done for the state of Ohio, or for any political subdivision thereof, whether said work is done by contract or otherwise, shall be, and is hereby limited, and restricted, to eight hours in any one calendar day; and it shall be unlawful for any officer of the state, or of any political division thereof, or any person acting for or on behalf thereof, or any contractor, or subcontractor for any part of any public works of, or work done for such state, or political subdivision thereof, or any person, corporation or association whose duty it shall be to employ or to direct and control the services of such laborers, workmen or mechanics, or who has in fact the direction or control of the services of such laborers, workmen or mechanics, to require or permit them, or any of them, to labor more than eight hours in any one calendar day, except in cases of extraordinary emergency, caused by fire, flood or danger to life and property, and except to work upon public, military or naval works or defenses in time of war, and except in cases of employment of labor in agricultural pursuits.

"Sec. 2. Each and every contract to which the state of Ohio, or any political subdivision thereof, is a party, and every contract made for or on behalf of the said state, or any subdivision thereof, which contract may involve the employment of laborers, workmen or mechanics, shall contain a stipulation that no laborer, workman or mechanic in the employ of the ²⁰⁸ contractor, or any subcontractor doing or contracting to do any part of the work contemplated by the contract, shall be required or permitted to work more than eight hours in any one calendar day; except in cases of extraordinary emergency, caused by fire, flood, or danger to life or property, and except to work upon public, military, or naval work, or defenses in time of war, and except in cases of employment of labor in agricultural pursuits, and each and every (such) contract shall stipulate a penalty for such violation of the stipulation directed by this act, of ten

dollars per each laborer, workman or mechanic, for each and every calendar day in which he shall labor more than eight hours, and the inspector or officer, or person whose duty it shall be to see that the provisions of any such contract are complied with, shall report to the proper officer of such state, or political subdivision thereof, all violations of the stipulation in this act provided for in each and every subcontract, and the amount of the penalties stipulated in any such contract shall be withheld by the officer or person whose duty it shall be to pay the moneys due under such contract whether the violations for which such penalties were imposed by contractor, his agents or employes, or any subcontractor, his agents or employes, no person on behalf of the state of Ohio, or any political subdivision thereof shall rebate or permit any penalty imposed under such (any) stipulation herein provided for, unless upon a finding which he shall make up and certify that such penalty was imposed by reason of an error of fact. Nothing in this act shall be construed to authorize the collection of said penalty from the state, or any political subdivision thereof.

"Sec. 3. Any officer of the state of Ohio, or any ²⁰⁰ political subdivision thereof, or any person acting for or on behalf thereof, who shall violate the provision of this act, shall be deemed guilty of a misdemeanor, and shall be subject to a fine or imprisonment, or both, at the discretion of the court, the fine not to exceed five hundred dollars, nor the imprisonment more than one year.

"Sec. 4. All acts and parts of acts inconsistent with this act, in so far as they are inconsistent, are hereby repealed.

"Sec. 5. This act shall take effect and be in force from and after its passage."

The court of common pleas held this law to be constitutional, and held that the answer of defendant, the city of Cleveland, constituted a good defense to the plaintiff's cause of action, and overruled the plaintiff's demurrer thereto and gave judgment for said city of Cleveland. This ruling and judgment of the court of common pleas was reversed by the circuit court of Cuyahoga county, on the sole ground that the court of common pleas erred in overruling the demurrer of plaintiff to said answer. And said circuit court proceeding to render the judgment that the court of common pleas should have rendered, held said law to be unconstitutional, and sustained said demurrer to said answer. And said defendant not desiring to plead further, said circuit court rendered judgment in favor of plaintiff, the Clements

Bros. Construction Company, and against said city of Cleveland for the full amount claimed by plaintiff. If the law under consideration is constitutional, then this judgment of the circuit court is erroneous and should, in this proceeding, be reversed; but if, as found by the circuit court, such law is unconstitutional, then the judgment of said circuit court was ²¹⁰ right and should be affirmed. Whether such law is constitutional is the sole question presented by the record in this case.

While the particular statute here in question has not, prior to this time, been before this court for review, nor has the precise question here presented heretofore been decided by this court, yet we are not without pertinent authority and direct adjudication by the courts of last resort in other states, upon the question here involved, and this court has more than once been called upon to consider and determine the constitutionality of statutes which were somewhat analogous to the statute under consideration, in that they had for their purpose, or did in effect, limit and restrict the right of contract between employer and employé; and in every instance such statutes have been declared and held by this court to be unconstitutional.

Counsel for plaintiff in error in this case apparently do not question the correctness of these decisions, and in argument they concede that it is beyond the power of the legislature to control by legislative enactment the contracts which shall be made between employer and employé when those persons are individuals or corporate persons, and the subject matter of their contracts is not necessary to be regulated for police reasons. And such clearly is the established law of this and other states. But, they contend that the statute here in question is not an attempt by the legislature of Ohio to restrict or interfere with the right of liberty to contract, but is only in the nature of a direction by a principal to his agent, and therefore within the legislative authority, and matter of concern to the principal and agent only. They argue that the several municipal governments of the state ²¹¹ are not in themselves independent and sovereign, but are subdivisions of the general government, created by it with enumerated powers, and with no powers except such as may be fairly drawn from their charters or creation. Hence, they contend that being mere subdivisions of the state, and deriving their powers from the state, such municipalities may be lawfully directed by the legislative will as to what contracts they may make and what provisions and stipulations their contracts shall contain; and that in the con-

tract here in question, the city of Cleveland being a mere agency and instrument of the state, the state had the right by and through its legislature, to direct and require the city, as its agent and representative, to insert in this contract the stipulations and provisions therein found. The fallacy of this contention lies in the assumption that the compulsory authority of the legislature over municipal corporations is so absolute and arbitrary that it may dictate the specific terms upon which such municipality shall contract, and may prescribe what stipulations and conditions its contracts shall contain, although such contracts may, as in this case, relate only to matters of purely local improvement. This is a misapprehension of the legislative authority, for no such right or power has been delegated to, or is possessed by, the general assembly.

As said in *Taylor v. Porter*, 4 Hill (N. Y.), 114: "Under our system of government the legislature is not supreme. It is only one of the organs of that absolute sovereignty which resides in the whole body of the people. Like other departments of the government, it can only exercise such powers as have been delegated to it and when it steps beyond that boundary its acts, like those of the most humble magistrate in the state who transcends ²¹² his jurisdiction, are utterly void. Therefore, as the security of life, liberty and property lay at the foundation of the social compact, to say that the grant of legislative power includes the right to attack private property would be equivalent to saying that the people had delegated to their servants the power of defeating one of the great ends for which government was established. This end being the protection of the absolute right to life, liberty and property."

Again, counsel for plaintiff in error are mistaken in the assumption that the statute here under consideration is, and should be, regarded as a mere direction by the sovereign authority, the state of Ohio, to one of its agents, the city of Cleveland, that contracts made by said city in certain cases, and for a certain character of work, are to be made in a particular way. In the case of *People v. Coler*, 166 N. Y. 1, 82 Am. St. Rep. 605, 59 N. E. 716, a statute distinguishable in no essential feature from the statute here under consideration was before the court of appeals of that state for review, its constitutionality having been challenged. O'Brien, judge in that case, in discussing the proposition we are now considering, speaking for the majority of the court says: "Nor is it entirely true that the statute is a mere direction by the sovereign authority to one of its own

agencies to contract in certain cases in a particular way. It is all that no doubt and very much more since it affects personal and municipal rights in many directions that are of vastly more importance than the mere form of a contract to perform municipal work. It is true enough that a city is an agency of the state to discharge some of the functions of government, but these terms do not adequately describe its true relation to the state or the people. A municipal officer directing a local improvement is not ²¹³ the agent of the state. He is the agent of the city, and the city alone is responsible for his negligence or misconduct. If the authorities in charge of the streets of a city are agents of the state, the city ought not to be held liable for their acts or omissions. . . . The city is a corporation possessing all the powers of corporations generally, and cannot be deprived of its property without its consent or due process of law any more than a private corporation can and since its revenues must be used for municipal purposes, it is difficult to see how the legislature can make contracts for it which involve the expenditure of these revenues without its consent." And further in the same opinion it is said: "The right which is conceded to every private individual and every private corporation in the state to make their own contracts and their own bargains is (by this statute) denied to cities and to contractors for city work; and moreover, if the latter attempt to assert such right the money earned on the contract is declared forfeited to the city without the intervention of any legal process or judicial decree. . . . The contractor is a private individual engaged in private business. When he enters into a fair and honest contract for some municipal improvement, that contract is property entitled to the same protection as any other property. It is not competent for the legislature to deprive him of the benefit of this contract by imposing burdensome conditions with respect to the means of performance or to regulate the rate of wages which he shall pay to his workmen, or to withhold the contract price when such conditions are not complied with in the judgment of the city. When he is not left free to select his own workmen upon such terms as he and they can fairly agree upon, he ²¹⁴ is deprived of that liberty of action and right to accumulate property embraced within the guarantees of the constitution, since his right to the free use of all his faculties in the pursuit of an honest vocation is so far abridged. . . . The exercise of such a power is inconsistent with the principles of civil liberty, the preservation and enforcement of

which was the main purpose in view when the constitution was enacted. If the legislature has power to deprive cities and their contractors of the right to agree with their workmen upon rates of compensation (or the number of hours that shall constitute a day's labor), why has it not the same power with respect to all private persons and private corporations? That question can be answered in the language which this court used when a case with features somewhat similar was under consideration. 'Such legislation may invade one class of rights to-day and another to-morrow, and if it can be sanctioned under the constitution, while far removed in time, we will not be far away in practical statesmanship from those ages when governmental prefects supervised the building of houses the rearing of cattle, the sowing of seed and the reaping of grain, and governmental ordinances regulated the movements and labor of artisans, the rate of wages, the price of food, the diet and clothing of the people, and a large range of other affairs long since in all civilized lands regarded as outside of governmental functions.' "

As suggested by counsel for defendants in error, the statute here under consideration absolutely ignores the fact that municipal corporations, in their property rights and their power to make contracts for local improvements for the benefit of their own citizens, are entitled to the same immunities and are protected by the same constitutional guaranties ²¹⁵ which shield the property of individuals or private corporations from legislative aggression. In considering the rights and powers of municipal corporations, in the case of New Orleans etc. R. R. Co. v. New Orleans, 26 La. Ann. 481, the supreme court of Louisiana says: "A municipal corporation possesses two classes of powers, and two classes of rights, public and private. In all that relates to one class, it is merely the agent of the state, and subject to its control. In the other, it is the agent of the inhabitants of the place, the corporators. maintains the character and relations of individuals, and is not subject to the absolute control of the legislature, its creator."

In the case of Atkins v. Town of Randolph, 31 Vt. 237, Judge Barrett, announcing the opinion of the supreme court of Vermont, states the proposition as follows: "It is true, as was urged in argument by the learned counsel for plaintiffs that in some respects legislatures have power in respect to municipal corporations that they have not in respect to private corporations, or individuals. They may alter or abolish municipal corporations at pleasure, but yet, not so as to defeat the pecuniary

rights of individuals as against such corporations, or as depending upon their existence. The legislature has the same power in respect to private corporations, when that power is reserved in the law creating them. So far as a municipal corporation is endowed by law with the power of contracting, and as such is made capable of acquiring, holding and disposing of property, and subject to the liabilities incident to the exercise of such power and capacity, thus being vested with legal rights as to property in contracts and improvements, and subject to legal liabilities in respect thereof, to be ascertained and enforced by suit in the ordinary judicial ²¹⁶ forums, with the same principles and by the same means as in the case of a private corporation, such municipal corporation must stand on the same ground of exemptions from legislative control and interference as a private corporation.

"As to third persons who seek to enforce pecuniary liabilities against towns arising upon contract, such towns are merely private corporations or individuals, and in this respect they are not affected by the purely municipal public and political features that appertain to their corporate existence in virtue, and in reference to which alone they are subject to the absolute control of legislation."

And to the same effect is the case of the *People v. Common Council of Detroit*, 28 Mich. 228, 15 Am. Rep. 202.

This distinction as to the powers delegated to municipal corporations was clearly recognized and commented upon by this court in the case of *Western College v. Cleveland*, 12 Ohio St. 375. In that case, Judge Gholson, announcing the opinion of the court, at page 377, says: "It is the duty of the state government to secure to the citizens of the state the peaceful enjoyment of their property and its protection from wrongful and violent acts. For the proper discharge of this duty power is delegated in different modes. One of these is the establishment of municipal corporations. Powers and privileges are also conferred upon municipal corporations, to be exercised for the benefit of the individuals of whom such corporations are composed; and in connection with these powers and privileges, duties are sometimes specifically imposed. It is obvious that there is a distinction between those powers delegated to municipal corporations to preserve the peace and protect persons ²¹⁷ and property, whether to be exercised by legislation or the appointment of proper officers, and those powers and privileges which are to be exercised for the improvement of the territory com-

prised within the limits of the corporation, and its adaptation to the purposes of residence or business. As to the first, the municipal corporation represents the state, discharging duties incumbent on the state; as to the second, the municipal corporation represents the pecuniary and proprietary interests of individuals. As to the first, responsibility for acts done or omitted is governed by the same rule of responsibility which applied to like delegations of power; as to the second, the rules which govern the responsibility of individuals are properly applicable": See also, *Cincinnati v. Cameron*, 33 Ohio St. 366.

The liberal quotations, in this opinion, from the authorities above cited need no further apology upon our part than to say that if the principles there announced and the conclusions there reached are correct, and we believe they are and adopt them, that they conclusively refute and answer the contention of plaintiff in error that the statute under consideration in this case does not restrict the right of liberty to contract and is in the nature only of a direction by a principal to its agent.

Again, stripped of its provisions, except so far as they relate to contractors and subcontractors, the first section of the statute under consideration reads as follows: "It shall be unlawful for any contractor or subcontractor for any part of any public works of, or work done for such state, or political subdivision thereof, or any person, corporation or association whose duty it shall be to employ or to direct and control the services of such laborers, workmen or mechanics, ²¹⁸ or who has in fact the direction or control of the services of such laborers, workmen or mechanics, to require or permit them, or any of them, to labor more than eight hours in any one calendar day."

Thus it is apparent that this statute, which is peremptory in terms is more than a mere direction by a principal to an agent, and that its provisions apply not only to officers and agents of the state of Ohio, but that they apply with equal force to all persons who would enter into contracts with the state or any of its political subdivisions, and undertakes to limit and restrict such persons in their right to contract by prohibiting the making of contracts for day's work of more than eight hours. What the terms and stipulations of a contract shall be is matter to be determined by the contracting parties, and the right has not been delegated to, nor is it within the power of the general assembly, by mandatory laws to prescribe the terms and provisions that shall be inserted in contracts that may be made between persons legally competent to contract. Doubtless the

legislature might, in the absence of contract between the parties, prescribe the number of hours' labor that should constitute a day's work, but it is not in the power of the legislature, by the enactment of a positive law, to abridge the right of parties to fix by contract the number of hours that shall constitute a day's work, nor to deny effect to the stipulations and agreements of the parties themselves touching such matter, except only as the exercise of such power may be authorized for the common welfare; and the right to so exercise this power of restraint extends only to matters affecting the public welfare or the health, safety and morals of the community. The number of hours' labor that shall be performed in a day is an important factor and constitutes ²¹⁹ an essential part of every contract of service, and to deny effect to the stipulations or agreements between employer and employé touching the number of hours the employé shall labor each day is, in effect, either to impair the obligation of their contract or to deny to them the right to stipulate or contract touching that matter. The latter is the right denied by the statute here in question. It is, we take it, axiomatic that in service contracts the right to contract necessarily includes the right to fix by agreement the number of hours that shall constitute a day's work for the person employed, but by the terms and provisions of this statute the parties are not left free to negotiate respecting this matter between themselves, but the number of hours which shall constitute a legal day's work for the laborer employed on work done for the municipality is, by this statute, arbitrarily fixed and determined, and the statute further provides just what stipulations in this respect shall by the contracting parties be incorporated in their contract, and enacts that noncompliance with the provisions of said statute shall be deemed a misdemeanor punishable by fine or imprisonment, or both, at the discretion of the court. The privilege of making and entering into contracts is more than a mere license or liberty. It is a property right. It is an essential incident to the acquisition and protection of property, and is such right as the legislature may not arbitrarily and without sufficient cause either abridge or take away.

In the case of *Palmer v. Tingle*, decided by this court and reported in 55 Ohio St. 423, 45 N. E. 313, the second clause of the syllabus is as follows: "Liberty to acquire property by contract can be restrained by the general assembly only so far as such restraint is for the common welfare and equal protection

and benefit ²²⁰ of the people, and such restraining statute must be of such a character that a court may see that it is for such general welfare, protection and benefit. The judgment of the general assembly in such cases is not conclusive."

There is one other claim of counsel for plaintiff in error upon which they seem to place some reliance, that should perhaps be briefly noticed and that is as to the matter of estoppel on the part of defendant in error. Counsel for plaintiff in error say in their brief: "It is plain that the municipality itself cannot complain, for, as has been shown above, it is merely an agency of a higher power, to wit, the state and can only contract as it is authorized by that power to do; nor can the contractor be heard to complain, for the city, in pursuance of its granted powers, and under restrictions imposed by the act in question, in effect said to him and all others, when it invited bids for the performance of the work: 'The statute is one of the conditions which must be complied with, and an obligation which must be assumed by the contracting party.' The contracting party (the Clements Bros. Construction Company) was not compelled to bid; it did so voluntarily, with full knowledge, and when awarded the contract, executed it voluntarily, knowing all of its provisions, and assumed the obligations and conditions imposed by the statute."

It would, perhaps, be a sufficient answer to this claim of plaintiff in error to say that the stipulation referred to became a part of the contract, not because of any voluntary agreement between the parties that it should be inserted therein, but because the statute forcibly injected it. And that such is the fact we think sufficiently appears from the language of the ²²¹ contract which immediately follows such stipulation. That language is: "The foregoing stipulation is made by reason of and to conform to the requirements of an act of the general assembly of the state of Ohio, 'to provide for limiting the hours of daily service of the laborers, workmen and mechanics employed upon public works, or of work done for the state of Ohio, or for any political subdivision thereof, providing for the insertion of certain stipulations to any contracts of public works etc., passed April 16, 1900, to the extent that the provisions of said act are applicable in the performance of this contract.'"

But further upon this proposition, as especially pertinent, we quote again from the opinion of Justice O'Brien in the case of *People v. Coler*, 166 N. Y. 1, 82 Am. St. Rep. 605, 59 N. E. 716,

above cited. He says: "The fact that certain provisions of the labor law were actually incorporated into the contract signed by the contractor, cannot change or add anything to the strength of the position assumed by the city. The relator is not estopped by the agreement when there is no element of estoppel in the case, and the question is with respect to the validity of the statute, and not the construction or effect of the contract in that regard. If the law is valid it governs the contract and the rights of the parties, whether actually incorporated into writing or not, since all contracts are assumed to be made with a view to existing laws on the subject. If it is not valid, the contractor has not made it so by stipulating in writing to obey it, and prescribing the penalty for his own disobedience, which is the forfeiture of all rights under the agreement. It is not in the power of the legislature to protect an invalid law from judicial scrutiny by providing that it must receive the assent of the parties to every contract to which it relates. . . . Courts ²²² in such cases, are not bound by mere forms, but must look at the substance of things, and so viewing this transaction, it would be idle to attempt to deceive ourselves with the idea that the question involved in this appeal arises out of the stipulations of the parties to the contract, or is governed by them, rather than the provisions of a statute. The contract is in the form that we find it, not because the parties so elected to contract, but for the reason that the statute would not permit them to contract in any other way."

As to the further claim of plaintiff in error that "even if the provisions of the statute were not actually inserted therein, they would be read into the contract as a part of the law of the state," for answer we need only refer to the third paragraph of the syllabus of *Palmer v. Tingle*, 55 Ohio St. 433, 45 N. E. 313, which syllabus is as follows: "While a valid statute regulating contracts is, by its own force, read into, and made a part of such contracts, it is otherwise as to invalid statutes."

As bearing more or less directly upon the questions herein considered, in addition to the authorities above cited, the following cases will be found instructive: *State v. Loomis*, 115 Mo 307, 22 S. W. 350; *Godcharles v. Wigeman*, 113 Pa. St. 431, 6 Atl. 354; *Ex parte Kuback*, 85 Cal. 274, 20 Am. St. Rep. 226, 24 Pac. 737; *State v. Goodwill*, 33 W. Va. 179, 25 Am. St. Rep. 863, 10 S. E. 285; *Commonwealth v. Perry*, 155 Mass. 117, 31 Am. St. Rep. 533, 28 N. E. 1126; *Low v. Rees Print-*

ing Co., 41 Neb. 127, 43 Am. St. Rep. 670, 59 N. W. 362; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; In re House Bill No. 203, 21 Colo. 27, 39 Pac. 421; In re Eight-Hour Bill, 21 Colo. 29, 39 Pac. 328; State v. Lake Erie Iron Co., reported in 33 Law Bulletin, page 6, and affirmed by this court, 51 Ohio St. 632; Marsh v. Poston & Co., reported in 35 Law Bulletin, page 327, affirmed by this court in 54 Ohio St. 681, 47 N. E. 1114; The Wheeling Bridge etc. Co. v. Gilmore, 4 Ohio C. Dec. 366, 8 Ohio C. C. 658.

²²³ Our conclusion in this case is, that the statute relied upon and pleaded by plaintiff in error, as a defense to the claim of defendant in error, is unconstitutional, because in conflict with sections 1 and 19 of the Bill of Rights. And therefore such statute cannot avail the city as a defense to shield it from liability to defendant in error, for the amount due said defendant in error under its contract. The circuit court was right in sustaining the demurrer to the answer and in rendering judgment against the city, and that judgment is therefore affirmed.

Burket, C. J., and Spear, Davis, Shauck and Price, JJ., concur.

The Principal Case is supported by *Seattle v. Smyth*, 23 Wash. 327, 79 Am. St. Rep. 939, 60 Pac. 1120. But see the later case of *State v. Buchanan*, 29 Wash. 602, 92 Am. St. Rep. 930, 70 Pac. 58; and consult the monographic note to *Booth v. People*, 78 Am. St. Rep. 244, 245.

BALL v. TOWLE MANUFACTURING COMPANY.

[67 Ohio St. 306, 65 N. E. 1015.]

EXECUTION—Lien Created on Corporate Stock—Proceedings in Aid of.—By a proceeding in aid of execution under which an order is made and served on a corporation requiring it to appear and answer concerning property of the defendant in its control, a lien is created on all stock owned by the judgment debtor therein, where the statute provides that the order binds all property in the possession and control of the corporation from the time of service, though the certificate for such stock is not in the possession of the corporation, but in that of the debtor. (pp. 689, 690.)

CORPORATIONS—Stock of, in Whose Possession Deemed to be.—The stock of a corporation for which a certificate has been issued to a subscriber or purchaser is, nevertheless, deemed to be in possession of the corporation, and, as property in its possession, may be subjected to proceedings in aid of execution against a stockholder. (p. 690.)

Suit by the Towle Manufacturing Company to foreclose a lien on certain shares of stock, which lien is claimed to have been created by proceedings commenced by it April 18, 1898, in aid of an execution in its favor against Webb C. Ball. Three days after the commencement of that proceeding and the making and serving of the order therein, the defendant in execution pledged his stock to W. J. Crowell, to secure an indebtedness of two hundred dollars, who received the pledge in good faith and without any knowledge of the proceeding in aid of execution. Judgment in favor of the plaintiff, the defendant prosecuted a writ of error.

J. P. Dawley, for the plaintiff in error.

A. A. Stearns, for the defendant in error.

³⁰⁷ CREW, J. Chapter 2, title 1, division 5 of the Revised Statutes of Ohio provides when and how proceedings in aid of execution may be instituted, and points out the method of procedure. By section 5464 of said chapter it is provided that any money, goods ³⁰⁸ or effects of a judgment debtor in the possession of a corporation, or any interest which he may have in any chose in action, may be reached and subjected to the payment of the judgment against him by action, which action is known and designated as a proceeding in aid of execution. Section 5475 of the same chapter provides, that in such proceeding a corporation having property of the judgment debtor in its possession may be ordered to appear and answer concerning said property, and that the service of said order upon the corporation, to appear and answer, shall bind the property of such judgment debtor in the possession or under the control of such corporation from the time of the service of such order. It appears in this case that on April 18, 1898, the defendant in error, the Towle Manufacturing Company, under favor of the provisions of this chapter, duly instituted proceedings in aid of execution against the plaintiff in error, Webb C. Ball and the American National Bank, and in such proceeding on April 18th, an order was duly made, issued and served upon said Webb C. Ball and the American Exchange National Bank, and said American Exchange National Bank was, by said order, directed and required to appear before a referee duly appointed by the court, and answer concerning all property in its possession or under its control belonging to said defendant, Webb C. Ball. Subsequently, and in obedience to said order, said bank, by its proper officer, appeared before

said referee in said proceeding and made its answer, and on April 27, 1898, said referee filed his report with the court, finding that said Webb C. Ball was the owner of ten shares of the capital stock of the American Exchange Bank and that said stock was of the value of twelve hundred dollars. On June 27, 1898, the ³⁰⁹ defendant in error, the Towle Manufacturing Company, commenced an action in the court of common pleas of Cuyahoga county, and in its petition alleged and claimed that by reason of said proceedings in aid of execution it had acquired a first and prior lien upon said ten shares of the capital stock of the American Exchange National Bank, and asking that said ten shares of stock be ordered sold and the proceeds applied to the payment of its judgment claim against said Webb C. Ball. To this action the American Exchange National Bank, Webb C. Ball and W. J. Crowell were made parties defendant. Said Webb C. Ball and W. J. Crowell answered severally, but the bank filed no answer. On the trial of the cause in the court of common pleas that court found the issues in favor of the plaintiff, the Towle Manufacturing Company, that it had a valid, first lien upon said ten shares of stock and adjudged and decreed that unless the amount found due plaintiff should be paid within five days from the date of said decree, that said ten shares of stock should be sold and the proceeds applied: 1. To the payment of the costs of said action and the costs of said proceeding in aid of execution; 2. To the liquidation of plaintiff's said claim and that the balance, if any, should be brought into court to abide the further order of the court. From this finding and decree of the court of common pleas, the defendant, Webb C. Ball, appealed to the circuit court. On the hearing of the cause in the circuit court, that court found and decreed as follows:

"On December 3, 1900, this cause came on to be heard upon the petition of plaintiffs, the answer of the defendants, Webb C. Ball and W. J. Crowell, the defendant, the American Exchange National Bank, being in default of answer or demurrer, although duly ³¹⁰ served with process, the court hearing the evidence and the argument of counsel and on consideration thereof finds that the allegations of the petition are true; that there is due to the plaintiff from defendant, Webb C. Ball, the sum of eight hundred and sixty-four dollars and eighty-six cents, with interest from October 22, 1900, the first day of this term of court upon the said judgment of the plaintiff as described in the petition and the sum of sixteen dollars and

twenty-nine cents for costs incurred in the proceedings in aid of execution set out in said petition, and the costs of this action which are taxed at \$——. That the said Webb C. Ball, on April 18, 1898, was and still is the owner of ten shares of the capital stock of the said American Exchange National Bank; that the said ten shares of stock were issued to Webb C. Ball by certificate No. 15; that the par value of said stock is one hundred dollars per share and that on April 18, 1898, and on date of the commencement of this action, the value of the said ten shares of stock was not less than twelve hundred dollars; and that the American Exchange National Bank was duly served with notice of the plaintiff's proceeding in aid of execution as alleged in the petition, and that by virtue of the said proceedings in aid of execution set out and described in the petition, the plaintiff on April 18, 1898, obtained a valid lien upon the said ten shares of capital stock of the American Exchange National Bank. The court further finds that on April 21, 1898, said stock was pledged to the defendant, William J. Crowell, to secure an indebtedness of two hundred dollars due and payable from said Ball to said Crowell, and one thousand dollars additional money then loaned by said defendant to said Webb C. Ball. That the said pledge was made and duly delivered to the said W. J. Crowell by the said Webb C. Ball, who was in possession of the same at the time of the beginning of said proceeding in aid ³¹¹ of execution, without any knowledge on his, said Crowell's part, that any proceedings were then or had been pending against said Ball, to subject said stock, and without any knowledge that said Ball was indebted to said plaintiff; that the said W. J. Crowell is a bona fide pledgee of said stock in the amount above stated, without notice of any of said plaintiff's claims or equities, and that said indebtedness is still due to said defendant, W. J. Crowell.

"It is therefore ordered, adjudged and decreed that unless the costs of this action, the costs of the proceedings in aid of execution and the amount found due the plaintiff, with interest, shall be paid within twenty days from the date of this decree the sheriff of Cuyahoga county, Ohio, is directed to appraise, advertise and sell at public sale, according to law, for not less than two-thirds of the appraisement, the said ten shares of the capital stock of the American Exchange National Bank so owned by said defendant, Webb C. Ball, as herein found. And the said defendant, the American Exchange National Bank, is ordered to deliver to the purchaser of said stock at

such sale, upon demand or order from such purchaser, ten shares of its capital stock free and clear of all encumbrances as a substitute for the said certificate No. 15, so issued to, and upon April 18, 1898, standing in the name of the defendant, Webb C. Ball, as herein found, and upon the demand of said purchaser to transfer to such purchaser on the books of said defendant bank the said ten shares of stock. It is further ordered that from the proceeds of such sale the sheriff shall pay: 1. The costs of this action, and of the said proceedings in aid of execution; 2. To the plaintiff the said sum of eight hundred and sixty-four dollars and eighty-six cents, with interest as aforesaid, and bring the balance into court for further order."

⁸¹² To reverse this judgment and decree of the circuit court this proceeding in error is prosecuted. The facts of this case are undisputed, and the sole question here for determination is, whether a judgment creditor in a proceeding in aid of execution under the Ohio statutes, by service of process upon a corporation thereby secures a lien upon stock in the corporation owned by the judgment debtor at the time of the service of such process.

If the action of the plaintiff below had been by attachment, and notice of garnishment had been duly served on the bank, Crowell, as a subsequent pledgee of said stock, would take it subject to the lien of such attachment. Such is the doctrine of *National Bank v. Lake Shore etc. Ry. Co.*, 21 Ohio St. 221, and *Norton v. Norton*, 43 Ohio St. 509, 3 N. E. 348. The procuring of a lien by attachment and garnishee process, before judgment, upon the corporate stock of a stockholder, and the securing of a lien upon such stock after judgment by a proceeding in aid of execution, differ in no essential principle or particular except in the method of procedure. The right to subject such property alike exists in either case. If attachment proceedings be instituted the statute provides, section 5538, that the order of attachment shall bind the property attached from the time of its service. If proceedings in aid of execution be the remedy invoked, the statute provides, section 5475, the order, in said section mentioned, shall bind the property in the possession or under the control of such person or corporation from the time of service. By force of the positive provisions of this latter section, in a proceeding in aid of execution, the property of the judgment debtor in the possession or under the control of the corporation served with notice as in said section provided, is held ⁸¹³ and bound from the time of the service of such notice. It is not disputed in this case

but that a proceeding in aid of execution was duly and regularly commenced by the Towle Manufacturing Company against Webb C. Ball and the American Exchange National Bank, and that said bank was on April 18, 1898, duly served with notice, as provided in section 5475. But it is claimed by counsel for plaintiff in error that at the time notice was served upon said bank in the proceeding in aid of execution, that the property sought to be reached was not then in the possession or under the control of said bank, but that the same was then in the possession of said Webb C. Ball, he then holding and having in his possession the certificate for said ten shares of stock, and that therefore said Towle Manufacturing Company could not, and did not, acquire any lien upon said stock by service of process and notice upon the bank. This claim of plaintiff in error suggests and presents the one proposition in this case that must govern and control the rights of the parties hereto, and the determination of which is decisive of this case, and that is: In whose possession was the stock in controversy at the time the bank was served with notice in the proceeding in aid of execution? Was it then in possession of the plaintiff in error, Webb C. Ball, or was it in the possession of the bank? If at the time of the service of notice on the bank the ten shares of stock owned by plaintiff in error and for which he held the certificate, were not then in contemplation of law in possession of said bank, but were in legal contemplation then in possession of said plaintiff in error, then it is clear that the service of notice on said bank could not operate to bind said stock, and no lien could attach to said stock in favor of the defendant in error by reason of the service of ^{§14} such notice, for by the provisions of section 5475 said notice binds such property only as is at the time of its service "in the possession or under the control" of the corporation upon which such service is made. The conclusion of counsel for plaintiff in error, that at the time of the service of notice on the bank the stock in controversy was then in possession of Webb C. Ball results from the erroneous assumption and mistaken notion that the stock itself follows the certificate, and that possession of the certificate is possession of the stock. There is a marked and obvious distinction between the stock of a corporation and the certificate representing such stock. The certificate of shares of stock in a corporation is not the stock itself, but is a mere evidence of the stockholder's interest in the corporate property of the corporation which issues said certificate: Cook on Stock and

Stockholders, sec. 485. In the absence of statutory or charter requirements no certificate of stock is necessary to attest the rights of the shareholder in the corporation, and such certificate, when issued to the owner of shares of stock is merely an evidence or acknowledgment of the owner's interest in the property of the corporation, but is not the property itself. In law a corporation is the trustee of the corporate property and holds the same for the benefit of the stockholders; and so long as such corporation continues to have a legal existence and to carry on the business for which it was created it alone is the proper custodian, and has possession of the corporate property. In *Cook on Stock and Stockholders*, section 480, the author says: "It has been held that if a stockholder whose stock has already been attached or sold on execution sells his certificate of stock after the levy of such attachment ³¹⁵ or execution, the vendee or transferee buys subject to such levy, even though he had no knowledge of it. The stock in contemplation of law has already been seized by the levy, and the purchaser is bound to take notice of that fact. The only means of avoiding this danger in the purchase of stock is by an inquiry at the office of the corporation at the time of making the purchase."

In *Chesapeake etc. R. R. v. Paine*, 29 Gratt. (Va.) 502, it was sought by attachment and garnishee process to reach and subject fifteen shares of stock belonging to one Trice, who was a stockholder in the plaintiff corporation, to the payment of a debt owing by said Trice to defendant, Paine & Co. The court in that case, page 506, says: "Shares of a stockholder are such estate as is liable to be attached in a proceeding instituted for that purpose by one of his creditors, . . . and such estate may properly be considered for the purpose of such proceeding as in the possession of the corporation in which the shares are held and such corporation may properly be summoned as garnishee in the case." So in the case at bar, while the certificate for said ten shares of stock was, at the time of the commencement of proceedings in aid of execution by the Towle Manufacturing Company and at the time of the service of notice on the bank, in the hands of Webb C. Ball, the judgment debtor, yet the actual property, the stock itself, which such certificate represented, was then in the possession of the bank, and being in the possession of the bank, by force of the provisions of section 5475, such property was bound from the time the notice was served on said bank, and by the ³¹⁶ service of said notice the Towle Manufacturing Company acquired a valid

lien thereon, which it may enforce by a judicial sale of said stock. The circuit court having so found and adjudged, its judgment is affirmed.

Burket, C. J., and Spear, Davis, Shauck and Price, JJ., concur.

A Certificate of Stock is mere evidence of the ownership of shares of stock in the corporation: Cartwright v. Dickinson, 88 Tenn. 476, 17 Am. St. Rep. 910, 12 S. W. 1030.

STATE v. TUTTLE.

[67 Ohio St. 440, 66 N. E. 524.]

RAPE—Accomplice—Female Under Age of Consent.—Under a statute making guilty of rape a man over eighteen years of age who carnally knows a female under the age of sixteen years with her consent, she cannot, in law, be deemed an accomplice in the crime, and it is error to instruct that she is such or that her testimony should be treated as that of an accomplice. (p. 691.)

JURY TRIAL—Instructions Concerning Witnesses Testifying in a Prosecution for Rape.—In a prosecution for rape in having carnal knowledge of a girl less than sixteen years of age with her consent, it is error to instruct the jury that the experience of courts warrants them to scan with caution and view with suspicion the testimony of abandoned women, and that the conduct of such women is often incomprehensible when tested by the standard applied to the generality of mankind, and that if any such has testified, the jury should be cautious in relying upon her evidence. (p. 692.)

JURY TRIAL—Instructions Stating the Experience of the Court Respecting the Credibility of Witness.—Courts may not impose their own experience on the jury in determining the credibility of witnesses. (p. 692.)

Prosecution for rape by having sexual intercourse with a female under sixteen years of age with her consent. The accused was a white man about fifty years of age. The girl upon whom the offense was committed and her companion, both under sixteen years of age, testified at the trial. The court charged the jury as follows:

“Charge 1. A female person under sixteen years of age, who, knowing it is wrong, consents to an act of sexual intercourse with herself by a man above the age of eighteen years, is an accomplice, and her testimony should be received with caution and very closely scrutinized before the jury acts upon it.

“Charge 2. The jury is warned that it is exceedingly unsafe to convict in any case upon the evidence of an accomplice unless the same is corroborated by other evidence which is reliable.

"Charge 3. The experience of courts warns them to scan with caution and view with suspicion the testimony of abandoned women or the like; and if any such have testified in this cause, it is your duty to apply the above warning.

"Charge 4. The conduct of abandoned women is often incomprehensible when tested by the standard applied to the generality of mankind; and if any such have testified in this case, you should be cautious in relying upon her evidence."

The jury having returned a verdict of not guilty, the state filed a bill of objections to the supreme court for its judgment.

Hoffheimer, Morris & Sawyer, for the plaintiff.

Thomas H. Darby, for the defendant.

⁴⁴³ PRICE, J. We have searched the record in vain for some of the rulings of the court upon the introduction of testimony. Counsel for the state have cited us to pages 17 and 20 of the record for objections to certain questions, and the rulings of the court thereon, but it appears that the evidence now complained of was permitted by the state without objection, and hence the court made no ruling on the subject. This ⁴⁴⁴ statement covers the entire assignment as to errors of the trial court in ruling upon the admissibility of testimony, save in one instance, and it relates to an inquiry which we regard as unimportant in the case, and therefore do not further consider it.

Before the arguments of counsel began the accused requested the two special charges contained in the statement of this case, and they were given, and no doubt they contributed largely to the verdict of acquittal. If they correctly state the law of the case then on trial, the general assembly performed an idle ceremony when it amended the statute against the crime of rape, so as to embrace the carnal knowledge and abuse of a female under the age of sixteen, with her consent. In the judgment of the legislature, the increasing number of assaults upon the person and chastity of not only adult women, but also of youthful girls and those of tender years, demanded an amendment of section 6816 of the Revised Statutes, enlarging its scope and fixing an age of consent, first, perhaps at fourteen years, and later as it stands now, at sixteen years.

The substance of the added provision is, that one, who being eighteen years of age carnally knows and abuses a female person under the age of sixteen years, with her consent, is guilty of rape.

With the amendment, the entire section reads: "Whoever has carnal knowledge of a female person, forcibly and against her will, or being eighteen years of age, carnally knows and abuses a female person under sixteen years of age, with her consent, is guilty of rape."

The legislature concluded to come to the rescue of youthful females from the brutal assaults upon their virtue, and to make it rape for the assailant to have ⁴⁴⁵ carnal knowledge of one, who is either too young to forcibly resist, or whose ignorance of the wiles and blandishments of evil men may make her an easy subject to their corrupt suggestions and persuasions. The provision was enacted for the protection of this class of our people from the lust and beguilement of designing men of maturer years and greater experience.

But if the doctrine of the charge is to prevail, and the subject of the rape is to be considered an accomplice, because the carnal knowledge was with her consent, then is the law against the crime thwarted, and conviction for its violation rendered in most cases impracticable.

There is neither precedent nor other authority for the position of the trial court. The very language of the section defining rape negatives any such construction of it. It surely was not intended that the lecherous male person should be held guilty of rape if he carnally knows or abuses a female person under sixteen years of age, with her consent, and at the same time, that she be treated as an accomplice, and her testimony smirched and discredited because she has been the victim of deception, falsehood, persuasion or other means of seduction.

The counsel who argue against the exception to these charges cites the *State v. McCoy*, 52 Ohio St. 157, 39 N. E. 316, in support of the trial court.

There is no reason for being misled by that case, for it was decided on very different principles. The purpose of the statute in that case is not so much to protect the woman, to whom drugs or medicines are administered to procure miscarriage, or for the same purpose, upon whom instruments are used, as it is to prevent destruction of unborn life, and, if the woman ⁴⁴⁶ aids and abets in the use of the means to procure her miscarriage, it was held in that case (*State v. McCoy*, 52 Ohio St. 157, 39 N. E. 316) her evidence might be weighed as that of an accomplice.

We think the error of the trial court is so gross and flagrant that it needs no further discussion. Otherwise such accom-

plice might not only be discredited as a witness, but also prosecuted and punished for the complicity in the crime. The rapist in this case has been acquitted, and the climax of folly will be reached when the accomplice is convicted.

Concerning the third and fourth charges given, we need only say that the trial court put in evidence the experience of trial courts when considering the testimony given by abandoned women, and the jury was told "the experience of courts warns them to scan with caution and view with suspicion the testimony of abandoned women or the like; and," that, "if any such have testified in this cause, it is your duty to apply the above warning."

In the next paragraph the jury was told that "the conduct of abandoned women is often incomprehensible when tested by the standard applied to the generality of mankind; and if any such have testified in this case, you should be cautious in relying upon her evidence."

A case might arise wherein the facts might justify the above broad and sweeping comment upon a certain class of witnesses. But the facts certainly would be peculiar and the issue singular where it could be justified.

In this case were two colored girls about fourteen years of age, as witnesses for the state. Their own evidence shows that they had begun a vicious life quite early, and yet they may not have reached the stage or ⁴⁴⁷ degree in vice that would class them among what the court called "abandoned women." Moreover, it is not the proper function of the court to classify witnesses to a jury, and say that one class is to be viewed with caution and suspicion, because its vices are different in kind or degree from the vices of another class. Nor should the court say to the jury that the conduct of one class of witnesses "is often incomprehensible when tested by the standard applied to the generality of mankind."

In deciding questions of fact before them, courts may often use their own experience and observations in weighing the testimony of witnesses having certain well-known traits and defects of character, but they may not impose that experience on a jury as its guide in determining the credibility of witnesses.

Both paragraphs smack too much of the court giving evidence in the nature of impeachment.

If evidence had been presented to the jury tending to, or showing, their depravity; if the facts exhibited them in that light, the jury might well be instructed to attach such weight

and give such credit to their testimony as, in their judgment, it should have.

But here the court fixed something of a degree of disbelief to govern the jury, and in so doing transcended its authority.

Exceptions sustained.

Burket, C. J., and Spear, Davis, Shauck and Crew, JJ., concur.

Impeaching Witnesses by proof of their moral character is considered at length in the monographic note to *Lodge v. State*, 82 Am. St. Rep. 26-34. According to the better rule, want of chastity in a witness cannot be inquired into for the purpose of impeachment, except perhaps when she is the prosecutrix in rape cases and the like: See *Kolb v. Union R. R. Co.*, 23 R. I. 72, 91 Am. St. Rep. 614, 49 Atl. 392; monographic note to *State v. Sibley*, 53 Am. St. Rep. 478-482; *State v. Williamson*, 22 Utah, 248, 83 Am. St. Rep. 780, 62 Pac. 1022.

Rape.—The rule requiring the testimony of an accomplice to be corroborated does not apply in a prosecution of carnally abusing a female under the age of consent, because she is not an accomplice: *Bond v. State*, 63 Ark. 504, 58 Am. St. Rep. 129, 39 S. W. 554.

CASES
IN THE
SUPREME COURT
OF
OREGON.

RICHMOND v. SOUTHERN PACIFIC COMPANY.

[41 Or. 54, 67 Pac. 947.]

NEGLIGENCE OF CARRIERS—Contract Limiting Liability for.—Public policy forbids a railroad company from relying upon a contract entered into with a passenger releasing it from liability resulting from its negligence while performing a duty which it owes to the public as a common carrier. (p. 696.)

NEGLIGENCE of a Common Carrier While Engaged as a Private Carrier.—A railroad company may become a private carrier and escape its liability for negligence by its contract to that effect when, as a matter of convenience to, or by special agreement with, a passenger, it undertakes to carry him by means not designed to accommodate the general public. (p. 696.)

CARRIERS—When Common and not Private.—A railroad corporation which voluntarily designates its freight train to carry passengers between specified places becomes, as to them, a common and not a private carrier, though it was not under any obligation to carry passengers on such train. (p. 700.)

CARRIERS' Liability to Passengers Injured on Their Trains.—A contract stipulating to waive the liability of a carrier for injuries to a passenger from its negligence while riding on a freight train is void, if it has been designated by the railway company as a train upon which all persons may ride as passengers on payment of fare, though the contract purports to be made in consideration of being granted the privilege of riding at less than the regular rates. (p. 700.)

Fenton & Muir, for the appellant.

Chamberlain & Thomas and Otto J. Kraemer, for the respondent.

54 MOORE, J. This is an action to recover damages for a personal injury. The facts are that plaintiff, having secured from the defendant a three thousand mile passenger ticket over certain

parts of its lines of railway, at two and one-half cents a mile, subscribed his name to the following stipulation, among others, indorsed thereon, to wit: "When used upon any freight train designated to carry passengers, the Southern Pacific Company is absolved from all liability as a common carrier for loss of life, personal injury, or loss or damage of baggage or property of the party so using this ticket." The plaintiff, while riding as a passenger, in pursuance of said ticket, in the caboose of a freight train from Oakland to Eugene, was injured by the sudden checking of the ⁵⁵ speed of the train. At the time he was injured said train had been designated by the defendant to carry passengers, and its agent sold tickets to all persons applying therefor at the lawful rate of four cents per mile, and such passengers were permitted, without any restriction, to ride upon said train to or from any station on the defendant's railway in Oregon between Junction City and Roseburg, though two passenger trains passed daily over said railway line. The cause being at issue, a trial was had, resulting in a verdict and judgment for plaintiff in the sum of nine hundred and twenty-five dollars, and defendant appeals, assigning as error the action of the court in refusing to grant a judgment of nonsuit, and in giving certain instructions to the jury over its objection and exception.

The only question involved in this appeal is whether a passenger's agreement to absolve a transportation company from all liability as a common carrier, while riding as a passenger upon its freight train, entered into in consideration of his securing a railway ticket at a reduced rate, is void as against public policy. It is contended by defendant's counsel that the railway company, in the discharge of the duty imposed upon it, having furnished adequate passenger trains to accommodate the traveling public, may lawfully enter into a contract with a passenger whereby, in consideration of being carried on a freight train, he exempts the company from all liability for personal injury caused by its negligence or otherwise, and that the validity of such agreement is not impaired by waiving its right to insist upon such contract as to all passengers who may be carried on such train or who may ride thereon by paying a single fare at the full lawful rate. They concede that the rule is general in the state and federal courts, except in Illinois and New York, that a common carrier cannot escape liability from the consequences of its negligence in carrying passengers on trains provided for that purpose; but they maintain that a railway

company, not being obliged to carry passengers on a freight train, may contract in relation thereto as a private carrier, and that an agreement of that character is not violative of public policy. Plaintiff's counsel maintain, ⁵⁶ however, that the defendant, having designated the train upon which their client was riding at the time he was injured to carry passengers, and permitted its agents to sell tickets therefor, and allowed passengers generally to ride thereon, thereby made it a passenger train to all intents and purposes, thus rendering the exception inapplicable, and hence no error was committed in refusing to grant the judgment of nonsuit or in instructing the jury as complained of.

Public policy forbids a railway company from relying upon the terms of a contract entered into with a passenger, whereby he releases it from liability resulting from its negligence while performing a duty it owes the public as a common carrier; but it may become a private carrier, and escape such liability to contract, when as a matter of convenience to, or by special agreement with, a passenger, it undertakes to carry him by means not designated to accommodate the traveling public: *Louisville etc. R. R. Co. v. Keefer*, 146 Ind. 21, 58 Am. St. Rep. 348, 44 N. E. 796. Thus, an agreement of an express agent to assume all risks of accident, in consideration of being carried in a baggage car, to facilitate his own business, releases a railroad company from liability of injury resulting from a casualty, because the agent is not a passenger, and the carrier is under no obligation to transport him in such car: *Blank v. Illinois Cent. R. R. Co.*, 182 Ill. 332, 55 N. E. 332; *Pittsburg etc. R. R. Co. v. Mahoney*, 148 Ind. 196, 62 Am. St. Rep. 503, 46 N. E. 917, 47 N. E. 464; *Bates v. Old Colony Ry. Co.*, 147 Mass. 255, 17 N. E. 633; *Hosmer v. Old Colony Ry. Co.*, 156 Mass. 506, 31 N. E. 652; *Baltimore etc. R. R. Co. v. Voight*, 176 U. S. 498, 20 Sup. Ct. Rep. 385. The reason assigned for the conclusions reached in the cases cited is based upon the theory that the railroad companies permitted the express messengers to ride in places where the companies were under no obligation to carry them, and without such license the agents would have been trespassers and could have been ejected from such cars. In *Bates v. Old Colony Ry. Co.*, 147 Mass. 255, 17 N. E. 633, Mr. Justice Allen, in speaking of the plaintiff's agreement to assume the risk incident to ⁵⁷ riding in the place agreed upon, says: "The contract did not diminish the liability of the defendant. It left the risk assumed by

the plaintiff in riding in the baggage-car what it would have been without the contract; it only secured him against being ejected from the car." In *Hosmer v. Old Colony Ry. Co.*, 156 Mass. 506, 31 N. E. 652, Mr. Justice Lathrop, in speaking of the plaintiff's assumption of the risk of all injuries received while riding in the baggage-car, says: "The place where he was riding was one in which the defendant was under no obligation to carry him. The contract gave the plaintiff a privilege which he sought for his own convenience." In *Pittsburgh etc. Ry. Co. v. Mahoney*, 148 Ind. 196, 62 Am. St. Rep. 503, 46 N. E. 917, 47 N. E. 464, the court, in speaking of the agreement entered into between the express company in whose service the decedent was an employé and the right of the latter thereunder, say: "His rights were those of the express company, and could not be greater. He was there by license given the express company, and he could not accept the license, and reject the conditions upon which it was granted."

Where railroad companies, furnishing trackage and motive power, haul the cars of circus and menagerie companies over their lines of railway, in consideration of the latter assuming the risk of injuries incident to the journey, it has been held that such companies and their employés, sustaining damage or injury, could not recover therefor from the railroad companies: *Chicago etc. Ry. Co. v. Wallace*, 66 Fed. 506, 14 C. C. A. 257; *Robertson v. Old Colony R. R. Co.*, 156 Mass. 525, 32 Am. St. Rep. 482, 31 N. E. 650; *Coup v. Wabash etc. Ry. Co.*, 56 Mich. 111, 56 Am. Rep. 374, 22 N. W. 215; *Forepaugh v. Delaware etc. R. R. Co.*, 128 Pa. St. 217, 15 Am. St. Rep. 672, 18 Atl. 503. The reason assigned in these cases for enforcing the contracts of exemption from liability is that, as the railroad companies were under no legal obligation to haul such cars, they might lawfully enter into any contract to do so, and as a condition precedent therefor were authorized to limit their ability in case of accident ^{as} thus becoming private carriers in respect to such cars. In *Wells v. Steam Nav. Co.*, 2 N. Y. 204, Mr. Justice Bronson, in speaking of the right of such a carrier to restrict its liability, says: "They are not, like common carriers and innkeepers bound to accept employment when offered, nor, like them, are they tied down to a reasonable reward for their services. They are at liberty to demand an unreasonable price before they will undertake any work or trust, or to reject employment altogether, and they may make just such stipulations as they please concerning the

risk to be incurred. They may become insurers against all possible hazards, or they may say, 'We will answer for nothing but a loss happening through our own fraud or want of good faith.' In short, the parties stand on equal terms, and can in this matter, as they may in others, make just such a bargain as they think will answer their purpose."

In the case at bar the question of the defendant's liability, or its exemption therefrom, under the contract, must be solved by determining whether it was a common or a private carrier in respect to the plaintiff at the time he suffered the injury of which he complains; for if it sustained the relation of a private carrier to him his agreement exonerates it from liability, but if it was a common carrier in respect to him at that time the contract is contrary to public policy, and therefore void. "A common carrier," says Mr. Justice Bradley in *New York Cent. R. R. Co. v. Lockwood*, 17 Wall. 357, "may undoubtedly become a private carrier, or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry. For example, if a carrier of produce, running a truckboat between New York and Norfolk, should be requested to carry a keg of specie, or a load of expensive furniture, which he could justly refuse to take, such agreement might be made in reference to his taking and carrying the same as the parties chose to make, not involving any stipulation contrary to law or public policy. But when a carrier has a regularly established business for carrying all or certain ⁵⁹ articles, and especially if that carrier be a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of the character." The principle thus so ably illustrated was adopted by this court in *Honeyman v. Oregon etc. R. R. Co.*, 13 Or. 352, 57 Am. Rep. 20, 10 Pac. 628, in which it was held that where the carrier does not hold itself out as a common carrier of dogs, but, as a matter of accommodation to a passenger who was notified of its rules, permits its servant to receive them, such arrangement can only charge the carrier as a bailee or private carrier. In the case at bar a special engagement was entered into between the parties, but such agreement was not wholly a matter of accommodation to the plaintiff. It was rather for their mutual advantage, for it may safely be assumed that, when passenger tickets can be

secured at low rates, many persons who would not otherwise travel purchase them for their own advantage. Such purchases necessarily increase passenger traffic, and, if the rate established leaves a margin of profit above the cost of transportation, the increase in the number of passengers ordinarily results in advantage to the railroad company, so that the purchase and sale of the ticket in question may be considered as a source of profit to each party. The question whether the defendant sustained the relation of a common carrier to the plaintiff at the time he was injured, and therefore is liable to him for the damages sustained, notwithstanding his agreement to assume the risk of injury, and to absolve the defendant from all liability therefor, must hinge upon a proper solution of the inquiry whether it was the defendant's business and duty to carry him on its freight train between the stations indicated.

The law imposes upon the railroad company, as a common carrier, the duty of transporting over its lines all ordinary freight delivered to it for that purpose, and of carrying all passengers against whom no legal objection can be successfully interposed, who have complied with the rules of the company in respect to securing tickets before entering the cars, if there be sufficient room for their accommodation, leaving to the carrier the privilege of dividing the traffic, and of furnishing separate trains for the accommodation of each; and, having exercised the discretion with which it is vested, thereby regulating the manner in which its business is to be transacted, it is under no legal obligation to carry passengers on freight trains or freight on passenger trains: *Hobbs v. Texas etc. R. R. Co.*, 49 Ark. 357, 5 S. W. 586; *Arnold v. Illinois Cent. R. Co.*, 83 Ill. 273, 25 Am. Rep. 386; *Thomas v. Chicago etc. R. R. Co.*, 72 Mich. 355, 40 N. W. 463; *Elkins v. Boston etc. R. R. Co.*, 23 N. H. 275; *March v. Concord R. R. Corp.*, 29 N. H. 9, 61 Am. Dec. 631. "A common carrier of passengers," says Judge Thompson in his work on *Carriers of Passengers* (page 26), "is one who undertakes for hire to carry all persons, indifferently, who may apply for passage." The defendant, having voluntarily designated its freight train to carry passengers between Junction City and Roseburg, thereby became, under the definition adverted to, a common carrier of passengers by the means so adopted, and its special contract in respect to the attempted limitation did not divest it of that character; for, if it is the habit of a railroad company to carry passengers on a freight train, it becomes a common carrier of passengers by

that means, and thereby assumes the liabilities of such carriers: *Flinn v. Philadelphia etc. R. Co.*, 1 *Houst.* 469. The defendant was under no legal obligation to carry passengers on its freight trains, but, having notified the public that it would do so between the stations indicated, the train, as long as it was used for that purpose, was a mixed freight and passenger train, thereby imposing upon the defendant all the duties of a common carrier in respect to any passenger riding thereon. The train in question was designed by the defendant to accommodate the traveling public generally, and was not provided for plaintiff's advantage alone, nor did he enjoy any special privileges thereon that were not extended to others. The defendant's undertaking to carry him by the means adopted for that purpose was a part of the performance ⁶¹ of its business, and within the line of its public duty, as long as such train was used to carry passengers. The ticket purchased by plaintiff was secured for five-eighths of the regular local fare, and, while he was a commercial traveler whose business compelled him to make extensive journeys, we understand from the transcript that any person could secure such tickets upon application by paying the same price therefor.

Plaintiff having paid value for his ticket, the contract of carriage could not be canceled at pleasure by the defendant, and we do not think a rebate in the price of a local ticket affords a sufficient consideration for the assumption of the risk undertaken, where no special privileges are conferred, for, if this were so, it would follow that the smallest remission from the regular price of a ticket might suffice for exemption from liability. No error having been committed as alleged, the judgment is affirmed.

A Railway Company cannot, by stipulation, exempt itself from liability for injuries received by a passenger through its negligence: *Doyle v. Fitchburg R. R. Co.*, 166 *Mass.* 492, 55 *Am. St. Rep.* 417, 44 *N. E.* 611. And this rule applies to passengers on a freight train: *Illinois Cent. R. R. Co. v. Beebe*, 174 *Ill.* 13, 66 *Am. St. Rep.* 253, 50 *N. E.* 1019; monographic note to *Illinois Cent. R. R. Co. v. O'Keefe*, 61 *Am. St. Rep.* 89. See this note, pages 91-95, on the general duty of a carrier to persons on freight trains; and consult, also, *Steele v. Southern Ry.*, 55 *S. C.* 389, 74 *Am. St. Rep.* 756, 33 *S. E.* 509; *Baltimore etc. Ry. Co. v. Cox*, 66 *Ohio St.* 276, 64 *N. E.* 119, 90 *Am. St. Rep.* 533, and cases cited in the cross-reference note thereto.

OREGON CONSTRUCTION CO. v. ALLEN DITCH CO.

[41 Or. 209, 69 Pac. 455.]

WATER—Privy Between Company and Land Owners.—

Where claimants of water rights organize a corporation for the purpose of constructing and managing a ditch to divert and carry such water, so that it may reach and be used on their lands, there is such privy created between the corporation and such claimants that it may defend on their behalf and assert such defenses as might be made by them. (p. 706.)

WATER—Loss of Riparian Owner's Right to by Prescription.—By the appropriation and use of water, the right of a riparian owner to have it flow in the stream undiminished in quantity may be lost. (p. 707.)

WATER—Prescriptive Right to the Use of—Statute of Limitations—When Commences to Run.—Though a statutory appropriation is not necessary to prescription, it has, for the one who seeks to acquire by prescription, this advantage: it gives to the prior claimant notice that the user is adverse, and under claim of right, and sets the statute of limitations in motion. (p. 708.)

WATER.—An Adverse Holding of Land and of an Easement Constituting the Use of Water are exactly parallel, so far as the similarity of the property will admit. (p. 708.)

WATER—Prescriptive Right to—From What Date Statute in Favor of Commences.—If there is an actual diversion of water, followed within a reasonable time by application and actual use, this is sufficient to set the statute of limitations in motion as of the date of the original appropriation or diversion. (pp. 708, 709.)

WATER.—An Adverse Holding of Water is not Interrupted by the fact that a riparian owner objects to taking it out of the river, if no attention is paid to his objection, and its use continues as before. (p. 710.)

WATER.—Prescriptive Title—The Adverse Use of Water is not Interrupted by the building of a ditch by other claimants through which the water is permitted to flow for a time, if the first claimants do not recognize any rights of the builders of the second ditch and take and use the water in defiance of their claims. (p. 711.)

Suit for an injunction. Decree for the plaintiff, and the defendant appealed.

Carter & Raley, for the appellant.

Williams, Wood & Linthicum and James A. Fee, for the respondent.

²¹⁰ WOLVERTON, J. The plaintiff being the owner of fifteen hundred and twenty acres of land through which the Umatilla river, a non-navigable stream, flows, seeks to enjoin the defendant from diverting any of the water thereof in disregard of its riparian rights. Formerly a slough at the mouth

of Alkali canyon, near the center of section 21, township 3 north, range 29 east, extended from the river in a northwesterly direction for one-fourth to a half mile, skirting a rocky bluff in a semi-circular form. About the year 1865 one Lowe and his brother constructed a ditch for some distance, to be used for floating logs and mining purpose, taking the water out of the northernmost end of the slough. What use was eventually made of it does not appear, and the brothers finally abandoned the enterprise. On the 12th of December, 1891, there was incorporated by M. C. Tribble, O. Teel, and Henry Baumgardner a company known as the Umatilla Meadows and Butter Creek Company, the initial purpose thereof being to build and construct a canal or canals for a system of irrigation on the Umatilla Meadows and Butter Creek lands in Umatilla county. The meadows are situated below the head of the proposed canal, along and to the west of the Umatilla river, extending down to the lands of the plaintiff, some five or six miles below, and Butter creek is some eight or ten miles distant to the west and northwest. A portion of the canal was constructed in 1891 and 1892, the exact extent of which does not appear. For some distance below the mouth of the Lowe ditch it occupied the identical course, but was extended along the slough and connected directly with the river at the mouth of Alkali canyon. Water was diverted through this ditch, and some use made of it from that source. A little later the Columbia Valley Land and Irrigation Company, a corporation of which W. W. Cavinness was the president, constructed a large canal by increasing the capacity of the Meadow ditch from its head down to what is known as the "drop" in the former, about a quarter of a mile below the head of the Lowe ditch, from which it diverged, and continued in its own route ²¹¹ westward for a distance of six or seven miles; but the project was never completed. Water was turned into it in 1892, and the same use made of it in that year and the year following, when it was abandoned, and has since fallen into disuse. The Allen Ditch Company, defendant, having incorporated October 12, 1892, with O. Teel, M. C. Tribble, and M. T. Allen, as incorporators, subsequently constructed a ditch from the drop to the river, intersecting it two hundred and eighty-eight feet below the head of the Columbia Valley ditch. Below the drop it utilized the Meadows ditch, perhaps as far as the latter was constructed, and continued upon the lines of the old Lowe ditch. At some distance below the drop the ditch divided into two branches,

one running near the river for a distance of three miles or more from the head, and the other to the westward for a distance of about four miles.

No privity of estate has been shown between any of the incorporations, and no attempt has been made to establish any, except there is some evidence that the Columbia Valley Company purchased the right of way of the Meadows ditch, and the parties owning the latter became interested to some extent in the former. J. H. Koontz testifies that he transferred his stock to the Columbia Valley Company in consideration of an agreement upon its part to furnish him one hundred and forty inches of water for irrigation. He was then living on the place subsequently purchased by Fred Andrews. Later he became interested in the Allen ditch, and used the water, as needed, from all three of the company ditches; and when he sold to Andrews assigned to him his interest in the Allen ditch. The plaintiff contends that no water was ever used through any of these ditches prior to 1890, and not until within ten years of the time this suit was instituted, to wit, May 5, 1900. The defendant's title is based upon a prescriptive right—that is, diversion and adverse user for a period of more than ten years last past—and that constitutes the principal question in the case. The defendant does not claim to be the owner of the water, or have any right to use it, but that it is a managing concern for its better control and distribution among those entitled to it. There was an attempt ²¹² by the company to make an appropriation in 1892, but all title through that source is abandoned, and the sole reliance for present title is based on a prescriptive right or usage for more than ten years by individual citizens having an interest in the company. These claimants are Moses Tribble, Fred Andrews, M. T. Allen, Elvira Teel, B. F. McCullough, C. J. Ward, B. F. Raley, Henry Baumgardner, John Boyce, W. H. Babb, Twig Teel, and J. H. Leasure. There is some positive testimony that no water was conveyed through any of these ditches, including the Lowe ditch, prior to 1890.

Mr. Koontz testifies that he assisted in the construction of the Meadows ditch, and that there was then no water running in the Lowe ditch, and but slight traces left of the ditch itself. There is other evidence of like import. Upon the other hand, however, there has been such an array of witnesses asserting to the contrary that it must be conceded as a fact that the Lowe ditch, or such as the farmers enlarged and extended, carried

water long prior to 1890. M. C. Tribble testifies that water has been flowing through a ditch within a quarter of a mile of his house since he began living there in 1877; that the ditch led to what is known as "Teel's Lower Place," and through Baumgardner's place down the other way, and came from the mouth of Alkali canyon, practically where the Allen Ditch Company takes its water; that the ditch referred to has been known as the "Lowe ditch"; that Dr. Teel cleaned it out at that time, and has been using water therefrom more or less ever since; that after the Lowes left, witness, Teel, Templetop, and others, and the neighbors generally, worked on the ditch, and that about the same volume of water has been flowing through it from that time to this; that witness is one of the original incorporators of the Allen Ditch Company, and that the persons composing it were Teel, Allen, Koontz, Mrs. Elvira Teel, and himself; that the farmers claim the water distributed through the ditch, and that the original appropriators have never sold to the company. O. Teel testifies that prior to 1877 water was conveyed by a ditch through lands at present owned by his mother, Tribble, and Allen, and onto his father's place, being ²¹³ the southwest quarter section of section 7, situate three miles and a half from its source; that part of it ran through the locality of Fred Andrews' place; that Jonathan Raley and other neighbors assisted in building the ditch; that the water was supplied from the slough, which was fed from the river, and that he has been using it on the place where he lives, near the head of the ditch, continuously since 1887 or 1888 for irrigation and stock purposes; that the water was formerly used on section 7 for irrigation, but within the last year has been used only for stock purposes; and the capacity of the ditch is now somewhat greater than it was in 1890. M. T. Allen testifies that water has been flowing to his place through the ditch since 1889, and that he has used it for his stock and irrigation. William Coffman says that water was flowing through the ditch in 1886; that there was a prong to it, and that part of the water ran through Tribble's place and part in a westerly direction. Henry Baumgardner states that he knew of the Lowe ditch, and that water came down in it prior to 1890, that Allen was taking water out of it down through his place in 1889; and that witness irrigated an orchard and used water from it for stock purposes. Asa Thompson testifies that he has known of water running through the ditch off and on all the time since 1883, but could not say whether it

continued during the dry season. B. F. Raley says that when the Lowes left the ditch partly finished others took hold of it, and extended it farther down, and took out the water; that witness, his father, and Teel and his boys worked on it in 1868 and 1869, and that the water has continued to flow through it and over the lands most of the time. John Boyce testifies that he left Teel's place in 1877, and that water was running in the ditch at the time, and has continued ever since; W. H. Babb, that he has been running it down to his place continuously since 1889; and J. H. Bobbins, Twig Teel, J. B. Stanley, Levi Gill, and T. C. Smith, that water was running through the ditch prior to 1890; so that, to our minds, it is clearly established that the ditch, as now used by the Allen Ditch Company, was utilized prior to that date for the distribution of water among the farmers interested ²¹⁴ therein. This establishes the diversion more than ten years prior to the institution of this suit.

Now, as to the use. Prior to 1890 it is probable that there was but little of the water used for irrigation in the ordinary way. There was some sub-irrigation, and much of it utilized for stock and domestic purposes. M. C. Tribble began the use to some extent prior to that time, even as far back as 1877, and has since reduced to cultivation from eighty to ninety acres of his land, and irrigates the same, together with an orchard and shrubbery. O. Teel began the use at the upper Teel place in 1887 or 1888, and now irrigates from one hundred and seventy to one hundred and eighty acres; and at another place he utilizes the water for stock purposes, and until recently for irrigation. M. T. Allen uses it for irrigating thirty acres of alfalfa, besides other ground for grain, orchard, and shrubbery. Fred Anderson uses it on fifty acres or more; T. C. Smith on forty to fifty acres; Dr. C. J. Smith on sixty to seventy acres; and others might be mentioned, but, suffice it to say, the evidence shows that the water is now employed for irrigating six hundred acres or more, besides orchards and shrubbery, and for stock and domestic purposes. Out of the six hundred acres, the use for one hundred and twenty or thereabouts is paid for at the rate of one dollar and fifty cents per acre by individuals who were not concerned in the construction of the ditch and the diversion, or have not succeeded to the rights of those who were. Of course, some of the persons instrumental in making the diversion have since parted with their lands, but the use of the water has continued appurtenant

thereto, and the present owners have thereby acquired the rights of their predecessors.

1. All the original owners concur in their testimony that in the formation of the Allen Ditch Company none of them surrendered their water rights previously acquired to the company, and that it was organized merely to facilitate the distribution of the water among those entitled thereto; that they have been selling the use of some water when not employed by those entitled to it, and that the recompense has been expended in keeping the ditch in repair, and not as a matter of profit to the concern. These conditions show such a privity between the ²¹⁵ Allen Ditch Company and the farmers, or original claimants, as to enable the former to maintain its defense in their behalf. That the water has been of great utility to the territory in proximity to the ditch is unquestioned. Houses and barns have been constructed, and many acres of land reduced from its wild and arid condition to a high state of cultivation. Orchards, shrubbery, and ornamental trees have been planted, and the community is described as thriving and prosperous. The use of the water is absolutely essential to the maintenance of the present condition. But, notwithstanding all this, if the plaintiff has a better right, under the law, to have it flow down the channel of the river, through and beyond its lands, by reason of its riparian ownership, than the farmers have to use it by virtue of a prescriptive right, the injunction should be maintained; otherwise not.

2. The plaintiff's riparian right to have the water flow in the stream undiminished in quantity, except by the reasonable use thereof by riparian proprietors, is appurtenant to the land, running with it as a corporeal hereditament. Adverse possession to realty may have its inception in trespass, and naked possession under a claim of right actual, hostile, open and notorious, exclusive, and continuous for a period of ten years, will, in this state, ripen into a perfect title: 1 Am. & Eng. Ency. of Law, 2 ed., 795; Joy v. Stump, 14 Or. 361, 12 Pac. 929; Altschul v. O'Neill, 35 Or. 202, 58 Pac. 95. If the riparian owner grants a right to divert the water and convey it away to and upon the lands of the grantee, the grant becomes an easement appurtenant to such lands, which becomes thereby the dominant estate, and the grant an incorporeal hereditament. If title be acquired by prescription, the estate and the right are the same. So that we are confronted with the anomalous proposition that plaintiff has lost a corporeal here-

ditament appurtenant to its land by reason of the operation of the statute of limitations, and the defendant has acquired an easement or corporeal hereditament appurtenant to its lands by virtue of the same statute; in other words, that the statute has operated to convert a corporeal hereditament into ²¹⁶ an incorporeal hereditament, and at the same time to divest plaintiff of the one and invest defendant with the other. Says Mr. Justice Currey, in *American Co. v. Bradford*, 27 Cal. 360, 366; "The general and established doctrine is that an exclusive and uninterrupted enjoyment of water in a particular way for a period corresponding to the time limited by the statute within which an action must be commenced for the recovery of property or of the assumed right held and enjoyed adversely becomes an adverse enjoyment sufficient to raise a presumption of title as against a right in any other person which might have been but was not asserted." The term "prescription," strictly speaking, is applicable only to incorporeal hereditaments, and not to land. Anciently, in order to support a title by prescription, the use of the incorporeal right must have continued immemorially; that is, have had a commencement before the reign of Richard I, but latterly it came to be held that a continuous use in a particular manner for twenty years corresponding to the period usually prescribed by statutes of limitations for entry upon lands was sufficient for the purpose: *Gould on Waters*, 3 ed., sec. 329. In analogy to this principle, the acquirement of a prescriptive right has come to be measured by the statute of limitations for the recovery of real property, and such is the rule in this state: *Kinney on Irrigation*, sec. 295; *Dodge v. Marden*, 7 Or. 456.

3. Plaintiff's riparian rights have been invaded by the diversion. This suit is based upon that idea, and there can be no further controversy relative thereto. But the point of time when the invasion commenced so as to set the statute of limitations running is yet a matter of inquiry. To render the enjoyment of any easement exclusive evidence of right, it must have been continued, uninterrupted, or pacific and adverse; that is, under a claim of right, with the implied acquiescence of the owner: 3 *Kent's Commentaries*, 434. It is said that the rules of law governing the acquisition of a right by prescription in a case where it is to run against the rights of a riparian owner are similar to those governing where the prescription is to run against a prior appropriator: *Kinney on Irrigation*, sec. 295. In *Huston* ²¹⁷ v. *Bybee*, 17 Or. 140, 20 Pac. 51, Mr.

Justice Thayer says: "The proof must establish an exclusive use of the water under a claim to so use it"; and Mr. Justice Fox, in *Alta Land etc. Co. v. Hancock*, 85 Cal. 219, 223, 20 Am. St. Rep. 217, 24 Pac. 645, says: "Actual and uninterrupted user, however, with or without the statutory appropriation, if adverse, for a useful purpose, and under a claim of right, continued for the period prescribed by the statute of limitations, gives a prescriptive right which will extinguish the rights of a riparian appropriator. Statutory appropriation, therefore, is not necessary to prescription, but it gives to one who seeks to acquire right by prescription this advantage: That it gives the prior claimant notice that his user is adverse, and under claim of right, and sets the statute in motion against such prior claimant." So the court say in *Smith v. North Canyon Water Co.*, 16 Utah, 194, 52 Pac. 283, 286: "The right of the defendant in the water would become fixed only after seven years' continuous, uninterrupted, hostile, notorious, adverse enjoyment; and, to have been adverse, it must have been asserted under the claim of title, with the knowledge and acquiescence of the person having the prior right, and must have been uninterrupted. . . . The possession must have been actual occupation, open, notorious, hostile, and under a claim of title exclusive of any other right." This principle has been reaffirmed by the same court in *Center Creek etc. Co. v. Lindsay*, 21 Utah, 192, 60 Pac. 559, the language there employed being that "the possession must have been actual occupation and use." The adverse holding of land and of an easement constituting the use of water are exactly parallel, so far as the similarity of the property will admit of it. As to land there must be actual occupancy, but the condition may be fulfilled either by *pedis possessio* or constructively, if the holding is under color of title. Literally, there can be no occupancy of water. There may be a use of it; and some of the authorities above cited seem to indicate that, to be adverse, the use must be actual, which would seem to imply that all the water must have been put to a beneficial use by the claimant from the inception of the adverse right. The manner of making a prior appropriation in this state is now well understood. Three elements must exist—an intent to apply the same to some beneficial use, diversion, and an actual application within a reasonable time to some useful industry: *Low v. Rizer*, 25 Or. 551, 37 Pac. 82. If the appropriation is initiated by notice, and there is a diversion within a reasonable time, and

application to a beneficial use made within a reasonable time after the diversion, it will be deemed to have been made as of the date of the notice given; but, if there is no notice, it will be deemed to have been made as of the date of the diversion: *Nevada Ditch Co. v. Bennett*, 30 Or. 59, 60 Am. St. Rep. 777, 45 Pac. 472. In such a case there is only constructive use of the water until actually applied, which completes the appropriation. It was said in the case last cited that "all rights acquired prior to this time, at whatsoever step in the process, amount simply to a claim of an appropriation; but they are none the less rights and privileges which may be asserted and maintained against all persons not entitled to priority in rights and privileges of like nature."

4. Now, if actual diversion, followed within a reasonable time by application and actual use, is sufficient for the inception of a valid prior appropriation, why is it not sufficient to set in motion the statute of limitations? The rights of the prior appropriator or riparian owner have been invaded, and he has been deprived of the use of the water, for which he has an action against the trespasser, and the possession passes absolutely under the control of the one making the diversion. There is a claim of right arising from the attempt to make the appropriation, so that this essential to adverse possession is subserved. The other essentials—that it must be open, notorious, exclusive, and continuous—are not incompatible with this kind of possession; so that all the elements of the statute to make it effective are complied with, unless it be that the use must be actual in the exact literal sense of that term. But we do not think that such is the requirement of the law. If there is a diversion, followed by actual and exclusive possession and ²¹⁹ control, such as will constitute an invasion of prior acquired rights, with the intent and purpose of applying the water to some need or useful purpose, and there is actual application within a reasonable time, such as will serve to complete a valid prior appropriation, there is such a user as will set the statute of limitations in motion, and, if continued for the statutory period, will confer a valid title to the easement. This is in harmony with the method for the acquirement of water rights by prior appropriation, and is a logical deduction from the principles by which they are sustained and upheld, and would seem to be reasonable and just.

In this view the farmers whom the defendant represents are entitled to so much of the water as they are now employing for

a useful purpose. Most of it was so employed early in the last decade, and has been continuous to the present time. Several witnesses state that about the same quantity of water flowed in the old Lowe ditch as is now being carried by the Allen ditch, and some are of the opinion that the latter carries more by a fourth. All of that which is carried seems to be used, but a portion is being sold to outside parties, as we have seen. The defendant claims two thousand four hundred inches, but the evidence adduced does not establish its title to this amount. One or two witnesses testify that the ditch, a short distance below the headgate, carries to the depth of two feet, being eight feet or more in width. Mr. Kimbrell, one of the plaintiff's witnesses, a surveyor and civil engineer, says he measured the water at the headgate, and that it was one foot deep by seven and one-half feet in width. The measurement was taken eight feet below the head gate. But he further states that the water was nearly two feet in depth above the head gate, and that there must have been one foot pressure. This is the most definite statement that we find in the record as to the amount of water being diverted. An orifice seven and one-half feet by one foot with a six-inch pressure will probably pass down to the defendant about the amount of the original diversion, thus giving it ten hundred and eighty miners' inches, as understood by many persons of practical experience, and not more than that, to which it is entitled.

229 5. Another question is pressed, which is that the holding has not been continuous. This is based upon the testimony of Hunt and Hamilton, whereby it appears that in 1885 Hunt made an objection to the defendant taking the water out of the river, addressing it to O. Teel, the secretary of the defendant company. Teel denies that any such objection was made; but, whether there was or not, it was not of such a nature as to break the continuity. The diversion continued, and neither Teel nor the company acceded to the demand, or paid any attention to it, but proceeded with the assertion of their right and the exercise of authority and control over the use of the water diverted. The objection amounted to nothing more than the mere denial of the defendant's right, and this was insufficient. "Mere denials of the right, complaints, remonstrances, or prohibitions of user, unaccompanied by any act which in the law would amount to a disturbance, and be actionable as such, will not prevent the acquisition of a right by prescription": Gould on Waters, sec. 332; Long on Irrigation, sec. 91;

Cox v. Clough, 70 Cal. 345, 11 Pac. 732; McGeorge v. Hoffman, 133 Pa. St. 381, 19 Atl. 413.

6. There is evidence tending to show that for a while in 1892 and 1893 some of the interested parties, represented by defendant, used water from the Columbia Valley ditch, but this was not a recognition by them of any right it had to divert such water. They used it in defiance of the alleged rights of the company, and because it had in the construction of its ditch interfered with the regular flow of the water in their ditch. It may have been that for a while all the water claimed by defendant passed into the big ditch, and flowed therein for a short distance, and was taken up again by the claimants; but these circumstances do not alter the case. There was no recognition by defendant of any rights antagonistic to its claim, or those for whom it is the agent and intermediary, and the controversy was not such as to break the continuity of its holding.

We have not considered the rights of any of the parties whom the defendant represents as riparian owners. Under ~~221~~ the pleadings, as they have come to us, it is doubtful whether such a question could be properly urged, and the defendant's rights are dependent entirely upon the statute of limitations; but, as we have seen, the statute has run in its favor, thus giving it title by prescription to the amount of water that will flow through an aperture seven and one-half feet by twelve inches under a six-inch pressure, and the decree of the court will be that defendant be enjoined from a diversion of any larger amount. The appellant is entitled to its costs and disbursements, both in this and the trial court.

Modified.

PRESRIPTIVE TITLE TO WATER.

- I. General Rule as to Prescriptive Title to Water.**
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 - b. As to Percolating Waters.
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- IV. Essentials of Title by Prescription.**
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c. Adverse Use or Possession.

1. Claim of Right.
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d. Continuity of the Adverse Use.**I. General Rule as to Prescriptive Title to Water.**

a. As to Surface Waters.—Whether or not the term “prescription” is technically applicable to the acquisition of title to water resulting from its continuous and adverse use, there is at least no doubt that title to it may be lost by one person and gained by another through such use: *Union Water Co. v. Crary*, 25 Cal. 504, 85 Am. Dec. 145; *Campbell v. West*, 44 Cal. 646; *Cox v. Clough*, 70 Cal. 345, 11 Pac. 732; *Smith v. Green*, 109 Cal. 228, 21 Pac. 422; *Fogarty v. Fogarty*, 129 Cal. 46, 61 Pac. 570; *Pillsbury v. Moore*, 44 Me. 154, 69 Am. Dec. 91; *Society v. Morris etc. Co.*, 1 N. J. Eq. 157, 21 Am. Dec. 41; *Campbell v. Smith*, 8 N. J. L. 140, 14 Am. Dec. 400; *Coalter v. Hunter*, 4 Rand. 58, 15 Am. Dec. 726; *Baker v. Brown*, 55 Tex. 376. The word “prescription” is usually employed in connection with this change of title. Thus in *Stein v. Burden*, 24 Ala. 130, 60 Am. Dec. 453, it is said that: “The uniform and uninterrupted diversion of the water for twenty years would give to the defendant in error a title by prescription.” Where the claim of title to the use of a stream was based on adverse enjoyment, the court answered: “To acquire title in this manner, it is necessary that the enjoyment or prescription should have continued for a period corresponding to that fixed by the statute of limitations as a bar to an entry on land”: *Crandall v. Woods*, 8 Cal. 136; *Alta etc. Co. v. Hancock*, 85 Cal. 219, 20 Am. St. Rep. 217, 24 Pac. 645; *Spargur v. Heard*, 90 Cal. 221, 27 Pac. 198; *Oregon etc. Co. v. Allen etc. Co.*, 41 Or. 209, 69 Pac. 455, ante, p. 701, and note; *Cape v. Thompson*, 21 Tex. Civ. App. 681, 53 S. W. 368. Differences between the application of the doctrine of prescription or adverse possession to water and its application to lands and other property arise solely from the nature of the title to water or to its use, and to the consequent fact that a person himself entitled to such use may not be damnified under certain circumstances by its use by another not entitled thereto, and may hence have no right of action against him, and therefore may not be held barred by delay in proceeding to commence an action which, if commenced, he could not maintain.

b. As to Percolating Waters.—Percolating waters are regarded as part of the lands in which they may be found, and the title to them while there is not affected otherwise than by affecting the title to such land. It is true that the owner of land may by a well, reservoir, or other excavation cause the waters percolating through his neighbor's land to gather or flow into such excavation, and may there make use of them so that they promote his convenience or add to the value of his land, and after such use is continued for a period greater than that prescribed by any statute of limitations, the

neighbor may, by some excavation or other work on his land, impair or wholly prevent the flow of such water, and then the claim may be made that he has by prescription lost the right to do so. This claim, whenever presented, has been denied: *Roath v. Driscoll*, 20 Conn. 533, 52 Am. Dec. 352; *Lybe's Appeal*, 106 Pa. St. 626, 51 Am. Rep. 542; *Wheelock v. Jacobs*, 70 Vt. 162, 67 Am. St. Rep. 659, 40 Atl. 41. Perhaps the reasons for such denial have nowhere been better expressed than in *Roath v. Driscoll*, 20 Conn. 533, 52 Am. Dec. 352, wherein the court said: "The case, when viewed most favorably for the plaintiffs, is simply this: Have they, by mere occupancy, acquired an advantage over the defendant in the use of this water? Or, in other words, can one of two adjoining proprietors, by first opening a watering place, prevent other persons from doing the same on their own land, though by so doing water is prevented from percolating the land so as to supply the first-made reservoir? We have already said that this case does not involve a right acquired by artificial use for fifteen years; but in the following reasons it will appear that, as to adjoining proprietors who open the earth for reservoirs of water, this distinction is not the rule; for nothing is gained by a mere continued preoccupation of water under the surface. Why should any advantage be gained by preoccupation? Each owner has an equal and complete right to the use of his land and to the water which is in it. Water, combined with the earth, or passing through it, by percolation, or by filtration, or by chemical attraction, has no distinctive character of ownership from the earth itself; not more than the metallic oxides of which the earth is composed. Water, whether moving or motionless in the earth, is not, in the eye of the law, distinct from the earth. The laws of its existence and progress while there are not uniform, and cannot be known or regulated. It rises to great heights, and moves collaterally, by influences beyond our apprehension. These influences are so secret, changeable, and uncontrollable, we cannot subject them to the regulations of law, nor build upon them a system of rules, as has been done with streams upon the surface. Priority of enjoyment does not, in like cases, abridge the natural rights of adjoining proprietors."

II. What Statute Controls.

In none of the cases coming within our observation was any statute relied upon specially directed to water or water rights. Water is, however, usually, but not universally, an incident of land or of its use, or, in other words, is claimed for the benefit of land, or its diversion is objected to by one whose lands may be diminished in value thereby. Nevertheless, it is not difficult to imagine a case in which one party may insist that he has acquired, and that his adversary has lost, the right to the use of the water, though neither claims any land, or the right to the use of water as appurtenant to any land, or that any land has been or will be injured by its con-

tinued diversion or appropriation. Notwithstanding this, for the purpose of the statute of limitations, it has always been considered, so far as we are aware, that the statute controlling the acquisition of title to water based upon its adverse possession was the statute of limitations applicable to actions to recover the possession of real property, and hence that the right to water might be acquired by its adverse use for the period required to acquire title to real property by adverse possession, and that no shorter period would suffice to create any presumption of abandonment: *Crandall v. Woods*, 8 Cal. 136; *Union Water Co. v. Crary*, 25 Cal. 508, 85 Am. Dec. 145; *American Co. v. Bradford*, 27 Cal. 360; *Dodge v. Marden*, 7 Or. 456; *Wimer v. Simmons*, 27 Or. 1, 50 Am. St. Rep. 685, 39 Pac. 6.

III. By and Against Whom Title by Adverse Possession may be Asserted.

a. **The Persons Who may Assert Prescriptive Title to water** do not need any extended consideration, for doubtless every person, whether natural or artificial, who may acquire title by grant may also acquire it by adverse possession, and, having so acquired, may assert it either as a defense or a cause of action. It is here, however, worthy of observation that the right to the use of the water is usually claimed as an incident or appurtenant to certain land, and where this is the case, it is not essential that the claimant should personally have been in adverse possession for the period prescribed by the statute for barring actions for the recovery of real property, or that he should be the grantee in any writing expressly purporting to convey any right in or to the use of the water, for if it has been used upon and for the benefit of certain land for the time required to create a prescriptive title, such title vests in every subsequent owner of the land, and though none of them may have used the water for the required period, the different periods in which all may have so used it may be tacked together to complete the time required to create a prescriptive title: *Oregon etc. Co. v. Allen etc. Co.*, 41 Or. 209, ante, p. 701, 69 Pac. 455. If, on the other hand, the persons using the water do not in some way connect themselves with the prior users, the use by the latter, however long continued, cannot be considered in support of the claim by prescription, and the use or possession of the water by the persons last in use of it must be treated as the inception of their rights: *Union etc. Co. v. Dangberg*, 81 Fed. 73.

b. **Persons Against Whom Prescription may be Asserted.**

1. **The Sovereign State or Government.**—The persons against whom prescriptive title to water may be asserted must be ascertained by consulting the statute of limitations applicable to actions involving the title to real property. The exceptions prevailing in other cases must be recognized in actions for the recovery of, or to

determine title to, water. Thus it is a rule universally admitted, that the sovereign is not bound by the statute of limitations, unless expressly named therein, and hence that title by prescription cannot be created either against the United States or the state. This rule applies when prescriptive title to water is claimed: *Mathews v. Ferreira*, 45 Cal. 51; *Wilkins v. McCue*, 46 Cal. 656. "The general government is not subject to the jurisdiction of the state, and the latter is without power to prescribe the time within which the United States shall assert its rights in order to preserve them, and it must be regarded as settled that the statute of limitations of the state does not apply to the government of the United States, and, as a consequence, that there can be no adverse possession of land under such a law, or adverse user of water, to the natural flow of which such land is entitled, while the title remains in the United States": *Jatunn v. Smith*, 95 Cal. 154, 30 Pac. 200; *United States v. Thompson*, 98 U. S. 488; *Steele v. United States*, 113 U. S. 135, 5 Sup. Ct. Rep. 396; *Shuffleton v. Nelson*, 2 Saw. 540, Fed. Cas. No. 12,822.

Generally, where title is acquired under the United States, the statute of limitations does not commence to run against its patentee until the issuing of the patent, and this rule operates against persons claiming to have acquired by adverse possession the right to the use of water flowing from or over the land patented: *Fremont v. Seals*, 18 Cal. 433; *Nessler v. Bigelow*, 60 Cal. 98; *Gibson v. Chouteau*, 13 Wall. 92. If, however, the title to lands may be regarded as granted by an act of Congress, so that the issuing of a patent, while authorized, is not indispensable, perhaps the statute of limitations may be regarded as operating against the donee from the date of his grant, and if so, the issuing of the patent to him does not create a new cause of action in his favor, nor prevent the commencement, or interrupt the running, of the statute of limitations in favor of an adverse user of water: *Jatunn v. Smith*, 95 Cal. 154, 30 Pac. 200; *Southern R. R. Co. v. Whittaker*, 109 Cal. 268, 41 Pac. 1083; *Wood v. Etiwanda etc. Co.*, 122 Cal. 152, 64 Pac. 726; *United States v. Thompson*, 98 U. S. 488; *Steele v. United States*, 113 U. S. 135, 5 Sup. Ct. Rep. 396; *Shuffleton v. Nelson*, 2 Saw. 540, Fed. Cas. No. 12,822.

Though the state, equally with the national government, is not bound by a statute of limitations unless expressly named therein, yet it may be so named, or otherwise express its consent thereto. If so, it is bound by the statute, and may, when the statute is applicable thereto, lose by prescription its right in public waters. Thus, in discussing this subject, the supreme judicial court of Massachusetts said: "The rule of the common law was expressed by the maxim, 'Nullum tempus occurrit regi.' There was no statute of limitations against the sovereign power, and prescription did not run against the king. This rule has been generally recognized by the American states, and it has been held that statutes of limitation are not applicable to suits brought by a state, unless they are made

applicable to them in terms: *Staughton v. Baker*, 4 Mass. 522, 528, 3 Am. Dec. 236; *Commonwealth v. Hutchinson*, 10 Pa. St. 466; *Bagley v. Wallace*, 16 Serg. & R. 245; *State v. Joiner*, 23 Miss. 500; *Brinsfield v. Carter*, 2 Ga. 143; *Des Moines v. Harker*, 34 Iowa, 84; *People v. Gilbert*, 18 Johns. 227; *Cincinnati v. Evans*, 5 Ohio St. 594. The statute of 9 George III, chapter 16, changed the law in England, and extended the statute of limitations to real actions brought by the king. Since the passage of that act, prescription has been pleadable there against the sovereign. The rule of the common law prevailed in Massachusetts until the enactment of the Revised Statutes in 1835, when, by section 12 of chapter 119, the statute of limitations of real actions was made applicable to suits brought by or in behalf of the commonwealth. This section, with slight amendments, now appears in the Public Statutes, chapter 196, section 11. Under this statute, a title by disseisin may be acquired against the commonwealth as readily as against a private person, and, by analogy, there seems to be no good reason why prescriptive rights in the real estate of the commonwealth may not also be acquired. Although the adjudications on this subject are not numerous, there are many cases which seem to recognize the possibility of acquiring such rights. It has several times been held, not only that the title of a private owner of flats may be divested by disseisin, but that the right of the public to use the water over the flats for navigation, boating, and fishing may in like manner be divested by long continued adverse use: *Nichols v. Boston*, 98 Mass. 39, 93 Am. Dec. 132; *Tufts v. Charlestown*, 117 Mass. 401; *Eastern R. R. v. Allen*, 135 Mass. 13. Other cases assume that this is so: *Lakeman v. Burnham*, 7 Gray, 437; *Tappan v. Burnham*, 8 Allen, 65. It may be said that the cases in relation to the acquisition of public rights in flats by prescription do not show that similar rights can be acquired in great ponds, because the rights of the public in the waters over flats are subordinate to the right of the private owner reasonably to improve his land by excluding the public and building upon it, while in great ponds there is no private ownership. But if prescription will run against the public, it may avail to shut off public rights in great ponds as well as anywhere else. In *Nichols v. Boston*, 98 Mass. 39, 93 Am. Dec. 132, the rights acquired by prescription did not depend on the peculiarities of private ownership in flats. They extended below low-water mark, where the sole ownership and control was in the commonwealth for the benefit of the public. In *Hittinger v. Eames*, 121 Mass. 539, the plaintiff claimed by prescription the right to prevent the public from cutting ice on a great pond. Although it was decided that he did not show such a use as to establish his claim, the opinion assumed without question that rights in great ponds could be acquired against the public by prescription, as well as by grant from the legislature. Other cases in which the court seem to assume

that rights adverse to the public may be acquired in great ponds by prescription are *Cowell v. Thayer*, 5 Met. 253, 38 Am. Dec. 400, *Cummings v. Barrett*, 10 Cush. 186, *West Roxbury v. Stoddard*, 7 Allen, 158, 170, 171, and *Tudor v. Cambridge Water Works*, 1 Allen, 164'; *Attorney General v. Revere etc. Co.*, 152 Mass. 444, 25 N. E. 605.

2. **Prior Appropriators.**—The person against whom prescriptive title is sought to be asserted must necessarily be one who claims as an appropriator or who claims water as appurtenant to or incident to the use of his land. It is not material what is the source of his right, for if it has been invaded, it may be lost by prescription. If he is an appropriator, it will generally be more easy than in the case of a riparian owner to determine whether the use made of the water is an infringement of his rights. If so, it may result in their loss if sufficiently long continued: *Union Water Co. v. Crary*, 25 Cal. 504, 85 Am. Dec. 145; *Davis v. Gale*, 32 Cal. 26, 91 Am. Dec. 554; *Brossard v. Morgan*, 7 Idaho, 211, 61 Pac. 1031.

3. **Lower Riparian Proprietors.**—Whether a riparian owner may by prescription lose his right to the water flowing through his land depends solely on the question of whether such use is an infringement of his rights. If the water is taken out before reaching his land, and is not returned thereto, there can be no doubt that this diversion, though not necessarily injurious to him, may be so, and if it is, that a prescriptive right may be created against him in favor either of an appropriator or of an upper riparian proprietor: *Alta etc. Co. v. Hancock*, 85 Cal. 219, 20 Am. St. Rep. 217, 24 Pac. 645; *Olney v. Fenner*, 2 B. L. 211, 57 Am. Dec. 711.

4. **Upper Appropriators and Riparian Proprietors.**—After water passes the lands of a riparian proprietor, he has no further right to its use, and nothing which can be done to or with it would seem to concern him or to require any action on his part. It is true that some person, either as appropriator or a lower riparian proprietor, may use, and claim to be entitled to use, the whole of the water, and that the upper proprietor has no right to the use of it, or any part thereof, for the purpose of irrigation or otherwise. In some of the states a suit could probably be maintained for the purpose of determining this adverse claim, but it has never, so far as we can ascertain, been held that the upper proprietor was under any obligation to bring such suit as long as his rights were not interfered with. If the water is permitted to flow through his land without any impairment of his riparian rights, nothing that can be done with it by another afterward can prejudice the upper proprietor. Hence, his inaction cannot create any inference that he intends to abandon any right he may have, nor can it be regarded as an encouragement to the appropriator or user to proceed in his course or to make the expenditures which it may necessitate. It, therefore, does not give any right to him either by prescription or estoppel

which will prevent the upper proprietor, whenever he sees proper, from making such use of the water while on his land as he would be entitled to had no use ever been made of it at some point farther down the stream: *Hanson v. McCue*, 42 Cal. 305, 10 Am. Rep. 299; *Anaheim etc. Co. v. Semi-Tropic etc. Co.*, 64 Cal. 192, 30 Pac. 623; *Lakeside etc. Co. v. Crane*, 80 Cal. 181, 22 Pac. 76; *Alta etc. Co. v. Hancock*, 85 Cal. 219, 20 Am. St. Rep. 217, 24 Pac. 645; *Bathgate v. Irvine*, 126 Cal. 135, 77 Am. St. Rep. 158, 58 Pac. 442; *Walker v. Lillingston*, 137 Cal. 401, 70 Pac. 282; *Crawford Co. v. Hathaway (Neb.)*, 93 N. W. 781; *Mud Creek etc. Co. v. Vivian*, 74 Tex. 170, 11 S. W. 1078. Before one can acquire a right to the doing of an act in which another so acquiesces, the act itself must amount to an invasion of that other's rights, and the doing must either have been so long continued as that a prescriptive claim can be supported upon the theory that the acquiescence presupposes a grant, or under such circumstances as will raise an estoppel against the objecting party. But, as the upper riparian proprietor's right to object to any use or diversion of the water below ceased when it flowed past his boundary, any such use could not work an invasion of his rights, and he was not called upon to protest against it: *Hargrave v. Cook*, 108 Cal. 72, 41 Pac. 18. It is not material that the lower riparian proprietor also claims as an appropriator, and that the upper proprietor knows of this claim, and also that under it all the waters of the stream, after passing his land, are diverted and used, and that large sums of money are being expended in the construction of ditches and lines of pipe: *Bathgate v. Irvine*, 126 Cal. 135, 77 Am. St. Rep. 158, 58 Pac. 442.

It must be remembered that the exemption of the upper riparian proprietor from the operation of the law of prescription in favor of one who has appropriated or used the waters of a stream does not rest on any personal or other immunity of the upper proprietor from the effect of the general rules of law, but upon the general fact that no right of his has been impaired. If his ownership of the water, like that of the land through which it flows, were absolute in the sense that he had no right to object to any use of it if made by another, whether he himself wished to use it or not, the rule would be different, but a riparian proprietor has no property in the water, but merely the right to have it flow through his land, and to use it for certain purposes and to a limited extent. When it so flows, and he either does not wish to use it or makes such use of it as he desires, no use which can afterward be made of it by another can be regarded as adverse. It is true another may make a claim of right, either with respect to the water or to the land itself, which the land owner might, if he choose, have decided in a suit to determine the conflicting claims of title, but no one would contend that he could lose the right to the land itself by failing to bring such a suit, and if so, there is no reason why the like inaction

should have any different result as against his right in the water.

An appropriator of water, after it passes beyond his control, has, like a riparian owner after it leaves his land, no interest in or right of control over it. If the appropriator allows the water or some portion of it to return to the stream or to escape in any other manner, he has no cause of action against another who afterward obtains control over and uses it. Nor does such other, by such use or control, however long continued, acquire any prescriptive right, or any right by estoppel, as against the first appropriator which will prevent the latter from thereafter making such use of the waters appropriated by him as that they will not return to such stream or run away as waste water. The right of the second user can never amount to anything more than a mere privilege or right to the use of waste water, and must always be secondary and subordinate to the right of the first appropriator, and subject to be determined by his action at any time: *Woolman v. Garringer*, 1 Mont. 535; *Wimer v. Simmons*, 27 Or. 1, 50 Am. St. Rep. 685, 39 Pac. 6.

IV. Essentials of Title by Prescription.

a. **Beneficial Use.**—In describing the elements necessary to create title by prescription in water, the courts, in their opinions, have often employed superfluous or misleading language. Thus, in *Smith v. North Canyon etc. Co.*, 16 Utah, 194, 52 Pac. 283, it is said that "the right of the defendant in the water would become fixed only after seven years' continuous, uninterrupted, hostile, notorious, adverse enjoyment; and to have been adverse it must have been asserted under a claim of title with the knowledge and acquiescence of the person having the prior right, and must have been uninterrupted. To be adverse, it must have been accompanied by all the elements required to make out such adverse possession; the possession must have been actual occupation, open, notorious, hostile, and under a claim of title exclusive of any other right, continuous and uninterrupted for the period of seven years. The use must also have been open as of right, and also peaceable; for, if there is any act done by the owner that acts as an interruption, however slight, it prevents the acquisition of the right by such use." This language was reiterated in *Center Creek etc. Co. v. Lindsay*, 21 Utah, 192, 60 Pac. 559, and yet, in so far as it implies any notoriety other than that resulting from being visible to ordinary inspection, or that there must be any actual knowledge or acquiescence on the part of the person whose right is to be affected, it is misleading. In *Alta etc. Co. v. Hancock*, 85 Cal. 219, 20 Am. St. Rep. 217, 24 Pac. 645, quoted with apparent approval in the principal case, it was said that "actual and uninterrupted user, with or without the statutory appropriation, if adverse, for a useful purpose, and under a claim of right continued for the period prescribed by the statute of limitations, gives a prescriptive right which will extinguish the right of the riparian

proprietor." The principal case also, though the point was not involved, seems to concede "that to be adverse the use must be actual, which would seem to imply that all the water must have been put to a beneficial use by the claimant from the inception of the adverse right." Where the title to water is dependent on appropriation, it must, no doubt, have been for some beneficial use, but if the title is dependent on prescription, the necessity of this use is by no means so clear. All, however, that need be said upon this subject is that it has not yet been judicially determined, and it will probably be long before any necessity for its determination arises.

b. **Knowledge, Notice, and Notoriety.**—The language employed in many of the decisions warrants the conclusion that the use or possession upon which title by prescription may be founded must, in addition to being adverse, be notorious, or that the party to be affected must have notice of it. It is certainly true that it cannot be secret, surreptitious, or such that the person whose rights are to be affected, though reasonably attentive to his property and interests, might remain in ignorance of it: *Ball v. Kehl*, 95 Cal. 606, 30 Pac. 780. "The title derived or forfeited by possession comes from the fact of actual adverse and notorious possession, and not from notice of it to the adverse party": *Close v. Samm*, 27 Iowa, 510. Notoriety is often spoken of as an element necessary to ripen adverse possession into a right by prescription. By this nothing more is meant than that the possession should be open, visible, and "so notorious that the owner may be presumed to have knowledge that it is adverse": *Morse v. Williams*, 62 Me. 445. "The rule to be deduced from the cases is, that the statute proceeds upon the ground that there has been an acquiescence on the part of the owner of the land in a claim which, on the part of the disseisor, was intended to be hostile, and in fact is hostile, to his interests; and obviously, it must appear that the possession or use which is claimed to be adverse was such that the owner knew, or might have known, that the disseisor intends to make title under it. The doctrine of prescription, being based upon an analogy with the statutes of limitation, depends upon the same principles, and consequently, the rules by which the question whether a right to an incorporeal hereditament has been acquired is to be solved, as stated in the books, in conformity with the rules by which the question whether the possession of a corporeal hereditament is adverse is determined. The user must be adverse, and not by sufferance. It must be contrary to the interests of the owner, and under a claim of right against the true owner, and by his acquiescence, he knowing of such use and not objecting thereto, and the user must be of such a nature as to afford an indication to the owner that a right is to be claimed against him": *Cobb v. Davenport*, 32 N. J. L. 369. The court of appeals of New York, while employing language in substantial harmony with that just quoted, when it came to apply it to the question whether

the right to flood lands had been established by prescription, said: "But, on the other hand, it may be well asked what manifestation of claim could the defendant employ other than the very act of which the plaintiff complains—the overflowing of a portion of his land so as to render it useless for cultivation or any other agricultural use. Or, if there were any other method in which his adverse claim could be indicated other than the express verbal assertion of it, could any be more effectual for the purpose of inducing the plaintiff to assert his rights than the continued overflow of his lands for three and twenty years. It was in its very nature hostile to the rights of the plaintiff; it was an open and constant injury to him. The user was plainly wrongful—an invasion of his rights for which he was entitled at any time within the twenty years to recover damages. An action for this purpose will be a sufficient vindication of the plaintiff's title even if he recover only nominal damages, and would remove every pretext for presuming a grant. In *Parker v. Foote*, 19 Wend. 309, which was an action for stopping lights in a dwelling-house, it was held, and clearly upon authority, if the user is wrongful—if it is a usurpation to any extent upon the rights of another, it is of itself adverse, and if adverse for twenty years, a reasonable foundation is laid for presuming a grant. This was the substance of the judge's charge in the present case; and, as the plaintiff adduced no proof to show that the use was by his leave and favor, it was not necessary that it should be left to the jury to find an express and positive adverse use": *Hammond v. Zehner*, 21 N. Y. 118.

In criticising a finding of a trial court "that neither the plaintiff nor his grantors had open, notorious, adverse use of said water for the period of five years as against the defendant or his grantors," the supreme court of California said: "But as all that is necessary to make a use adverse is a claim of right in the party using it and knowledge of the claim in the adverse party, the use of the water might be adverse without being open and notorious": *Fogarty v. Fogarty*, 129 Cal. 46, 61 Pac. 570. The criticism itself might be criticised on the ground that knowledge on the part of the adverse party is not indispensable. It is doubtless true that he must have the means of knowledge, and the statute of limitations cannot run against him while these means are suppressed by the adverse claimant. "The user, to be adverse, must be attended by such circumstances and notoriety as would reasonably impart notice to the person to be affected, as there can otherwise be no presumption of his acquiescence, which is essential to prescription. It 'must not be clandestine or by stealth, but open, notorious, visible, and indisputable,' so that the party affected may be enabled to resist the prescriptive acquisition by suit in time before the statutory period has elapsed": *Salem etc. Co. v. Lord* (Or.), 69 Pac. 1033. Other cases employ language from which it is inferable that notice to the

riparian proprietor is necessary to establish title against him by prescription, but on examination it will be found that the point really determined was that the adverse use was so inconsiderable as not to amount to a substantial impairment of his rights, or to imply that any adverse use thereunder was intended to be made: *Britt v. Reed* (Or.), 70 Pac. 1029; *Green Bay etc. Co. v. Kaukauna etc. Co.*, 90 Wis. 370, 48 Am. St. Rep. 937, 61 N. W. 1121, 63 N. W. 1019. We infer from the authorities cited that actual knowledge on the part of the person to be affected is never indispensable; otherwise a nonresident or a land owner unusually inattentive to his property and business might escape the operation of the rule of prescription under circumstances which would expose to it a resident or land owner who kept well informed respecting his property, and thus diligence would be punished and laches rewarded. If the acts done by the adverse claimant of water are not secret and are of such a character as are well calculated to notify the land owner or prior appropriator of the adverse claim and use, we apprehend that they must be affirmed, to be attended with all the notoriety required to create a prescriptive right, whether he against whom the right is attempted to be asserted knew of them or not.

In many of the states an appropriator may, if he chooses, give written notice of his intended appropriation by posting it at or near the point of appropriation and filing it for record in some public office designated by statute. In the principal case and also in *Alta etc. Co. v. Hancock*, 85 Cal. 219, 20 Am. St. Rep. 217, 24 Pac. 649, this statutory proceeding is spoken of as giving the appropriator the advantage of imparting notice to others that his user is adverse and under a claim of right.

c. Adverse Use or Possession.

1. *Claim of Right.*—A user can never be adverse if it is by permission of the owner: *Stewart v. White*, 128 Ala. 202, 30 South. 526; *Feliz v. City of Los Angeles*, 58 Cal. 73; *Coalter v. Hunter*, 4 Rand. 58, 15 Am. Dec. 726; or if it is a use which he has no right to deny: *Hall v. Blackman* (Idaho), 68 Pac. 19. It is not sufficient that water is used by a person not entitled to such use, unless he further uses it under a claim of right not recognizing the title or right of any other person, but claiming such right in himself: *American Co. v. Bradford*, 27 Cal. 360; *Alta etc. Co. v. Hancock*, 85 Cal. 219, 20 Am. St. Rep. 217, 24 Pac. 645; *Cleveland etc. Ry. Co. v. Huddleston*, 21 Ind. App. 621, 69 Am. St. Rep. 385, 52 N. E. 1008; *Mud Creek Irr. etc. Co. v. Vivian*, 74 Tex. 170, 11 S. W. 1078. Therefore, a finding "that the possession, claim, and use of the defendant and his grantors, as in this finding set forth, has been quiet, peaceable, open and notorious," further supplemented by a statement that the defendant used the water "as his own property" is not sufficient to show that his possession was adverse: *Oneto v. Restano*, 78 Cal. 374, 20 Pac. 743.

2. **What Use is Adverse.**—Because there is no absolute right of property in the land owner in the water itself, but only a right to use it for certain purposes, it is manifest that uses or acts on the part of another may not be prejudicial to him, and that he may not have any right to prevent or object thereto, whether they are, strictly speaking, rightful or not. We have already incidentally referred to this topic in discussing the right of a riparian proprietor to complain of the use or appropriation of water after it has passed his land, and shown that after such passage he has no ground of action on account of anything that may be done or claimed by another. Whenever, however, the water is diverted before it reaches the lands of a riparian proprietor, a more difficult question is presented, for it may be said, in general terms, that, as such proprietor has the right to have the stream run through his lands in its ordinary channel, quantity, and quality, any act or use by another which prevents it so running, if under a claim of right, must be adverse to such proprietor. Nevertheless it may not do him any injury, and hence may not support a claim for damages or an application for an injunction. Generally speaking, if one property owner does nothing more than merely to use his own property in such a manner as to do no injury to his neighbor, the latter has no right to object, and therefore cannot, for failing to object, lose anything through the operation of the law of prescription: *Parker v. Hotchkiss*, 25 Conn. 321; *Donnell v. Clark*, 19 Me. 174. Hence it was held that the owners of a mill who interrupted the flow of the waters of the stream on which it was built no more than was necessary for their own reasonable and proper use of the water consistently with the common interest of all the riparian proprietors on the same stream, were not liable to an action by the owner of a mill below for not regarding in their use of the water his peculiar necessities arising from the size and character of his pond and the nature of his work, although his mill had been established and work carried on there for eighty years: *Gould v. Boston Dock Co.*, 13 Gray, 442. Where certain defendants claimed that they had by prescription acquired the right to discharge certain dyeing materials and drugs into a stream, the court answered: "The defendants have a right to use the water upon their own soil in such manner as they may deem for their interest, provided they discharge it upon the soil of the complainants in its accustomed channel, pure and unpolluted. They can, therefore, acquire no right by prescription until they show that the acts which are claimed to constitute the adverse user injured the complainants and gave to them, or those under whom they claimed title, a right of action. The very ground of title by adverse use is that the party against whom it is set up has so long permitted the adverse enjoyment and failed to vindicate his rights that the presumption of a grant is raised. But there can be no such presumption,

and consequently no title by adverse enjoyment, where no violation of a right is shown to exist. Thus, where an action is brought for overflowing the plaintiff's land by backwater from the defendant's milldam, it establishes no title by adverse enjoyment to prove that the defendant's mill has been in existence over twenty years, or that the dam has been in existence for that period. The question is not how high the dam is, but how high the water has been held, whether it has been held for twenty years so high as to affect the land of the plaintiff as injuriously as it did at the time the action was brought. To prove, therefore, that there was a fulling and dyeing mill or other manufactory for twenty years on defendant's land, and that they discharged drugs and dye stuffs into the stream during that period, proves nothing, unless it is shown that the materials discharged into the stream were of such character and of such an amount as to pollute the water which flowed upon the complainant's land and rendered it unfit for use": *Holsman v. Boiling Spring etc. Co.*, 14 N. J. Eq. 335.

In Massachusetts it is settled that the diversion of water, though it inflicts no actual damage on the lower proprietor, is, nevertheless, if made under a claim of right, a wrong of which he may complain, and that if he suffers his rights to be thus invaded for a period of more than twenty years, "it is quite unimportant whether he suffers any actual damage or not": *Bolivar etc. Co. v. Nepouset etc. Co.*, 16 Pick. 241.

This extreme view is not accepted in those states in which irrigation is extensively practiced. In them a riparian owner has no cause of complaint which the courts will recognize and enforce, if sufficient water is left for use upon his land and his use of it there is not interfered with: *Egan v. Estrada* (Ariz.), 56 Pac. 721; *Meng v. Coffey* (Neb.), 93 N. W. 713; *Montana Co. v. Gehring*, 21 C. C. A. 414, 75 Fed. 384; *Union etc. Co. v. Dangberg*, 81 Fed. 73. Here, as elsewhere, it is admitted that, to create a prescriptive right against a party, there must be such a use of the water "as to occasion damage and give him a right of action." No use which does not reach this point can be treated as adverse: *Grisby v. Clear Lake W. W. Co.*, 40 Cal. 396. Still if the law as understood in Massachusetts were applicable, it might be held that, though the damages were inappreciable or nominal, still the presumption of some damage must be indulged from an invasion of the right, and hence that such invasion, if under a claim of right and sufficiently long continued, must result in title by prescription. Therefore, we return to the question of what is an invasion of the rights of a riparian proprietor. There may be times of superabundance of water, and its diversion may be restricted to those times, or, though the diversion is not confined to them, it may still leave in the stream sufficient water to answer every necessity of the riparian proprietor. If so, any injury resulting to him is nominal, and cannot sustain any ac-

tion on his part unless, indeed, on the ground that his inaction is equivalent to acquiescence and cannot be continued without exposing him to the peril of the plea of prescription.

A riparian proprietor cannot successfully resort to a court of equity to compel the discontinuance of a diversion of water from the stream above him on the ground that, as such proprietor, he has an absolute right to have the water continue to flow through his land. If, for instance, there are freshets when the streams therein are swollen by heavy rains, a diversion may be made therefrom if sufficient water is left for his use: *Egan v. Estrada* (Ariz.), 56 Pac. 721; *Edgar v. Stevenson*, 70 Cal. 286, 11 Pac. 704; *Heilbron v. Land etc. Co.*, 80 Cal. 189, 22 Pac. 62. "In a state like this, where irrigation is greatly needed, and where large areas of land are comparatively worthless unless artificially irrigated, it is difficult to lay down a rule as to riparian rights which will be applicable to and cover all cases. It seems clear, however, that in no case should a riparian owner be permitted to demand, as of right, the intervention of a court of equity to restrain all persons who are not riparian owners from diverting any water from the stream at points above him, simply because he wishes to see the stream flow by or through his land undiminished and unobstructed. In other words, a riparian owner ought not to be permitted to invoke the power of a court of equity to restrain the diversion of water above him by a nonriparian owner, when the amount diverted would not be used by him, and would cause no loss or injury to him or his land, present or prospective, but would greatly benefit the party diverting it": *Modoc etc. Co. v. Booth*, 102 Cal. 151, 36 Pac. 431; *Vernon etc. Co. v. Los Angeles*, 106 Cal. 237, 39 Pac. 762; *Meng v. Coffey* (Neb.), 93 N. W. 713; *Crawford Co. v. Hathaway* (Neb.), 93 N. W. 781. In *Anaheim etc. Co. v. Semi-Tropic etc. Co.*, 64 Cal. 185, 30 Pac. 623, the court said: "The title by prescription relied on by the plaintiffs is based on the fact found by the court below to the effect that from the 1st of January, 1858, until within a year or two prior to the commencement of this action, the plaintiffs, their predecessors, etc., quietly, openly, notoriously, and continuously appropriated, used, and enjoyed enough of the water of the river to keep their ditch, which was constructed in and over the land described in the deed from Yorba to Ontiveras, flowing full to its utmost capacity at all times and seasons of the year, claiming the right and title so to do, adversely to the whole world, and so diverted, appropriated, used and enjoyed said water without let, hindrance or objection from any person whomsoever; and that the owners of the Santiago rancho, with knowledge thereof, stood by and made no objection. But the court below also found that during the same time the water of the river was diverted, appropriated, used, and enjoyed by the owners of the ranchos Santiago and Canon for the irrigation of their respective tracts, and further, that while the diversion and use of the

water by the respective parties, and upon the respective ranchos and tracts of land as stated in the findings, 'has been done and claimed as of right, and claimed to be done adversely to all others, still, until within a year or two prior to the commencement of this action, there has been no interference of serious importance with the diversion or attempted diversion of anyone by any of the others, there having prior to that time been sufficient water flowing in the river to supply the respective wants and demands of all the parties; but since then, that is, within a year or two prior to this suit, on account of the increased appropriations and diversions above the ditches of all the parties, water has become scarce and insufficient to supply the demands and necessities of all the parties. That except as to noninterference and failure to object under the circumstances aforesaid, there has never been any acquiescence or consent to the use of water as to any person, party, or corporation, by the owners or claimants of any of the ranchos mentioned in these findings, or of any of the parties hereto or their predecessors or grantors, but ever since water has become scarce, as aforesaid, each party has respectively asserted, and at all times attempted as best they could, to maintain the rights as respectively claimed by them.' In the face of such facts as these, how can we be expected to hold that as against the owners of the Santiago rancho the plaintiffs have established any prescriptive right? In order to establish a right by prescription, the acts by which it is sought to establish it must operate as an invasion of the right of the party against whom it is set up. The enjoyment relied upon must be of such a character as to afford ground for an action by the other party. This is thoroughly settled. Now it is very clear that while there was sufficient water flowing in the river to supply the wants and demands of all the parties, its use by one could not be an invasion of any right of any other; and as the court below found, as a fact, that until a year or two prior to the commencement of this action, there was sufficient water flowing in the river to supply the wants and demands of all the parties, it is plain that the plaintiffs, as against the owners of the Santiago rancho, have acquired no right by prescription."

The reasoning which excepts a riparian proprietor from the plea of prescription is equally applicable to one who has acquired title or the right to use water by appropriation. Other appropriations or diversions may be made from the same stream, but as long as the first appropriator receives the quantity of water which he is entitled to use, his rights are not invaded by the use of the surplus by any other person, and hence from such use no right of prescription can arise: *Faulkner v. Rondoni*, 104 Cal. 140, 37 Pac. 883.

In a number of cases in Oregon the decisions of California upon this subject are cited with apparent approval and applied without hesitation: *Wimer v. Simmons*, 27 Or. 1, 50 Am. St. Rep. 685, 39 Pac.

6; North Powder Co. v. Coughanour, 34 Or. 9, 54 Pac. 223; Bowman v. Bowman, 35 Or. 279, 57 Pac. 546; Boyce v. Cupper, 37 Or. 256, 61 Pac. 642; Britt v. Reed (Or.), 70 Pac. 1029. We do not know that there is any intention on the part of the courts of that state to depart from these decisions, and yet we are not wholly able to reconcile them with the decision in the principal case. That case is not, in the opinion or otherwise, accompanied with any statement of fact from which we can determine whether or not the diversion of water of which the plaintiff complained was at any time, or at all times, such as to leave him with less water than it was necessary or desirable to use upon his lands. The assumption is made in the opinion that his rights had been invaded by the diversion. Whether by this is meant that his rights were invaded simply because there was some diversion, or because the diversion was of sufficient quantity to produce a scarcity of water upon his lands, we are left to conjecture.

Conceding that in the principal case it was not intended to recede from the earlier decisions of the same state adopting and applying the rule as maintained in California, much doubt still exists whether one can be exempted from the operation of the law of prescription on the ground that the use of the water diverted from his land did not interfere with any use that he wished to make of it at the time. Naturally, in the earlier development of the country, the greater portion of its land remained uncultivated, and the chief employment of water was for domestic purposes and the watering of livestock, and if irrigation was practiced at all, it was rarely to an extent which required the land owner to consider any appropriation or use of the waters by others. We may now undoubtedly find large tracts of land remaining unused, except for pasturage, in the midst of a highly cultivated and well irrigated country and where it is clear that the amount of water diverted and used by appropriators and by other riparian owners is such that its continued use must require the lands now uncultivated and devoted to pasturage to remain in that condition. Can it be said that under these and similar circumstances the use being made by the appropriators and other riparian owners is not adverse to him who permits his lands to remain substantially in a state of nature? To this question we think no positive answer can be given which has the support of the accepted decisions.

Where the owner of a mill constructed a dam and a reservoir into which he conducted the waters of a small stream, so that he might hold them back and draw from them when necessary or convenient to carry the machinery of his mill, and gates were maintained and opened and closed as his necessities required, and, when closed, prevented any water from passing down the natural channel except what leaked through, or, in seasons of abundant rains, overflowed the dam, it was held: "This mode of controlling and regulating the use of

the water in the stream, as it essentially interrupted the original and natural flow of the water and interfered materially with the right of the riparian owners on lands between the reservoir and the mill, to appropriate and use the water was in its nature adverse, and having been continued under a claim of right for forty-five years and upward, affords a conclusive presumption of a grant from such intermediate owners': *Brace v. Yale*, 10 Allen, 441.

3. **Commencement of.**—As the use must continue for the time prescribed by the statute to ripen into title by prescription, it is evident that it is always necessary to fix a time after which the use, if not interrupted, must be regarded as adverse and from which the statute of limitations must be deemed to run. This question must ordinarily be determined by what, in the state wherein it arises, is deemed an adverse use. If to it it is necessary, as hereinbefore suggested, that the rights of the riparian owner or other person entitled to the use of the water be invaded to the extent of depriving him of the use of such water when he wishes or has occasion to use it, then the statute can run only from that time. If, on the other hand, the mere diversion of water under a claim of right is adverse to riparian owners and other claimants, then they must accept such diversion as the point of time at which the statutes commence to operate against them, and if the diversion alone is not sufficient, but the water must further be applied to some beneficial use, then the time of such application becomes controlling. In some of the states one intending to appropriate water may give notice of his intention in the manner pointed out in the statute, and, if he proceeds with the diligence required, his rights as an appropriator relate to the time of giving such notice: *Nevada etc. Co. v. Bennett*, 30 Or. 59, 60 Am. St. Rep. 777, 45 Pac. 472. In *Alta etc. Co. v. Hancock*, 85 Cal. 219, 20 Am. St. Rep. 217, 24 Pac. 645, speaking incidentally of a statutory appropriation, it was said to give, "to one who seeks to acquire a right by prescription this advantage: that it gives to prior claimants notice that his user is adverse and under a claim of right, and sets the statute in motion against the prior claimants." The question thus alluded to was not involved in the case; no claim was made therein which was based on any supposed appropriation; and the remark of the court was merely a mischievous dictum. In the principal case the question was presented of whether the user was adverse from the original diversion of the water or only from its application to some beneficial use, and the court reached the conclusion that, as in the case of an appropriation an actual diversion, followed, within a reasonable time, by application to a beneficial use, was sufficient for the inception of such appropriation, it was also sufficient to set the statute of limitations in motion. There was not in this case, however, any claim that the appropriators had given notice of their appropriation, and hence there was no

consideration of the question whether the statute of limitations could be regarded as commencing to run from the giving of such notice. Obviously it cannot, for the notice itself cannot constitute an invasion of the rights of prior claimants to the water, either substantially or nominally, for the reason that it may never be followed by any actual diversion, and such diversion, if made, must be the first act which can possibly interfere with the rights of the prior claimants, riparian or otherwise. We agree, however, with the principal case that "if there is a diversion followed by an actual and exclusive possession and control, such as will constitute an invasion of prior acquired rights, with the intent and purpose of applying the water to some needed or useful purpose, and there is actual application within a reasonable time such as will serve to complete a valid prior appropriation, there is such a user as will set the statute of limitations in motion, and, if continued for the statutory period, will confer a valid title to the easement."

Preparation for the diversion of water is, however, essentially different from the diversion itself. Hence it was held, where a dam was necessary to effect a diversion, that the time while it was in course of erection and before it had so far advanced as to form a permanent and effectual barrier to the water, it would be "going too far to say that it should operate to lay the foundation of a claim as though it actually was completed and had the effect of setting back the stream. Until it is so far complete as to answer the purpose for which it was intended, that of permanently raising the water, it cannot be said properly that any permanent use or enjoyment of the water has commenced, and until then the defendant does not begin to acquire a right by prescription. And a title of this description ought to be made out clear, and not by construction": *Branch v. Doane*, 17 Conn. 401, 18 Conn. 233. This view corresponds with that which we understand to have been entertained in Oregon prior to the decision in the principal case, *Lavery v. Arnold*, 36 Or. 84, 57 Pac. 906, and it has also the support of the supreme court of California, which has said: "That the mere construction of ditches or the laying of pipes for the purpose of using water do not constitute such adverse user as would set the statute in motion": *Senior v. Anderson*, 115 Cal. 496, 47 Pac. 454.

d. Continuity of the Adverse Use.—If an adverse use is commenced, it must be continued, before it can create title or right by prescription, for the period required by the statutes of the several states. These, with respect to time, vary greatly, being five years in California, Idaho and Nevada: *Crandall v. Woods*, 8 Cal. 136; *Hall v. Blackman* (Idaho), 69 Pac. 19; *Boynton v. Longley*, 19 Nev. 69, 3 Am. St. Rep. 781, 6 Pac. 437; seven years in Utah: *Smith v. North etc. Co.*, 16 Utah, 194, 52 Pac. 283; ten in Missouri and Texas; *Smith v. Musgrove*, 32 Mo. App. 241; *Mud Creek etc. Co. v. Vivian*, 74 Tex. 170, 11 S. W. 1078; fifteen in Connecticut and Vermont:

Buddington v. Bradley, 10 Conn. 213, 26 Am. Dec. 386; Norton v. Volentine, 14 Vt. 239, 39 Am. Dec. 220; twenty in Alabama, Georgia, Maine, Massachusetts, Minnesota, Mississippi, New Hampshire, New York, North Carolina, and Tennessee: Stewart v. White, 128 Ala. 202, 30 South. 526; Phinizy v. Augusta, 47 Ga. 260; Murchie v. Gates, 78 Me. 344, 4 Atl. 698; Campbell v. Talbot, 132 Mass. 174; Swan v. Munch, 65 Minn. 560, 60 Am. St. Rep. 491, 67 N. W. 1022; Alcorn v. Sadler, 71 Miss. 634, 42 Am. St. Rep. 484, 14 South. 444; Burnham v. Kempton, 44 N. H. 78; Terry v. Smith, 47 Hun, 333; Geer v. Water Co., 127 N. C. 349, 37 S. E. 474; Railway Co. v. Mosman, 90 Tenn. 157, 25 Am. St. Rep. 670, 16 S. W. 64; Harmon v. Carter (Tenn.), 59 S. W. 656; and twenty-one in Ohio and Pennsylvania: Tootle v. Clifton, 22 Ohio St. 247, 10 Am. Rep. 732; Messenger's Appeal, 109 Pa. St. 285, 4 Atl. 162; Horn v. Miller, 142 Pa. St. 557, 21 Atl. 194.

The question of the continuity of the adverse use may be considered (1) with respect to interruptions due to the act of persons other than him in favor of whom the prescriptive title is claimed, and (2) the inaction of the claimant by prescription. It is not necessary that the claim by prescription be undisputed or that the acts done under it be actually acquiesced in. They may, indeed, be forbidden by the person affected by them, provided no respect be given to his prohibition: Cox v. Clough, 70 Cal. 345, 11 Pac. 732; Construction Co. v. Ditch Co., 41 Or. 209, ante, p. 701, 69 Pac. 455; McGeorge v. Hoffman, 133 Pa. St. 381, 19 Atl. 413. We doubt whether it is essential, as some of the cases assume, that this possession or use be peaceable, for we apprehend if there were a constant state of hostility during the statutory period, this, if it did not result in any interruption of the adverse use, would only tend to more conclusively establish that it was accompanied by all the elements necessary to create title by prescription. If, however, there is any interruption in the use of the water by the person having a paramount right or in the possession and use by any other under a claim of right, for however short a time, then the continuity of the adverse use or possession is broken, and there can be no prescription unless founded upon a new possession and use taken and maintained for the statutory period after such interruption terminates: Last Chance etc. Co. v. Heilbron, 86 Cal. 1, 26 Pac. 523; Cave v. Crafts, 53 Cal. 135; Ball v. Kehl, 95 Cal. 606, 30 Pac. 780; Bree v. Wheeler, 129 Cal. 145, 61 Pac. 732; Rice v. Meinera, 136 Cal. 292, 68 Pac. 817; Authors v. Bryant, 22 Nev. 242, 38 Pac. 439; Huston v. Bybee, 17 Or. 140, 20 Pac. 51.

An interruption may result from a suit and judgment, as where the person claiming by prescription is in possession of the land affected, and an action in ejectment is brought against him in which judgment for the possession of the land is entered: Alta etc. Co. v. Hancock, 85 Cal. 219, 20 Am. St. Rep. 217, 24 Pac. 605; or where

the person using the water without right to do so is subjected to an action for damages, in which judgment is recorded against him: *Harmon v. Carter* (Tenn. Ch. App.), 59 S. W. 656.

If the use of the claimant by prescription has not been interrupted by another, but it is insisted that it was not continuous, so as to support his claim, the question arising has not been much considered by the courts. To require him to have used the water at all times, or even every day or week, would be to ignore the well-known purpose for which water is appropriated and used. Its flow is sometimes restricted to a small part of the year, and even during that part, its use for irrigation or otherwise may be desirable for a portion of the time only.

We apprehend that a use must be deemed continuous when it is carried on in the manner, at the times, and for the purposes for which water is commonly employed in the neighborhood in which the question arises. "Where the claimant needs the use of the easement from time to time, and so uses it, there is a sufficiently continuous adverse use to be adverse, although it is not constant." Hence it was held that the building of a dam and using it for the raising of water three months of the year for sluicing logs indicated that its purpose was to be permanent, and that this use gave a title or easement by adverse possession: *Swan v. Munch*, 65 Minn. 500, 60 Am. St. Rep. 491, 67 N. W. 1022; *Cornwell etc. Co. v. Swift*, 89 Mich. 503, 50 N. W. 1001. The leading case upon this subject when the question relates to the use of water for irrigation is *Hesperia etc. Co. v. Rogers*, 83 Cal. 10, 17 Am. St. Rep. 211, 23 Pac. 196, where the court said: "The correct rule as to the continuity of user, to give a prescriptive right to an easement, and what shall constitute such continuity, can be stated only with reference to the nature and character of the right claimed. The right is not abandoned to the use of a ditch to convey water for purposes of irrigation because water does not flow in it every day of the year. The party claimant does not need the ditch every day in the year, and the law does not require him, to constitute continuity of use, to use the water when he does not need it. If he has used the ditch at such times as he needed it, it is regarded by the law as a continuous use. If a right of way over another's land has been used for more than five years, it is not necessary, to make good such use, that the claimant had used it every day. He uses it every day, or once in every week, or twice a month, as his needs require. He is not required to go over it when he does not need it, to make his use of the way continuous. The claimant is required to make such reasonable use of the way as his needs require. So it is of the ditch. If, whenever the claimant needs it from time to time, he makes use of it, this is continuous use. An omission to use when not needed does not disprove a continuity of use, shown by using it when needed: *Bodfish v. Bodfish*, 105 Mass. 317. Neither such intermission or omission breaks

the continuity." These views have been expressly approved in Minnesota and Oregon: *Swan v. Munch*, 65 Minn. 500, 60 Am. St. Rep. 491, 67 N. W. 1022; *McDougal v. Lame*, 39 Or. 212, 69 Pac. 864.

WHITE v. LADD.

[41 Or. 324, 68 Pac. 739.]

A JUDGMENT Void on Its Face may be Set Aside or Vacated at Any Time, whether within the term or afterward, when the attention of the court in which it was rendered is called to it, or the court may act at its own suggestion. (p. 737.)

ATTACHMENT not Stating the Name of the Occupant of the Property.—If the name of the occupant of property is unknown, that is a sufficient reason for not stating it, and a judgment based on the levy of an attachment will not be held void or set aside because of the failure to state such name. (p. 737.)

A JUDGMENT on Attachment Cannot be Set Aside or held void on its face on the ground that several parcels of real property were included in one levy, or that it extended to property not owned by the defendant, if these facts did not appear in the return of the writ. (p. 738.)

ATTACHMENT—Presumption in Favor of Judgment.—Every intendment of the law is in favor of the sufficiency of an attachment, where the writ issues from a court of superior or general jurisdiction unless the record affirmatively shows want of jurisdiction. (p. 738.)

ATTACHMENT—Jurisdiction to Proceed Against Property of Deceased Defendant.—The jurisdiction of the court to grant a continuance and proceed against the executor depends on a valid attachment, and the judgment can be effectual only so far as the property has been attached. (p. 738.)

RES JUDICATA.—The Potency of a Judgment as an Estoppel concludes every fact necessary to uphold it, and extends not only to matters actually determined, but to every other matter which the parties might have litigated and have had decided as incident to, and essentially connected with, the subject matter of litigation, and every matter within the legitimate purview of the original action, both in respect to matters of claim and of defense. (p. 739.)

RES JUDICATA.—A Judgment by Default or One Confessed is attended with the same legal consequences as if it had resulted from a trial on contested issues, and there exists no tenable ground of distinction between title confessed and one tried and determined, but if the second action is upon a different claim, the former judgment operates as an estoppel only as to matters actually litigated or as to facts distinctly in issue in that action. (p. 739.)

RES JUDICATA—Decision of Motions.—The tendency of recent adjudications is to inquire whether the issue or question has been in fact presented for decision and necessarily determined, and if so, to treat it as *res judicata*, though the decision is a determination of a motion or a summary proceeding. (p. 740.)

RES JUDICATA—Decision Involving the Validity of an Attachment.—Where a motion is made to continue a cause against an executor on the ground that property of his testate had been levied upon in his lifetime, and the executor makes a counter-motion to set aside the service of summons and the continuance on the ground that the court was without jurisdiction, and his motions are denied, and, on appeal, the action of the court is affirmed, and the question of the validity of the attachment is necessarily passed upon, it becomes *res judicata*, and the same question cannot be subsequently raised by a motion to set aside the sale of the attached property and vacate the judgment ordering such sale, or to refuse confirmation to the sale. (p. 741.)

RES JUDICATA—Default in an Attachment Suit.—Where the plaintiff's amended complaint presents the jurisdictional question of the sufficiency of an attachment, and the defendant makes default by failing to controvert it, and judgment is rendered based on the attachment, the question of its validity becomes *res judicata*. (p. 742.)

Action by White against Johnson to recover money, accompanied by an attachment. The defendant died a few hours after the commencing of the action. His executrix was substituted as a defendant, and on her death, an administrator was appointed and afterward made a party defendant. Objections were made to the confirmation of the sale of the attached property, which were sustained, and the plaintiff appealed.

Cotton, Teal & Minor, for the appellant.

R. & E. B. Williams and Williams, Wood & Linthicum for the respondent.

³²⁵ WOLVERTON, J. This is the third appeal, and the question now presented is raised by a motion to set aside a sale of attached property on execution, and to vacate the judgment directing the sale, and has relation to the sufficiency and validity of the attachment. A view in the retrospect will not be amiss in arriving at a clear understanding of the situation. Shortly after the filing ³²⁶ of the complaint in this action against A. H. Johnson, and the issuance of the summons and writ of attachment, and after the appointment of Cordelia Johnson executrix of the will of defendant, who died before the summons could be served on him, to wit, on May 29, 1894, the plaintiff filed a motion for continuance, basing it upon an affidavit wherein it is averred that certain real property of the defendant had been attached, and the manner of the attachment was particularly set out, in effect as shown by the return of the sheriff; whereupon the court granted an order of continuance against the executrix, who, having been served with a copy of

the complaint, summons, and order of continuance, appeared specially, and moved the court to set aside the service of summons and the order of the court continuing the action against her, "for the reason that the service of said summons is illegal, and the court had no jurisdiction to make said order." This motion was denied, and the judgment with reference to it was made the basis of an appeal to this court. A reversal was adjudged because of irregularities attending the service of summons upon the executrix: *White v. Johnson*, 27 Or. 282, 50 Am. St. Rep. 726, 40 Pac. 511. Upon the case being remanded, the plaintiff filed an amended and supplemental complaint, setting out the filing of an affidavit and undertaking, the issuance of the writ of attachment, its due execution, the appointment of Mrs. Johnson executrix, and that the cause had been continued against her as the personal representative of the original defendant. A copy was served upon the executrix, together with a copy of the summons, and in due time she appeared again specially, and moved to set aside the service of summons, and the order of the court relative to the continuance made and entered April 6, 1896, for the reasons that no writ of attachment had been issued, and the court had no power or jurisdiction to make the order. This motion, after a full hearing, was overruled, and judgment entered adjudging and ordering, among other things, that the attached property be held and sold to satisfy the same. Another appeal was prosecuted, but the proceedings of the trial court were held to be regular, ³²⁷ and the judgment affirmed: *White v. Ladd*, 34 Or. 422, 56 Pac. 515.

The return of the sheriff on the writ of attachment, so far as it is involved in this controversy, is as follows: "I further certify that I further executed the within writ of attachment on the sixteenth day of April, 1894, at the hour of 3 o'clock P. M. of said day, by attaching all of the right, title and interest of the within named defendant in and to the following described real property, situated in the city of Portland, county of Multnomah, state of Oregon, to wit: 'Beginning at a point at the intersection of the north side of Park avenue with the east side line of Ford street, running thence northerly along the east side line of said Ford street to its intersection with the south side line of Washington street; thence easterly along the south side line of Washington street to its intersection with the west side line of St. Claire street; thence southerly along the west side line of St. Claire street to its intersection with the north side line of Park avenue; thence westerly along north side line

of Park avenue to place of beginning; all of said property lying and being in the city of Portland, Multnomah county, state of Oregon'—by leaving with and delivering a copy of said writ of attachment, prepared and certified to by me as sheriff, to a Chinaman, the sole occupant thereon and thereof, whose name to me is unknown, and by filing with Henry E. Reed, clerk of the circuit court of the state of Oregon for the county of Multnomah, certificates of said attachment."

Another parcel of realty was attached under the same writ, and at the same time, about the validity of which no question is made, and has been sold and the proceeds applied toward the satisfaction of plaintiff's demand. The following portion of the above-described realty was, on August 4, 1899, sold by the sheriff under execution to satisfy the balance due upon plaintiff's judgment, and bid in by him, to wit: "Beginning at a point in the west line of St. Claire street, which point is two hundred feet distant, measured in a northerly direction along the west line of St. Claire street, from the point where the west line of St. Claire street intersects the north line of Park avenue, and running thence in a westerly direction on a line parallel with the north line of Park avenue three hundred ³²⁸ feet, more or less, to the east line of Ford street; thence northerly along the east line of Ford street to a point where the east line of Ford street intersects the south line of Wayne street extended westerly; thence easterly on the south line of Wayne street extended westerly to the point where the south line of Wayne street extended westerly intersects the east line of St. Claire street; thence southerly along the west line of St. Claire street to the place of beginning."

When this sale came on for confirmation the defendant objected thereto, and moved the court to set it aside, and also "to set aside, vacate, and hold for naught so much of the judgment and order of sale herein as provided for the sale" of the whole of said tract, as shown by the return of the sheriff on the writ of attachment, and particularly of the tract sold under execution and bid in by plaintiff, and to set aside the attachment claimed to exist upon said realty, including the tract sold under execution, "for the reason that said attachment is not valid, . . . and the court had no power to make any order of sale thereof."

The motion is based upon affidavits of the defendant and others, the defendant having been substituted for Cordelia Johnson while the case was last here on appeal. By these it is averred, among other things, that the property attached embraces

and includes five distinct parcels of land, namely: One parcel embracing the property sold under execution; one embracing all of the attached property lying, adjoining, and north of the property sold; one consisting of one hundred feet fronting on St. Claire street, and extending westerly through to Ford street, adjoining the parcel sold on the south; one consisting of the west half of the one hundred feet next south, being the south one hundred feet of the property attempted to be levied upon; and the other consisting of the east half thereof; that one Bickel was the owner of the said west half at the time of the levy, had a dwelling thereon, and occupied the same with his family; that the said east half was owned by one Warren, but unoccupied. The tract lying to the north of the premises sold stood in the name of William M. Ladd, as trustee for Johnson, to dispose of and apply the proceeds in payment of Johnson's ²²⁰ liabilities, and as to this it is averred that there was situated on the northwest corner a frame building occupied at the time. The one hundred feet adjoining the property sold on the south stood in the name of Johnson, but was intended to have been conveyed to Ladd under a like trust as the property to the north, but by mutual mistake was omitted, and the one hundred feet lying next south included. The deed, however, was subsequently reformed in this particular. As to this, it is averred that it, together with a portion of that sold, was fenced off so as to constitute a separate and distinct tract from the remainder, and that the other portion of the property sold was also distinct from the remainder, upon which was located the dwelling house of Johnson occupied by his family at the time. The other averments by affidavit tend to show that the premises were not occupied by a Chinaman.

The contention is that the judgment directing the sale of the real property so attached, including the property sold under execution, is void, for want of jurisdiction of the court, and is based upon the alleged invalidity of the attachment, which it is urged, arises from an insufficient service of the writ in two particulars, namely, a copy thereof was not left with the occupant, and the attempted attachment was upon several distinct parcels of realty, including therewith property of third parties. It is maintained (1) that the validity appears upon the face of the return of the sheriff; and (2) that, if it does not so appear, it has been shown by affidavits aliunde, and that it is competent in a case of this kind to contradict such return and show that the facts are different from those stated therein. Plain-

tiff makes the point that these questions cannot be considered upon objections to the confirmation of the sale, and such objections can only extend to substantial irregularities in the proceedings concerning the sale, to the defendant's probable loss and injury: Hill's Annotated Laws, sec. 296, subd. 2; *Krutz v. Batts*, 18 Wash. 460, 51 Pac. 1054. The defendant seeks to evade this point, however, and insists that his motion is to set aside and vacate the judgment as it relates to the property in dispute, as well as to set aside. Of course a vacation ³³⁰ of the judgment would be tantamount to setting the sale aside. The motion in this sense, it is insisted, is a direct attack upon the judgment, and lets in proof aliunde to show a want of jurisdiction in the court to render it. We are disposed, without deciding as to the regularity of the proceeding by which the question is raised, to treat the motion as one to vacate the judgment, and to consider it as such without determining at this time whether it constitutes a direct or collateral attack thereon.

1. A judgment void upon its face may be set aside or vacated at any stage of the proceedings, or at any time, whether within the term at which it was rendered or afterward, when the attention of the court in which it was rendered is attracted to it. Such a judgment, it has been said, "is a dead limb upon the judicial tree, which should be lopped off. . . . It can bear no fruit to the plaintiff, but it is a constant menace to the defendant." This power is inherent with the court, and will be exercised, even at its own suggestion, for the preservation of its dignity, the protection of its officers, and to arrest further action, which can serve no lawful purpose, and the most effectual method is by extirpation of the judgment itself as superfluous and vexatious: *Evans v. Christian*, 4 Or. 375; *Ladd v. Mason*, 10 Or. 308; *People v. Greene*, 74 Cal. 400, 5 Am. St. Rep. 448, 16 Pac. 197; *Lee v. O'Shaughnessy*, 20 Minn. 173; *Hanson v. Wolcott*, 19 Kan. 207.

2. But we cannot assent to the proposition that the present judgment is such a one as it affects the property in question. The return of the sheriff shows that the copy of the writ was left with the occupant of the premises, who is described as a Chinaman, and whose name was unknown to the officer. The statutes (Hill's Annotated Laws, sec. 149, subd. 3) does not require that the name of the occupant shall be stated, however convenient it may be as a description of the person upon whom the copy is served. If unknown, the fact affords a sufficient excuse for not stating it. It cannot be assumed, in the absence

of more explicit language, that it was ³³¹ the intention of the legislature that a valid service should depend in all cases upon the ascertainment of the name of the occupant. If so, the levy would fail in every instance where the occupant would refuse to give his name, or it could not otherwise, after the exercise of reasonable diligence, be accurately ascertained. Suppose the action be against Chinamen, and Chinese realty was sought to be levied upon, having a Chinese occupant; must the levy fail because these peculiarly secretive people should refuse to disclose the name of the occupant? Our attention has been called to no authority going to the exact question but the method employed can hardly be assumed to be without the reason and purview of the statute. As it pertains to the contention that separate parcels are included in one attachment, or that it extends to property not owned by the defendant, such a condition does not affirmatively appear upon the face of the return. So that the judgment rendered cannot be said to be void upon its face.

3. It is now settled law in this court that every intendment of the law is in favor of the sufficiency of the attachment, where the writ emanates from a court of superior and general jurisdiction, unless the record affirmatively shows a want of jurisdiction: *Bank of Colfax v. Richardson*, 34 Or. 518, 527, 75 Am. St. Rep. 664, 54 Pac. 359; *Schlosser v. Beemer*, 40 Or. 412, 67 Pac. 299.

4. The plaintiff contends that the matter now sought to be presented to establish the invalidity of the attachment is *res adjudicata*, and that defendant is thereby concluded by the judgment rendered. It is well understood by this time that the jurisdiction of the court to grant a continuance of the cause and to proceed against the executrix depended upon a valid attachment, and that the judgment was effectual only in so far as there was property attached. If none had been attached, the action could not have been continued, and, if the attachment fails as to any, the judgment is without support as to that; so that the jurisdictional inquiry was as to what property was legally attached and brought within the jurisdiction of the court. When Johnson died the action thenceforth was ³³² substantially in *rem*, and the inquiry was whether the court acquired jurisdiction of the property through the method adopted and pursued in serving the writ. The fact, therefore, that some property was well attached does not affect the jurisdictional question pertaining to the legality of the seizure of the remainder.

5. The potency of a judgment as an estoppel concludes every fact necessary to uphold it, and extends, not only to matters actually determined, but to every other matter which the parties might have litigated and have had decided as incident to and essentially connected with the subject matter of the litigation, and every matter coming within the legitimate purview of the original action, both in respect to the matters of claim and defense, and a default judgment, or one confessed, is attended with the same legal consequences, as there exist no tenable grounds of distinction between a title confessed and one tried and determined: *Barrett v. Failing*, 8 Or. 152; *Neil v. Tolman*, 12 Or. 289, 17 Pac. 103; *Glenn v. Savage*, 14 Or. 567, 13 Pac. 442; *Harris v. Harris*, 36 Barb. 88; *Hanson v. Manley*, 72 Iowa, 48, 33 N. W. 357; *Hobby v. Bunch*, 83 Ga. 1, 20 Am. St. Rep. 301, 10 S. E. 113; *Cromwell v. Sac County*, 94 U. S. 351. This applies where a subsequent action is sought to be maintained upon the same claim or demand. But if the second action is upon a different claim, the former judgment will only operate as an estoppel against the matters actually litigated, or as to facts distinctly in issue in that action: *Applegate v. Dowell*, 15 Or. 513, 16 Pac. 651; *Cromwell v. Sac County*, 94 U. S. 351.

6. This rule is not so pervasive where applied to motions and adjudications had with reference thereto. From general declarations contained in the cases it may be gathered that the rule formerly obtained that the decision of a motion was never to be regarded in the light of *res adjudicata*, and ordinarily it may still be said that such a decision is not so far conclusive upon the parties as to prevent their drawing the same matters in question by leave of the court first had and obtained, or in the more regular form of a suit or action. The reasons which ~~are~~ form the basis of the rule are that motions are frequently made in the hurry of the trial, considered in a summary manner, and disposed of without full or mature consideration, and they are not the subject of review by another or higher tribunal. Such reasons have latterly been adjudged inapplicable to motions that admit of more solemn and deliberate consideration, and touching which an appeal may be prosecuted to another court and review had relative to the matters in dispute. Mr. Freeman, in his excellent work on Judgments (volume 1, fourth edition, section 325), says of this condition: "The tendency of these decisions is to disregard the form or time of an adjudication, and to inquire whether the question really arose and was

or might have been contested on the merits, and necessarily decided by the court. If so, it will generally be regarded as conclusively and finally settled, though such decision disposed of a motion, rather than of an independent action or proceeding, and especially if the action of the court was subject to review by some appropriate appellate proceeding." This was said with reference to the effect of the adjudication when drawn in question in cases other than those in which they were made and rendered. When drawn in question at another stage in the same case, strictly speaking, the principle of *res adjudicata* does not apply. Rules have grown into familiar use and practice, however, which, in the prevention of the reargitation of the same matter, operate with substantially the same potency. The trial court is endowed with a discretion respecting the renewal of a motion to be exercised only when there is something attending the former hearing to excite a suspicion of unfairness, or the parties were taken by surprise, or upon the discovery of new facts of a material nature, or the springing of new conditions, and the like, and as to these the moving party is charged with the exercise of the same degree of diligence that would be sufficient to free him from the imputation of laches if he were engaged in the regular trial of the cause. The public welfare and the dictates of common justice require that there should be an end of litigation, and the maxim is just as applicable to the judicial determination ³³⁴ of motions as of the cause at the final hearing. In a résumé of the doctrine applicable in this feature Mr. Freeman again says (section 326): "The tendency of the recent adjudications is to inquire whether an issue or question has been in fact presented for decision and necessarily decided, and, if so, to treat it as *res adjudicata*, though the decision is the determination of a motion or summary proceeding, and not of an independent action. This is especially true when the decision did not involve a mere question of the proper form or time of proceeding, but was the determination of a substantial matter of right, upon which the parties interested had a right to be heard upon the issues of law or fact, or both, and these issues, or some of them, were necessarily decided by the court as the basis of the order which it finally entered granting the relief sought." The foregoing observations have the support of numerous adjudications: *Dwight v. St. John*, 25 N. Y. 203; *Second Ward Bank v. Upman*, 14 Wis. 596; *Roulhac v. Brown*, 87 N. C. 1; *Grier v. Jones*, 54 Ga. 154; *Obear v. Gray*, 73 Ga. 455; *Gordinier's Appeal*, 89 Pa. St. 528; *Johnson*

v. Latta, 84 Mo. 139; Page v. Esty, 54 Me. 319; Hoge v. Norton, 22 Kan. 374. Mr. Justice Rapallo, in Riggs v. Pursell, 74 N. Y. 370, and Mr. Justice Brewer, in Commissioners v. McIntosh, 30 Kan. 234, 1 Pac. 572, following the New York cases, prescribe certain limitations upon the rule and confine its operation to facts actually called in question and litigated, without extending it so as to conclude the party as to a fact or facts which might have been litigated, but were not; but it is believed this limitation is without relevancy where the point subsequently insisted upon, whether based upon a legal proposition or a fact, was necessarily passed upon in the court's decision in reaching the conclusion arrived at upon the former motion: Spitley v. Frost (C. C.), 15 Fed. 299, and National Bank of Port Jervis v. Hansee, 15 Abb. N. C. 488.

Now, in the case at bar, plaintiff, by his motion for a continuance against Cordelia Johnson, executrix, set forth by affidavit the facts attending the attachment. These are the same as returned by the sheriff, it is true, but the matter was ³³⁵ called directly to the attention of the court. The defendant, without controverting them, moved to set aside the service of the summons and the continuance, on the ground that the court was without jurisdiction to make the order, and was successful. The case was appealed without going further, and reversed because of irregularities attending the service of the summons. On the return of the case to the trial court, and after the executrix had been served with an amended and supplemental complaint and an alias summons, the defendant renewed her motion, basing it upon the same jurisdictional ground, and, being unsuccessful, the case was again appealed, but the decision of the trial court was affirmed. The question as to the sufficiency of the attachment was necessarily passed upon at both trials of the motion, or the judgment could not have gone that way, and this as it may affect either parcel of the realty attached. Mrs. Johnson must of necessity have been acquainted with the facts relied upon for an impeachment of the sheriff's return. True, the present administrator affirms, and, we have no doubt, truly, that he had no knowledge of such facts until recently, but it is nowhere denied that Mrs. Johnson, his predecessor, was without such information. So that the matter is not presented in a favorable light for the trial court even to grant a rehearing upon leave regularly applied for. But no such application was made, and the case has twice gone to judgment upon the motion, and twice been appealed, and the judgment of the lower court

finally affirmed. So far the rulings of this court have become the law of the case, and the doctrine of *res adjudicata* applies with even greater rigor.

7. Beyond all this, however, plaintiff's amended complaint presented the jurisdictional question as to the sufficiency of the attachment in an issuable form, and the default of the defendant in failing to controvert it, and in suffering it to be taken as confessed, renders it *res adjudicata*, under the general rule relative to trials upon the merits. After such repeated trials, and the default and the confession of the defendant, and the adjudications with reference thereto, the question ³³⁶ now sought to be presented should have been settled for all time, and it must be so regarded. The defendant is, therefore, precluded from again litigating it by the motion interposed to vacate the judgment as to the parcel of realty now in dispute.

There being no other objections urged against the confirmation, the order of the trial court will be reversed, and the cause remanded with directions to confirm the sale on execution, and it is so ordered.

A Writ of Attachment is presumed to have been properly issued and served: See *Harris v. Daugherty*, 74 Tex. 1, 15 Am. St. Rep. 812, 11 S. W. 921; note to *Hall v. Stevenson*, 20 Am. St. Rep. 808. As to the effect of the death of the defendant before judgment, see *Reynolds v. Nesbitt*, 196 Pa. St. 636, 79 Am. St. Rep. 736, 46 Atl. 841; *Shea v. Shea*, 154 Mo. 599, 77 Am. St. Rep. 779, 55 S. W. 869; *Dow v. Blake*, 148 Ill. 76, 39 Am. St. Rep. 156, 35 N. E. 761; note to *Waite v. Thompson*, 80 Am. Dec. 139-143.

Res Judicata.—A judgment is conclusive, not only as to every question actually presented and considered, but upon every point which might have been presented and decided: *Hart v. Moulton*, 104 Wis. 349, 76 Am. St. Rep. 881, 80 N. W. 599; *Hentig v. Redden*, 46 Kan. 231, 26 Am. St. Rep. 91, 26 Pac. 701; *Slater v. Skirving*, 51 Neb. 108, 66 Am. St. Rep. 444, 70 N. W. 493; *Gross v. People*, 193 Ill. 260, 86 Am. St. Rep. 322, 61 N. E. 1012; monographic note to *Fahey v. Esterly Machine Co.*, 44 Am. St. Rep. 570. Compare *Pitts v. Oliver*, 13 S. Dak. 561, 79 Am. St. Rep. 907, 83 N. W. 591; *Freeman v. Barnum*, 131 Cal. 386, 82 Am. St. Rep. 355, 63 Pac. 691; *Fuller v. Metropolitan Life Ins. Co.*, 68 Conn. 55, 57 Am. St. Rep. 84, 35 Atl. 766; *Hunter v. Hunter*, 63 S. C. 78, 90 Am. St. Rep. 663, 41 S. E. 33. Orders made upon motions, petitions, or rules affecting substantial rights, and from which an appeal lies if the matter in question has been fully tried, are as conclusive upon the issues necessarily decided as are final judgments or decrees: *Burner v. Heyener*, 34 W. Va. 774, 26 Am. St. Rep. 948, 12 S. E. 861. But see *Clopton v. Clopton*, 10 N. Dak. 569, 88 N. W. 562, 88 Am. St. Rep. 749, and cases cited in the cross-reference note thereto. Judgments by consent or by default are ordinarily conclusive: *Adler v. Van Kirk Land etc. Co.*, 114 Ala. 551, 62 Am. St. Rep. 133, 21 South. 490; *Slater v. Skirving*, 51 Neb. 108, 66 Am. St. Rep. 444, 70 N. W. 493.

CARROLL v. NODINE.

[41 Or. 412, 69 Pac. 51.]

NEGOTIABLE INSTRUMENTS.—On an Indorsement Without Recourse there is an Implied Warranty by the seller that the paper is what it purports to be, and that no payments have been made except those which appear to be indorsed thereon, and that such as so appear are genuine and operate to continue the obligation in force as against the statute of limitations. (pp. 744, 745.)

NEGOTIABLE INSTRUMENTS.—An Indorsement Without Recourse does not Constitute a Contract in Writing and serves merely to transfer the title as in case of delivery when payable to bearer. (p. 746.)

NEGOTIABLE INSTRUMENTS — Indorsement Without Recourse—Parol Evidence to Vary.—One who has indorsed a negotiable instrument without recourse, and who is sued on the implied warranty that the indorsement of a payment appearing thereon was genuine and true, is entitled to prove, by parol evidence in his defense, that the indorsee, at the time of the purchase, agreed and guaranteed that the indorser should never be held liable thereon in any capacity. (pp. 746, 747.)

JUDGMENT—When Necessary to Bind an Indemnitor.—If one is liable to another on a decision adverse to the latter of an action pending against him, the former is entitled to a reasonable notice of the pendency of the action and an opportunity to participate in or interpose such defenses as he may desire, but not to a request to take charge of or assume the responsibility of the defense. (pp. 747, 748.)

JUDGMENT—Indemnitor—Notice to Bind by a Judgment, What Sufficient.—If one who has agreed to be present and to testify in an action which may be brought by his indorsee is called to testify only a few hours before the trial, he having no previous notice of the pendency of the action and no request being made on him to participate in or to assist the prosecution of the action, he is, nevertheless, bound by the judgment if he appears and testifies. (p. 748.)

Action by Carroll against Eliza Nodine on a warranty implied by the sale without recourse of a promissory note, which was secured by a mortgage. When the sale and indorsement were made, certain payments were indorsed on the note, which, if made, would prevent the running of the statute of limitations. In the suit on the note brought by the indorsee the defendant in that action succeeded in sustaining the defense that one of the payments so indorsed was not in fact made, and, as a consequence, that such suit was barred by the statute of limitations. In the present action the defendant was permitted, against the objection of the plaintiff, to offer evidence to the effect that the indorsee, when the indorsement was made, agreed

and guaranteed that she should never, at any time, be held liable on the note in any capacity or for any portion thereof.

Plaintiff recovered judgment, and the defendant appealed.

Leroy Lomax, for the appellant.

C. E. Cochran and Thomas H. Crawford, for the respondent.

⁴¹⁴ WOLVERTON, J. There are but two errors relied upon for reversal. It is first contended that the plaintiff, at the time he purchased the note, agreed and guaranteed that the defendant should never be held liable thereon in any capacity, and that such an agreement constitutes a valid defense to the action. The question arose upon an attempt to prove the express warranty set up in the answer by parol, which the court refused to permit, under the idea that the contract, being in writing, could not be thus varied. The theory of the plaintiff is that the indorsement of the note fixes and determines the relation of the parties to the transfer—that is, imports a contract in writing between them—and that, like other contracts of the kind, cannot be varied or controlled by a contemporaneous verbal agreement, as it is presumed that the whole understanding of the parties has been incorporated in the writing. The case of *Smith v. Caro*, 9 Or. 278, and other cases of like nature, are relied upon in support of the contention. In the case cited the indorsers simply wrote their names upon the back of the note; and the court held that by the law merchant indorsement imported a contract in writing, which served not only as a means of transfer, but to fix and determine the liabilities of the indorsers, and that it was not competent to vary the contract by any parol agreement that might have been entered into at the time.

1. The liabilities of an ordinary or unqualified indorser are upon the instrument indorsed, conditioned upon demand and notice; but where the transfer is by indorsement without recourse, or by delivery, the vendor's liabilities arise from the fact or contract of sale, and not upon the paper. The purpose of such an indorsement, like delivery, without indorsement, is simply to carry title to the purchaser, without alone importing ⁴¹⁵ a contract: 4 Am. & Eng. Ency. of Law, 2d ed., 475. The authorities are in unison, however, that where a note is thus transferred there is an implied warranty by the seller that it is what it purports to be, and, as applied to the exigencies of this case, that no payments have been made, except those that appear to

have been indorsed thereon, and that such as so appear are genuine, and operate to continue the obligation in force as against the statute of limitations: *Bank v. Smiley*, 27 Me. 225, 46 Am. Dec. 593; *Society v. Giddings*, 96 Cal. 85, 31 Am. St. Rep. 181, 30 Pac. 1016; *Hannum v. Richardson*, 48 Vt. 508. There is an intimation in a note to *Drennan v. Bunn*, 7 Am. St. Rep. 354, 366, that the general rule that oral evidence is inadmissible to change the contract of indorsement relates to restrictive indorsements, also, and, extended, it applies to indorsements without recourse. The authorities referred to, however, as sustaining the principle, go to the proposition that it cannot be shown by parol that an unqualified indorsement was made for the sole purpose of transferring the title, and that it was agreed at the time that the words "without recourse" should be written over it. This, it appears to us, is coming back to the same question.

2. An indorsement without recourse is a very different thing from an unqualified indorsement; and it would be just as objectionable to show an agreement by parol that the vendor should be relieved of all liability on the instrument, as it would be that the vendor agreed to waive demand and notice, which was the case of *Smith v. Caro*, 9 Or. 278. In either case there is a variance of the contract which the unqualified indorsement imports. We have been unable to find any case covering the exact point here. Where an article of personalty in the vendor's possession is sold and delivered to another, and nothing is said, there goes along with the contract an implied warranty of title, and a failure thereof renders the vendor liable. The implied warranty attending the sale of commercial paper arises upon like principle: *Hannum v. Richardson*, 48 Vt. 508, 21 Am. Rep. 152. It will hardly be disputed that the vendor ⁴¹⁶ of personalty may by verbal understanding or agreement limit the liability under the implied warranty of title, and thereby make the transfer entirely at the purchaser's risk; and why should not the same principle govern as to the sale and delivery of commercial paper, where the indorsement merely operates to transfer the title? And to carry the reasoning a little further, there is no implied warranty by a sale and simple delivery of the paper, or by indorsement without recourse, of the solvency of the maker or other person liable for its payment; but we take it to be unquestioned now that the vendor may, by express verbal agreement, warrant the solvency of such parties, and thereby render himself directly liable in case of their

default in payment. The statute of frauds does not stand in the way of such an agreement: *Milks v. Rich*, 80 N. Y. 269, 36 Am. Rep. 615; *White v. Webster*, 58 Ind. 233. So that it may be deemed competent for the vendor to verbally enter into an express warranty with relation to the paper in connection with the transfer of the title, and the only question that remains is whether it is superseded by the contract which the mere delivery or indorsement without recourse implies. But we have seen that such an indorsement does not constitute a contract in writing, and serves merely to transfer title, as in the case of delivery when payable to bearer. In *Smith v. Corege*, 53 Ark. 295, 14 S. W. 93, the vendor, by verbal agreement, expressly warranted that the paper transferred by delivery was good, and hence not tainted with usury; and the court permitted the establishment of the agreement against an objection that it was contrary to the statute of frauds. Now, if it be permissible to show by parol an express warranty that the paper is not usurious, or that the makers are solvent, why is it not equally competent to show by parol that the purchaser agreed to take the paper at his own risk, absolutely, and thus relieve the vendor of all liability of whatsoever nature that ordinarily attends the sale and transfer by such methods where nothing is said to vary the effect of the transaction? Logically there is but one answer to the question, which is that the verbal ⁴¹⁷ agreement may be shown, and we are constrained to so hold.

3. This entails a reversal of the judgment, without more; but the other question presented will again arise on a retrial, and may induce another appeal, hence we deem it important that we should pass upon it now. After the indorsement and transfer of the note, the plaintiff sued the makers, and the defendant here was a witness on the trial. She appeared at the request of the plaintiff made on the same day, and but a few hours previous to taking the stand. This was the first knowledge she had of the pendency of the suit, no request having been made that she assist in or take charge of the defense; nor was she notified in any manner that she must assume the responsibilities thereof. It developed on her cross-examination that she agreed with the plaintiff at the time of the sale and transfer of the note and mortgage to be a witness for him in case suit should be brought against the makers. Now, it is contended by defendant that the decree obtained in that suit was not admissible against her in this action, because she was

not given adequate and proper notice of the pendency thereof, and required to assume the burden of the defense. The contention proceeds upon the hypothesis that the defendant is an indemnitor, dependent upon the finding of the jury as to the agreement, and her consequent liability attending the sale of the note and mortgage. As indemnitor, the primary liability for the loss incurred by a failure to prove that the seven dollars payment was genuine, and entitled to rightful and lawful indorsement upon the note, rested upon her. Such a relation brings her into privity with the purchaser, the party to be indemnified; and she, as well as the plaintiff, had a direct interest in defending the suit. But before an indemnitor can be expected to defend, he must have reasonable notice of the pendency of the suit or action by which he is to be bound, and afforded an opportunity to participate in or interpose such defense as he may desire; and it is only by complying with such conditions that the party to be indemnified can estop the indemnitor to ⁴¹⁸ controvert the matter anew upon an action against him upon the indemnity contract or obligation. Of course, the suit or action that works the estoppel must have been prosecuted without collusion or fraud, as it affects the indemnitor. While notice of the pendency of the suit or action is always necessary to render the decree or judgment binding upon the indemnitor, the better reason and the weight of authority dispense with any request to take charge of or assume the responsibilities of the defense. Having notice, the indemnitor may, as it is his right, interpose and make such defense as to him might seem most expedient and effective; and, if he did nothing in that direction, it must be considered a matter of his own volition, and a request for him, coupled with a warning of consequences, to do that which duty and interest require him to do, would seem superfluous, and the law, which is founded upon reason, does not require a vain thing.

The question thus recurs whether defendant had reasonable notice, or such under the circumstances attending the controversy as required her to defend or abide the consequences. The notice given her was of very short duration, and we are not prepared to say that it would have been sufficient ordinarily, but she actually attended as a witness, and gave evidence on trial; and, what is of far greater consequence, and a circumstance of decisive moment, she agreed at the time she sold the note to testify in the case, if called upon; thus anticipating a suit at the time, and impliedly indicating her willingness

that plaintiff should conduct the defense in her behalf, and that she would aid him by her testimony, if desired. The circumstances are such as to make the decree binding upon her. In support of these views, see *Giffert v. West*, 33 Wis. 617; *Daskam v. Ullman*, 74 Wis. 475, 43 N. W. 321; *Davis v. Smith*, 79 Me. 351, 10 Atl. 55; *City of Boston v. Worthington*, 10 Gray, 496, 71 Am. Dec. 678; *City of Chicago v. Robbins*, 2 Black, 418; and *Robbins v. City of Chicago*, 4 Wall. 658.

The ruling of the trial court as to this latter contention was ⁴¹⁹ therefore correct, but, for error as to the first, the judgment will be reversed, and the cause remanded for such further proceedings as may seem appropriate.

The Indorsement of Negotiable Instruments without recourse is considered in *Drennan v. Bunn*, 124 Ill. 175, 16 N. E. 100, 7 Am. St. Rep. 354, and note. An indorser's liability cannot ordinarily be varied by parol: *Hately v. Pike*, 162 Ill. 241, 44 N. E. 441, 53 Am. St. Rep. 304, and cases cited in the cross-reference note thereto; *Dennis v. Jackson*, 57 Minn. 286, 47 Am. St. Rep. 603, 59 N. W. 198; *Holmes v. First Nat. Bank*, 38 Neb. 326, 41 Am. St. Rep. 733, 56 N. W. 1011. And it is held that this rule is applicable to an indorsement without recourse: *Youngberg v. Nelson*, 51 Minn. 172, 38 Am. St. Rep. 497, 53 N. W. 629; note to *Drennan v. Bunn*, 7 Am. St. Rep. 366.

HARMON v. DECKER.

[41 Or. 587, 68 Pac. 11, 1111.]

EVIDENCE—Entries Made by a Deceased Person.—If in a pass-book several entries are made by a deceased person, but under such circumstances as to indicate that they are not original entries in the usual course of business, but merely summaries copied from his ledger, they are not admissible in evidence. (p. 752.)

EVIDENCE—Immaterial Error in Excluding.—If a deed is offered in evidence in corroboration of an entry in a pass-book and is excluded on a ground which may not be sustainable, this is an immaterial error, if it appears that the pass-book must be excluded, and hence that there is no evidence on the subject to be corroborated. (p. 752.)

EVIDENCE—Books of Account—Right to Vary.—Though a party in his books of account makes a charge against another, which is there designated "note," parol evidence is admissible to prove that what was so described as a note should have been goods, wares, and merchandise delivered and the value thereof. (p. 753.)

EVIDENCE of Books of Account to Prove Loans.—While books of original entry are admissible to prove the price, sale, and delivery of articles, or the performance of labor, or the rendition of services, they are not generally admissible to prove the loan of

large sums of money. An exception to this rule exists in favor of the books of a banker or broker kept in pursuance of his ordinary business methods. (pp. 754-756.)

EVIDENCE.—Books of Account are not Admissible, When Kept by a Merchant to Prove Advances made to, or checks in favor of, persons other than his debtor, in the absence of testimony tending to show that such advances were for moneys loaned to him or furnished to others upon his order. (p. 756.)

EVIDENCE, Secondary, of a Lost Writing.—No precise rule can be prescribed as to what shall constitute a reasonable effort, but the party alleging the loss or destruction of a document must show that he has in good faith exhausted, in a reasonable degree, all sources of information and means of discovery which the nature of the case would suggest and which are accessible to him. If the testimony shows that the document was last seen by the witness in a certain courthouse, and there is no direct statement that it has been searched for there, secondary evidence of its contents is not entitled to be admitted on the witness' general statement that he has searched in all places where it could be to his knowledge and also all the files and records that he has in his office. (pp. 757, 758.)

EVIDENCE—Admission of—Charge of Interest as Proof of Principal.—Though the defendant's books disclose that they agree with the plaintiffs as to a charge of annual interest due to the latter, this does not furnish conclusive proof of the principal indebtedness especially when it seems that there must be an easy mode of proving such principal, if it exists. (pp. 759, 760.)

Action by Harmon as administrator of Gasquet on an open account to recover \$2,908.80. A copy of the account was made part of the complaint, but it was alleged therein that the item of December 31, 1889, for \$5,448.51 designated, to the account, as "note" was for merchandise and buildings purchased by the defendant of the decedent, and for which no note was in fact ever executed. Judgment for the plaintiff for \$382.14, from which he appealed.

Robert Glenn Smith and H. D. Norton, for the appellant.

A. C. Hough and Austin S. Hammond, for the respondent.

589 MOORE, J. 1. The account began December 31, 1889, when the defendant was credited with sundry items, and charged among others, as follows:

"To amount of note	\$5,448.51
To int. on same for 14 mo. at 6% per annum.....	381.39
To cash advanced Krewski	300.00
To cash advanced Nunan	200.00
To bal. due from 1889.....	4,803.50"

This remainder is carried over to 1890, and the defendant is charged, among other items, with the two following:

"Int. bal. on note\$ 288.21"

leaving due from him, after deducting sundry credits appearing at length in the ledger, a remainder of \$4,564.62. Each year thereafter the defendant was charged with a remainder, and with the interest thereon until March 1, 1896, when, having been credited with all payments made, there was due from him, as appears from the bill of particulars, the sum of \$2,908.80, which is sought to be recovered in this action. He was also charged, among other items, with the following:

"Jan. 22, 1892. To check favor of Falkenstein....\$ 143.30"

"Mch. 23, 1893. To check favor Levi Strauss & Co.. 154.22"

At the trial his counsel admitted the correctness of said account, except the items thereof hereinbefore enumerated, which they contend could not be established by a book account. The defendant, having been called as plaintiff's witness, identified his own ledger, which, being introduced in evidence, shows that his account with Gasquet purports to commence December 12, 1893, from which time the items thereof coincide with the latter's account, except that Decker does not charge himself with the principal, but only with the interest thereon. Fred Frantz, a resident of Crescent City, California, one of the executors in that state of the last will of Horace Gasquet, deceased, testified, as plaintiff's witness, that he found in the latter's effects a pass-book, ⁵⁹⁰ which being identified by the witness, the following entry therein was offered in evidence, to wit:

" '88	Charles Decker Ac't.	
10—6	1375.00)	
	4073.51).....	5448.51
Jan. 1st, '90,	14 months' interest	381.39
		<hr/> 5829.90
Charged on ac't on	deductions on his bill	1026.40
		<hr/> 4803.50
Balance due by Ch. Decker	Jan. 1, '90.....	4803.50
Paid in by Ch. D.,	Jan. 1, '91.....	1014.28
Bal. due Jan. 1, '92		3789.22
		<hr/> 4803.50
Jan. 1, '92, Bal. due by Ch. D.....		3789.22
Condition 6% per annum.		
Security, all the buildings which were	deeded to my name."	

To explain this entry, plaintiff's counsel offered in evidence the following memorandum:

"Waldo, Josephine Co., Oregon, October 6, 1888.

"Received from H. Gasquet two drafts, No. 138 vs. Porter, Sleisinger & Co. for W. J. Wimer, sum (\$1375.00) thirteen hundred and seventy-five dollars.

"Also No. 139 vs. Porter, Sleisinger & Co. for G. W. Wimer, sum (\$4073.51) four thousand and seventy-three and 51-100 in payment of goods and buildings in Town of Waldo.

"Rec'd. Oct. 6th, 1888

"GEO. W. WIMER."

To supplement the entry in the pass-book, plaintiff offered in evidence a deed purporting to have been executed October 9, 1888, by George W. and W. J. Wimer and their wives to Horace Gasquet, in consideration of \$30,000, and conveying certain lots, stores, dwellings, barns, and other buildings; and they also offered Gasquet's ledger, containing the charge against the defendant of \$5,448.51. The defendant's counsel having objected to the introduction of the deed, on the ground that neither of the subscribing witnesses thereto had been called or their handwriting, ⁵⁹¹ or that of the grantors, proved, so as to establish the execution thereof, and to the ledger and other memorandum and receipt, on the ground that they were incompetent irrelevant, immaterial, plaintiff's counsel stated to the court, in effect, that the pass-book was offered to explain the original transaction and the ledger to show that the sum in question had been carried into the current account; that they expected to show by Decker's books, which they would offer in evidence, that he had given Gasquet credit for interest on that sum; and that these matters, considered in connection with others, would show that there had been a consummated negotiation between the parties in respect thereto; but the court rejected the evidence offered, and allowed the plaintiff an exception.

It will be observed that the sum of the drafts specified in the receipts corresponds with the charge made on the pass-book and in the ledger, and the dates also coincide. An inspection of the pass-book shows that of the four debits the first was apparently made therein October 6, 1888, and the other three on the 1st day of January, 1890, 1891, and 1892. It is quite evident that these entries are not original, for when the charges therein noted are compared with the bill of particulars attached to the complaint it is found that many other items intervene, thus showing that they were not made in the usual course of the

business, but are only the summaries copied from Gasquet's ledger, relating to his account with the defendant. The entry in the pass-book, though made by a person deceased, was evidently not made at or near the time of the transaction, nor was it against the interest of the person making it, and hence it was not admissible as primary evidence of the fact as stated: Hill's Ann. Laws, sec. 767.

2. The deed, like the receipt, was offered only to corroborate the entry in the pass-book, in which case it is doubtful whether the strict formality required by the statute (Hill's Ann. Laws, sec. 761) should be observed, as when an instrument of that character is designed to prove title or to subserve a higher purpose; but, however that may be, the pass-book which was the foundation for the introduction of the receipt, deed, and ledger in evidence ⁵⁹² having failed, the latter must also fall with it, unless the evidence proposed to be offered by plaintiff's counsel of what they expected to prove connected the pass-book, receipt, deed, and ledger with the transaction, so as to charge the defendant with the sums stated as the foundation of the account. The answer denies, upon information and belief, that the sum of \$5,448.51 was intended to be charged for merchandise and buildings received from Gasquet. No testimony appears in the bill of exceptions tending to show that either of the lots or buildings so purchased by Gasquet was conveyed to the defendant, or that any agreement was ever entered into between them whereby the latter was to purchase or pay for any of the property described in Wimer's deed. "The other matters," alluded to by plaintiff's counsel in their statement of what they expected to prove, and which were to be considered in connection with the pass-book, receipt, deed, and ledger, are, in our opinion, not sufficiently definite to render the offer available, and hence no error was committed in rejecting the memorandum and other documents offered in support thereof.

3. The witness Frantz having identified the day books containing Gasquet's original entries as made by his bookkeeper, and the ledger to which the defendant's account was transferred, the same were admitted in evidence as corroborative of the bill of particulars attached to the complaint, except that all entries relating to the note and interest thereon, the balance of the accounts as yearly ascertained, and the interest thereon, the cash advanced to Karewski and Nunan, and the checks issued in favor of Falkenstein and Levi Strauss & Co.,

were excluded, and plaintiff's counsel excepted to the court's action in these respects, and contended that errors were thereby committed. If Gasquet's day-book contained any entry in relation to the origin of or consideration for the charge made against the defendant for the sum of \$5,448.51, the bill of exceptions fails to disclose it. As we understand the transcript, this sum was charged against Decker in the Gasquet ledger as a "note," and also in his pass-book, as hereinbefore stated. The day-books offered in evidence have not been sent up, and, so far as apparent ⁵⁹³ from the bill of exceptions, no mention whatever is made in the books of original entry of this sum. It is alleged in the complaint that the debt was incurred by the defendant's purchase of goods, merchandise, and property from Gasquet, and that no note had ever been executed as evidence thereof. We think the plaintiff had the right to contradict the entry made by Gasquet in his books, and to show, by competent evidence that what was there designated a "note" should have been a statement of certain goods, wares, merchandise, and property sold and delivered, and the value thereof, which was provable by the books of original entry, and that nothing said by this court in *Strong v. Kamm*, 13 Or. 172, 9 Pac. 331, militates against this principle. The entry in a day-book made in the hurry and press of business does not rise to the character or dignity of a contract, or evidence the aggregatio mentium of the parties, so as to require the interposition of a court of equity to correct a mistake that may have occurred through the carelessness or ignorance of the bookkeeper; and hence, upon principle, the entries made in such books ought to be corrected, if necessary, to make them comport with the facts which should have been recorded in the first instance. The plaintiff having alleged the facts relied upon, and they being denied, the burden of establishing them rested upon him. No memorandum in any book of original entries was introduced to substantiate the important fact referred to, nor was any testimony introduced, so far as discoverable from an inspection of the bill of exceptions, tending to show why the defendant should have been charged with \$5,448.51, or any other sum, and hence no error was committed in excluding that sum from the account.

4. As to the other item excluded by the court, some contrariety of judicial utterance exists in respect to the right of establishing the loan of money in large sums by the production of the books of original entry, unless the person so making the

loan is a banker or broker. The transcript does not purport to contain all the testimony given at the trial, so that it is difficult to state, with any degree of certainty, the business in which Gasquet was engaged, but we think it fairly inferable from the ⁵⁹⁴ bill of exceptions that he was a merchant, and conducted general stores at Crescent City, Happy Camp, and Gasquets. It was the rule of the common law that entries made in the regular course of business by a clerk in the shop books were admissible in evidence after the death of such clerk, on proof of his handwriting: *Welsh v. Barrett*, 15 Mass. 380; *Walker v. Curtis*, 116 Mass. 98. This rule was first extended in the United States to cases in which the person making the entry is still living, and verifies the memoranda, though he may not remember the facts so entered; but such entries are not admissible in the lifetime of the clerk, unless they would be admissible after his death, upon proof of his handwriting: *Spann v. Baltzell*, 1 Fla. 301, 46 Am. Dec. 346. The rule was further expanded in this country so as to admit in evidence entries made by the parties themselves, as well as those made by their clerks, to prove the price of goods, the sale or delivery thereof, or the performance of work or labor: *Union Bank v. Knapp*, 3 Pick. 96, 15 Am. Dec. 181; *Merrill v. Ithaca etc. R. R. Co.*, 16 Wend. 586, 30 Am. Dec. 130. In *Bracken v. Dillon*, 64 Ga. 243, 37 Am. Rep. 70, it was held that, before the books of a merchant or other tradesman can be used to prove an account, it must appear that he has no higher evidence of its truth, and therefore that he had no clerk who sold the goods, or that clerk, if he had one, is dead, beyond the jurisdiction, or otherwise inaccessible; if he had no clerk who sold the goods, or the clerk is inaccessible, then, before he can introduce the books, the bookkeeper, if accessible, must be produced to prove that it is the book of original entries; if he had none, or he is inaccessible, then he may prove that it is the book of original entries himself; books are secondary evidence, and only admissible *ex necessitate rei*; that the books will not establish considerable items for cash, nor accounts of third persons transferred to defendants, nor are they admissible at all to show the authority to make such transfer. They may be admitted to show that a transfer was made pursuant to previous authority.

While books of original entry are admissible to prove the price, sale, and delivery of articles, and the performance of labor or ⁵⁹⁵ the rendition of service, because such entries are made in the usual course of business, such books are generally

inadmissible to prove the loan of large sums of money, because transactions of this character are usually evidenced by promissory notes, checks, and bills of exchange. Thus, in *Veiths v. Hagge*, 8 Iowa, 163, the defendant, by way of setoff to the plaintiff's action, pleaded an account which contained, among others, several items charged against the plaintiff as "cash \$100," and "cash \$146." After having produced the necessary preliminary evidence in verification of his books of account, and after having proved by one Jensen, who was defendant's clerk from March, 1855, to March, 1856, that plaintiff during that time was a customer of the defendant, and in the habit of borrowing sums of money of him from time to time, which were charged in said books of account, without offering any other evidence in support of said cash items, the defendant offered to prove the same by said books. The court charged the jury that "cash, except in small items, to the amount of ten dollars or thereabouts, which appear to have been furnished in the ordinary course of dealing between the parties, is not the subject of the book account, and cannot be proved by the books alone. But, to entitle the defendant to recover for such items, there must be other evidence than what the books furnish. If there is evidence, other than the books, that the money was loaned to the plaintiff, items of such character the jury will allow." Mr. Justice Stockton, in speaking for the court in deciding the case, after reviewing many decisions from other states supporting this principle, says: "We think the general rule is clearly established by these authorities that a charge for 'money paid' or 'money lent' cannot be proved by the party's book of accounts; that such transactions are not usually the subject of a charge in account; and that charges of that nature are not such as are made in the ordinary course of business by one party against another." To the same effect, see *Lyman v. Bechtel*, 55 Iowa, 437, 7 N. W. 673; *Culver v. Marks*, 122 Ind. 554, 17 Am. St. Rep. 377, 23 N. E. 1086; *Lehmann v. Rothbarth*, 111 Ill. 185; *Kelton v. Hill*, 58 Me. 114; *Winner v. Bauman*, 28 Wis. 563.

596 5. While the loan of large sums of money is usually evidenced in the manner indicated, and the payment thereof by receipts, these items may be proved by the books of a banker or broker, when such is in pursuance of his ordinary business method: *Union School Furn. Co. v. Mason*, 3 S. Dak. 147, 52 N. W. 671. What shall be considered as a large sum of money, the loan of which cannot be established by the mere production

of books of account, will probably ever remain problematical. The growth of commercial enterprise must necessarily expand the methods of transacting the business pertaining thereto, including the mode of evidencing such facts, and as courts are not called upon to make, but to enforce, the rules adopted by experience, it would seem to follow that what, a few years ago, would have been regarded as a large sum of money, must now be considered as a mere bagatelle, so that the standards as formerly fixed cannot longer remain as guides of procedure. Admitting that Gasquet was not a banker, and conceding that he was only a general merchant, we are not prepared, nor is it necessary, to say that the sum of \$300 advanced to Karewski, and the smaller sums involved in this appeal, were "large sums," within the meaning of the rule discussed by the authorities, to which attention is called. We rest our decision upon the principle that the items adverted to, and excluded by the court, do not appear from an inspection of the original entries to have been money loaned to the defendant or furnished to others upon his orders. The production of the books of account did not, therefore, establish a charge against the defendant in respect to such items, and before the fact could be established, testimony should have been introduced explaining the ambiguity, and imposing upon the defendant a liability therefor. The plaintiff having failed in this respect, no error was committed in excluding the items above referred to. If Gasquet took a note to evidence the sale of the goods, wares, merchandise, and property alleged to have been purchased by the defendant, as would appear from an inspection of the defendant's account of 1890 and 1891, the production of the instrument or the proof of its loss would establish its execution, and hence the note could not be the subject ⁵⁹⁷ of a book account without rendering the defendant also liable on the instrument, if it should be found in the hands of a person to whom it had been assigned for value before maturity.

Other errors are assigned, but, not considering them important, the judgment is affirmed.

ON PETITION FOR REHEARING.

MOORE, J. 6. Plaintiff's counsel, having filed a petition for a rehearing, contend therein that the trial court rejected material testimony to their prejudice, which action it is said this court failed to consider, although duly assigned as error. At the trial, in order to show that defendant was indebted to

Gasquet's estate in the sum sought to be recovered, they attempted to prove the contents of a lost instrument by Fred Frantz, who testified that, as one of the executors of the last will of Horace Gasquet, deceased, he found among his papers a statement of account which he thought was in Decker's handwriting; that this document was lost or mislaid; that he supposed it had been sent to plaintiff at Grants Pass, Oregon; that he had searched among all the effects in his possession at Gasquet and Crescent City, California, and was unable to find the missing paper. Referring to the statement and to persons residing at Grants Pass, where the trial was held, he was asked to state what inquiries he made there, and of whom, to which he replied: "Made inquiries of Mr. Harmon, and searched everywhere at home, and can't find it." Plaintiff, appearing as a witness in his own behalf, testified that, as administrator of Gasquet's estate in Oregon, he received from Frantz what purported to be a statement of account between Decker and Gasquet, dated about December 31, 1895, and that about a year prior to the trial it disappeared from the files of the estate at the courthouse in Josephine county, and he did not know what had become of it. In answer to the question, "What search have you made for it since that time?" the witness said: "I have ⁵⁹⁸ searched all the files and records—all the papers that I have in my office; in fact I have made a pretty clean search for it. I haven't it in my possession at all. Q. Have you searched in all places where it could be, to your knowledge? A. I have." The witnesses Frantz and Harmon, having been requested to state in detail the contents of the statement of account, the court refused to hear such testimony, and exceptions were reserved, whereupon plaintiff's counsel stated to the court that they expected the answers of the witnesses to show that they had seen the lost statement; that it was in Decker's handwriting, dated about December 31, 1895; and that it showed a balance of \$2,908.80 due from him to Gasquet.

The question to be considered is whether the court erred in not receiving the testimony so offered. To avoid the presumption that higher evidence would be adverse from inferior being produced (Hill's Ann. Laws, sec. 776, subd. 6), a party is expected to furnish the best evidence obtainable. When primary evidence of a material fact cannot by a reasonable effort be secured, secondary evidence of the contents thereof is often admissible. Thus, the rule that there shall be no evidence of the contents of a writing other than the writing itself

is subject, among others, to the following exception: "When the original cannot be produced by the party by whom the evidence is offered, in a reasonable time, with proper diligence, and its absence is not owing to his neglect or default": Hill's Ann. Laws, sec. 691. No precise rule can be prescribed as to what shall be considered a reasonable effort, but the party alleging the loss or destruction of a document must show that he has in good faith exhausted in a reasonable degree all sources of information and means of discovery which the nature of the case would suggest, and which are accessible to him: *Wiseman v. Northern Pac. R. R. Co.*, 20 Or. 425, 23 Am. St. Rep. 135, 26 Pac. 272. It will be remembered that Harmon testified that the statement of account was last seen in the court house at Grants Pass, about a year prior to the trial, which was held November 20, 1899. His testimony fails to show, however, that he made any examination of the papers on file at the courthouse in said county, unless such fact is to be ⁵⁰⁰ inferred from his affirmative answer to the question: "Have you searched in all places where it could be to your knowledge?" The answer to this interrogatory must be held insufficient, for otherwise the witness, and not the court, would be the judge of the places to be examined for the discovery of lost documents. Harmon says he "searched all the files and records," which, at a casual glance, might seem to imply that he had made an examination of the papers on file at the courthouse in said county in the matter of the estate of Horace Gasquet, deceased; but by limiting the investigation to "all papers that I have in my office" he necessarily excludes an examination of the papers at the courthouse where the statement of account was filed. The document having been filed in the proper office, search should have been made in such office to rebut the presumption that it remains there: Hill's Ann. Laws, sec. 776, subd. 33; *Jones on Evidence*, sec. 213. No direct testimony having been offered to the effect that the courthouse had been searched for the discovery of the missing paper, the plaintiff failed to make the showing required, in order to let in secondary evidence of the contents of the statement of account, and no error was committed in its exclusion.

7. Plaintiff offered in evidence Decker's books, which disclosed that his account coincided with Gasquet's in respect to the annual interest purporting to be due from him. The court, referring to such entries in charging the jury, said: "These items, standing alone, would not be sufficient to warrant you in

saying Mr. Decker thereby admitted the amount claimed on the part of the plaintiff. If the plaintiff had offered evidence, and it had been admitted by the court, showing that Mr. Decker had actually owed Mr. Gasquet the amount claimed in the complaint, and that Gasquet was entitled to charge interest on the same, then the credits on Mr. Decker's books might be considered as a circumstance tending to support the plaintiff's claim; but in the absence of other evidence, the entries in Decker's books would not warrant you in saying that the items claimed on the part of the plaintiff were thereby admitted by Mr. Decker." It is contended that the court erred in giving this instruction. To render it intelligible it is deemed necessary to state that Gasquet's ⁶⁰⁰ books show that his account purports to have begun December 31, 1889, with the following charge:

"To amt. of note. \$5,448.51
To interest on same, 14 mo. @ 6 per cent per annum. 381.39"
—leaving, as apparently due him, after deducting certain payments made by Decker, a remainder of \$4,564.62, the interest upon which, for the year ending December 31, 1890, is \$288.21. The account is balanced each year, and the new principal forms a base upon which interest is charged, as follows: 1891, \$373.87; 1892, \$227.35; 1893, \$195.06; 1894, \$182.13; 1895, \$157.36—leaving due March 1, 1896, as disclosed by Gasquet's account, \$2,908.08, but according to the defendant's books only \$382.14, for which judgment was given. The instruction complained of presents the question whether Decker's entry in his books of the annual interest, which coincided with Gasquet's account thereof, affords a conclusive recognition of the debt and a promise to pay the sum upon which such interest is calculated. The fact that in consequence of certain payments made by him the annual interest charge was constantly diminishing is a circumstance tending to show that he promised to pay the principal originally charged to him, and hence rendering him liable for the sum found to be due March 1, 1896, as disclosed by Gasquet's books. While such circumstance raises an inference in favor of plaintiff's theory of the case, we do not think it irresistibly follows that because Decker recognized the interest by annually entering in his books a memorandum thereof he thereby in the absence of any testimony upon the subject, conclusively evidenced a promise to pay the principal upon which such interest is calculated. Interest is ordinarily an incident of and follows the principal upon which it is based, the latter being the sub-

stance and the former its shadow; but because the interest is an incident of the principal it does not irresistibly lead to the conclusion that the principal follows the interest. It would appear from Gasquet's books that the debt with which Decker was charged was originally incurred on account of certain buildings conveyed by George W. and W. J. Wimer to Gasquet. No evidence ⁶⁰¹ was introduced tending to show that these buildings ever became the property of Decker, or that he agreed to purchase them, or that any consideration ever existed for the debt so charged to him. If Decker had agreed to purchase the property, the fact could undoubtedly have been established without resorting to such an indirect method of inferring the existence of the debt as by a mere credit upon his books of an annual interest thereon; for it may be that such interest was the rent agreed to be paid for the use of the buildings. We think the court's charge was warranted by the evidence, and no error was committed in giving it. It follows that the petition for rehearing is denied.

Books of Account as Evidence are considered in the monographs note to *Union Bank v. Knapp*, 15 Am. Dec. 191-198. An account-book of original entries, fair on its face and shown to have been kept in the usual course of business, is evidence in favor of the party by whom it is kept: *Borgess Investment Co. v. Vette*, 142 Mo. 560, 64 Am. St. Rep. 567, 44 S. W. 754; *Zang v. Wyant*, 25 Colo. 551, 71 Am. St. Rep. 145, 56 Pac. 565. As to whether an account of loans is within this rule, see *Security Co. v. Graybeal*, 85 Iowa, 543, 39 Am. St. Rep. 311, 52 N. W. 497. But mere private memoranda cannot be received as independent evidence without proof that they were made as original entries: *Post v. Kenerson*, 72 Vt. 341, 82 Am. St. Rep. 948, 47 Atl. 1072.

Secondary Evidence of the contents of a writing shown to be lost or destroyed is admissible: *Hunter v. Hunter*, 63 S. C. 78, 90 Am. St. Rep. 663, 41 S. E. 33; *Spears v. Lawrence*, 10 Wash. 363, 45 Am. St. Rep. 789, 38 Pac. 1049. And to justify such evidence, it is not necessary to prove the loss of the writing beyond all possibility of mistake; a reasonable probability of its loss is sufficient: *Woods v. Montevallo Co.*, 84 Ala. 560, 5 Am. St. Rep. 393, 3 South. 475. But a reasonable, faithful, and diligent search for it must be shown: *Phoenix Assur. Co. v. McAnthon*, 116 Ala. 659, 67 Am. St. Rep. 154, 22 South. 903; *Wiseman v. North Pacific R. R. Co.*, 20 Or. 425, 23 Am. St. Rep. 135, 26 Pac. 272. The degree of diligence required depends upon the character and importance of the document, the purpose for which it is expected to be used, and the place where a paper of that kind might naturally be supposed to be found: *Wiseman v. North Pac. R. R. Co.*, 20 Or. 425, 23 Am. St. Rep. 135, 26 Pac. 272.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

EHNI v. NATIONAL TUBE WORKS COMPANY.

[203 Pa. St. 186, 52 Atl. 166.]

MASTER AND SERVANT—Appliances—When Master not Liable for Defects in.—If material of apparent good quality is furnished to an employé and accepted and used by him for a long time without objection, the master is not answerable for its breaking and injuring the employé, when there is nothing to indicate any defect known before the accident. (p. 763.)

MASTER AND SERVANT—Duty of Inspection of Material by a Third Person.—An employer does not owe to his employé the duty of having an inspection by a third person of a plank in the constant use of the employé. It is his duty to discover and report any defect which may arise in the course of the use of the material and to exercise reasonable care for his own protection. (p. 763.)

MASTER AND SERVANT—Risks of the Breaking of Appliances.—It is not negligence on the part of a master if an appliance or machine breaks, whether from external, original fault not apparent when it was first used, or from an external apparent one produced by time and use, but not brought to the master's knowledge. This is one of the ordinary risks of the employment which the servant takes upon himself. (p. 763.)

Trespass to recover for personal injuries. At the trial plaintiff sought to prove by an expert what was the custom of mills with respect to the inspection of scaffolding, and what would be the effect on the structure of the wood of a plank by the breaking of which the plaintiff was injured by its use for the time and under the conditions in which it was used, and whether it would remain suitable for scaffolding, and what would be the natural result of continuing its use, but the evidence offered was excluded, and the plaintiff excepted. At the close of the testimony, the trial court directed a compulsory nonsuit.

F. C. McGirr, Pettes & McAllister and John Marron, for the appellant.

W. B. Rodgers, for the appellee.

¹⁸⁸ POTTER, J. The plaintiff was in the employ of the defendant company as a belt repairer. In addition to mending belts when broken, it was his duty to replace them upon the pulleys whenever they had been removed for repairs or were off for any other reason. According to his own testimony, he had been engaged ¹⁸⁹ in this capacity some two or three years prior to the date of the accident.

On July 11, 1898, it became necessary to place in position a rather heavy belt which was more than fifty feet in length. The shafting upon which the belt ran was at a considerable height above the floor, perhaps some seventeen or eighteen feet, and in order to reach it and enable the men to care for the other machinery which was running overhead, scaffolds were erected, and maintained in position through the mill. They were of simple construction, consisting of parallel planks, running longitudinally with the lines of belting, and connected at intervals by a cross-plank running from one to the other.

It does not clearly appear from the evidence whether the cross-planks were permanently fastened in place, or were movable, but this is not a matter of special importance. At the time of the accident, the plaintiff and a fellow-workman were standing upon one of these cross-planks, which was about fourteen inches wide, and two inches in thickness, and at least sixteen feet in length. The men had just made a strong effort to place the belt upon the pulley, without success, and were resting quietly for a moment after their exertion. Suddenly the plank upon which they were standing broke beneath them, and the plaintiff fell, receiving the injuries for which recovery is here sought.

Upon the trial in the court below, at the close of the plaintiff's testimony, a compulsory nonsuit was entered; and the subsequent refusal to take off this judgment is made the subject of the first assignment of error. The facts of the case are perfectly simple. The plaintiff testified that he was very familiar with the plank which broke, and that he had used it a great many times during the two years or more of his employment by the defendant. He could not say specifically how many times he had stood upon it, but said that it might be half a dozen times in one day, and then not again for a month.

It is perfectly apparent, however, that if there was any defect in the plank, no one could have been in a better position to have ascertained that fact than the plaintiff himself. From its elevated position, it must have been almost constantly before his eyes, as well as under his feet. If he, therefore, with his thorough familiarity with the plank, and his almost constant ¹⁹⁰ use of it, discovered nothing wrong with it, how could it with any reason be expected that anyone else should discover that which he was unable to detect? The plank was apparently of ample size and strength. The fact that it had been in use for so long a period of time, without breaking or showing any signs of being defective, is evidence of its original suitability.

Where, as in this case, material of such apparent good quality was furnished to the employés, and was accepted as such by them, and used without objection for so long a period of time, it would be most unreasonable to hold the employer responsible for a break in the absence of any testimony indicating any defect known before the accident.

It was suggested in the argument that the employer owed to the plaintiff the duty of an inspection by a third party, in order to ascertain the safety of the plank upon which the plaintiff stood. This is a mistaken idea as applied to any such a condition as prevailed in this case. When suitable material is furnished by the employer, he does not engage that it will always continue in the same condition. It is the duty of the employé to discover and report to his employer any defect which may arise by reason or in course of the use made of the material. He has means of observing and ascertaining any such defect which the employer does not possess; and it is his duty to exercise reasonable care for his own protection.

As is said in *Mixter v. Imperial Coal Co.*, 152 Pa. St. 395, 25 Atl. 586, when reasonably safe tools or machinery have once been furnished, "it is not negligence in the master if the tool or machine breaks, whether from an external, original fault, not apparent when the machine or tool was at first provided; or from an external apparent one produced by time and use, not brought to the master's knowledge. These are the ordinary risks of the employment which the servant takes upon himself."

The present case does not involve even the sufficiency of any tool or machine. The exercise of judgment required upon the part of the plaintiff was only that of determining the ap-

parent strength and sufficiency of an ordinary plank, which calls for about as modest an exercise of discretion as can well be imagined.

There was no occasion for the introduction of any expert testimony, either as to the character of the plank when it was first selected for use, or as to the effect upon it of the conditions under which it was used by the plaintiff.

There was therefore no error in the rejection of testimony offered for this purpose, or to show the absence of inspection by anyone else, than the men who were daily using the plank.

The assignments of error are all overruled, and the judgment is affirmed.

A Master is Bound to exercise all reasonable care to provide safe, sound, and suitable machinery and instrumentalities for doing the work: *Baltimore etc. Mfg. Co. v. Jamar*, 93 Md. 404, 86 Am. St. Rep. 428, 49 Atl. 847; *Sroufe v. Moran Bros. Co.*, 28 Wash. 381, 93 Am. St. Rep. 847, 68 Pac. 896. But an employe assumes the risks that are known to him, or might have been known by the exercise of ordinary care, of which he has made no complaint: *Davis Coal Co. v. Pollard*, 158 Ind. 607, 92 Am. St. Rep. 819, 62 N. E. 492; *Sanderson v. Panther Lumber Co.*, 50 W. Va. 42, 88 Am. St. Rep. 841, 40 S. E. 368. However, master and servant do not stand upon equal footing, even when they have equal knowledge of danger: *Shortell v. St. Joseph*, 104 Mo. 114, 24 Am. St. Rep. 317, 16 S. W. 397. The fact that a servant has as good an opportunity as his master to know of defects does not necessarily charge him with contributory negligence. He has a right to rely on his master's inquiry, because it is the latter's duty to inquire, and he may assume that inquiry has been made: *Starr v. Kreuzberger*, 129 Cal. 123, 79 Am. St. Rep. 92, 61 Pac. 641; *Wellston Coal Co. v. Smith*, 65 Ohio St. 70, 87 Am. St. Rep. 547, 61 N. E. 143.

GRUBB v. GALLOWAY.

[203 Pa. St. 236, 52 Atl. 176.]

RES JUDICATA.—A decree of the orphans' court authorizing the mortgage of the real property of a decedent for the payment of his debts is conclusive of everything involved in it, including the death of the decedent at the time stated in the petition and the existence of the debts set up in the schedule, and the mortgagee may rely on the court's adjudication, and is not bound to examine for himself. (p. 765.)

Scire facias on a mortgage executed by the administratrix of the estate of Joseph D. Galloway, deceased, under authority of a decree of the orphans' court. A verdict was directed in favor of the assignee of the mortgage, but motion for judg-

ment non obstante veredicto was made by the defendant, on the ground that the orphans' court was without jurisdiction to authorize the mortgage, because the decedent had been dead more than five years before the order was made, and that the statement of debts in the schedule accompanying the petition was so loose as to put the mortgagee on inquiry, and that inquiry would have disclosed that the amount of debts remaining unpaid was insufficient to warrant authorizing the mortgage. The first ground of the motion was held by the trial court not to be good, because the petition had averred the death of the decedent within five years, but the second ground was adjudged to be sufficient to warrant the court in reducing the amount of the judgment so as to include therein such sums which had been applied to the satisfaction of certain liens against the property and the expenses of administration.

John G. Johnson, Daniel J. Neff and A. J. Riley, for the appellants.

H. C. Malden and W. M. Beyer, for the appellee.

241 MITCHELL, J. The petition in the orphans' court averred, affirmatively and specifically, every fact necessary to support the decree authorizing the mortgage, and the decree was therefore a judicial ascertainment of the truth of such facts, on which the mortgagee was entitled to rely.

The learned judge below so held in regard to the date of decedent's death, but drew a distinction as to the debts set up in the schedule to the petition, and held that the latter exhibited such looseness or irregularities as to put the mortgagee upon inquiry as to the actual facts. This distinction is inconsistent with the other ruling and indefensible on principle. The decree was conclusive of everything involved in it and in reaching the result the orphans' court necessarily passed on the subject of the debts in the schedule, as fully as on the date of decedent's death, and determined that they were debts of the decedent, a lien on his real estate, and of the proper amount to require the mortgage petitioned for. The mortgagee was not bound to examine for himself and come to a different conclusion at his own risk, but was entitled to rely on the court's decree as a conclusive adjudication of all the facts, so far as concerned the validity of the title under the mortgage.

Much reliance was placed by the court below on *Smith v. Wildman*, 178 Pa. St. 245, 56 Am. St. Rep. 760, 35 Atl. 1047.

That case went to the utmost verge in authorizing collateral attack on a decree of the orphans' court, but it falls far short of sustaining a judgment like this. In that case the petition for sale merely recited that the decedent ²⁴²died intestate, owning real estate but not enough personalty to pay the debts. No averment was made of the date of death, and the only debt set forth in the record was on a parol contract more than eleven years due. Under these circumstances the heirs were held not to be precluded from showing the actual facts. The case came before the court again in 194 Pa. St. 294, 45 Atl. 136, and the extent of the decision was accurately stated in the syllabus of the latter report, that where the petition shows on its face that the debt is on a parol contract eleven years old, the court has no authority to grant an order of sale without an averment and proof that the debt is still existing and in lawful condition for enforcement at the time when the petition is presented. The difference between that case and this is clearly shown by a quotation from the opinion of Williams, J., in the first case (178 Pa. St. 253, 56 Am. St. Rep. 760, 35 Atl. 1049): "The court should be satisfied before making an order for the sale of real estate that there are unpaid debts properly chargeable upon the real estate of the decedent; that the real estate described in the petition is bound by the lien of the said debts; and that it is necessary to have recourse to the land to enable the administrator or executor to pay them. The most convenient way for presenting these facts to the court is to embody them in the petition, stating the date of the decedent's death, and whether the debts were at that time secured by mortgage or judgment." Every step in the practice here pointed out as correct was exactly followed in the present case.

There is nothing in *Hemphill v. Pry*, 183 Pa. St. 593, 38 Atl. 1020, at variance with the views here expressed. There the decree was founded partly on the assent of an infant without a guardian, and the defect of jurisdiction as to his interest was patent on the record.

It is of common knowledge, and has long been a subject of judicial regret, that sheriff's sales pass uncertain titles, and property suffers in price accordingly. But it is the settled policy, founded on the highest interests of all concerned, that titles under sales and mortgages by order of the orphans' court shall be secured beyond question, and the courts have been vigilant to secure and preserve this result. Occasional hardship from false statements or improvident decrees has been inevitable,

and sometimes has led to decisions like that in *Smith v. Wildman* ²⁴³ belonging to the class which are said to make bad law. But in general the security of titles based on regular adjudications of the courts having jurisdiction of the subject, has been steadfastly maintained in the highest interests of public policy. The real hardship, fortunately only occasional, arises from a serious defect in the act of 1834, the failure to require notice to heirs and devisees before sale or mortgage which may affect their estates or interests. Careful judges in practice require such notice now, but it should be made mandatory by statute.

Judgment reversed and judgment directed to be entered on the verdict.

The Judgments of Probate Courts are entitled to the same favorable presumptions and the same immunity from collateral attack as are accorded those of courts of general jurisdiction. They are final and conclusive unless corrected on appeal: *Sherwood v. Baker*, 105 Mo. 472, 24 Am. St. Rep. 399, 16 S. W. 938; *Apel v. Kelsey*, 52 Ark. 341, 20 Am. St. Rep. 183, 12 S. W. 703; *Stuckey v. Watkins*, 112 Ga. 268, 81 Am. St. Rep. 47, 37 S. E. 401; *J. B. Watkins Land etc. Co. v. Mullen*, 62 Kan. 1, 84 Am. St. Rep. 372, 61 Pac. 385; *Cobb v. Garner*, 105 Ala. 467, 53 Am. St. Rep. 136, 17 South. 49. But see *Smith v. Wildman*, 178 Pa. St. 245, 56 Am. St. Rep. 760, 25 Atl. 1047; *Tracy v. Roberts*, 88 Me. 310, 51 Am. St. Rep. 394, 34 Atl. 68. Proceedings for the sale of a decedent's lands are generally considered conclusive and exempt from collateral attack: *Satcher v. Satcher* 41 Ala. 26, 91 Am. Dec. 498; *Bradley v. Drone*, 187 Ill. 175, 79 Am. St. Rep. 214, 58 N. E. 304; *Neville v. Kenney*, 125 Ala. 149, 82 Am. St. Rep. 230, 28 South. 452.

SIEGLER v. MELLINGER.

[203 Pa. St. 256, 52 Atl. 175.]

HIGHWAYS—Negligence in Using the Side Rather than the Middle.—The presumption is that it is negligence to walk on the side instead of the middle of a country road on a dark night. (p. 768.)

HIGHWAYS—Negligence.—Township Supervisors are not Guilty of Negligence because they permit third persons to construct a cinder path on the side of a country road and at places several feet above its level, if the road itself remains safe for travel and of sufficient width, though a person walking in the night-time takes such path and is injured by falling therefrom into such road. (p. 769.)

EXPERT EVIDENCE that a Particular Place is Dangerous is properly excluded, where there is nothing in the situation which a brief description would not enable the jury to fully understand. (p. 769.)

Trespass against township trustees to recover for personal injuries received by the plaintiff while walking in the night-time along a cinder path on the side of a country road, where it was five or six feet above the level of such road. This path had been constructed by persons other than the supervisors, and though mostly on the level of the highway, was above at the point of the accident. The road itself was level and safe and of thirty feet in width.

The plaintiff offered to prove by witnesses that the place where the accident occurred was dangerous, and that one of them had fallen at the same place after the accident to the plaintiff. This evidence was excluded, and a judgment of nonsuit was entered against the plaintiff.

W. U. Hensel and B. F. Davis, for the appellant.

M. G. Schaeffer and Coyle & Keller, for the appellees.

²⁵⁸ MITCHELL, J.—A man desiring or being compelled to travel an unknown road on a dark night must always be in some uncertainty, if ²⁵⁹ not peril. The middle of the road is usually the freest from obstructions and in the best condition for travel, and, therefore, is prima facie the proper and safest place to go, notwithstanding its special disadvantages in the risk of collision with vehicles having also a right of way. On the other hand, a side path perhaps offers smoother and more comfortable walking, but is liable to its own special dangers such as produced the accident in this case. Plaintiff testified that the cinder side path at the point where he turned on to it and along most of the distance was level, or nearly so, with the rest of the roadway. In cities or municipalities where there is a well-defined sidewalk, and on country roads in daylight, the side is usually the proper place for foot-passengers, and circumstances might be shown as to the condition of the side path and of the general roadway that would make a question for the jury whether a traveler, even in the dark, might not be justified in following the former instead of the latter, but the presumption is that it is negligence to do so on a dark night on a country road. The circumstances testified to in the present case were not sufficient to overcome this presumption.

There was no evidence to warrant a jury in finding the defendants guilty of negligence. They were under no obligation to construct a footpath, and the one they permitted to be con-

structed and used there was not intrinsically dangerous. So far as shown it was a smooth cinder path about four feet wide, running at the side and for the most part on a level with the roadway. At the point where this unfortunate accident occurred the path was between five and six feet above the road, and a man walking in the dark night, as in this case, make a misstep. But that did not make the place intrinsically dangerous for ordinary travel, which is the measure of defendant's duty in regard to it.

The opinions of witnesses that the place was dangerous were properly excluded. There was nothing in the situation which a brief description would not enable the jury fully to understand. In such cases opinions of witnesses are not admissible: *Graham v. Pennsylvania Co.*, 139 Pa. St. 149, 21 Atl. 151.

Judgment affirmed.

A *Municipal Corporation* is answerable for the condition of a bicycle path which it constructs and maintains along the side of a public street: *Prather v. Spokane*, 29 Wash. 549, 92 Am. St. Rep. 923, 70 Pac. 55. But it is held that municipalities are not required to keep the margins of streets and highways free from obstructions and in a passable condition: *Monongahela v. Fischer*, 111 Pa. St. 9, 56 Am. Rep. 241, 2 Atl. 87; *McArthur v. Saginaw*, 58 Mich. 357, 55 Am. Rep. 687, 25 N. W. 313, and cases cited in the cross-reference note thereto. As to their duty in regard to boulevards, see *McDonald v. St. Paul*, 82 Minn. 308, 83 Am. St. Rep. 428, 84 N. W. 1022; *Burridge v. Detroit*, 117 Mich. 557, 72 Am. St. Rep. 582, 76 N. W. 84.

BRIGHT v. ALLAN.

[203 Pa. St. 394, 53 Atl. 251.]

PARTY-WALL—Right to Increase Height Of.—Where there is an implied grant of an easement of a party-wall, there is included the right to increase the height of the wall and make such other changes as the owner of the dominant tenement may find to his advantage. (p. 771.)

ESTOPPEL to Object to the Building up and Heightening of a Wall.—Where a building extends wholly on one's own premises, and another has no right to use it as a party-wall or otherwise, the former is not estopped from complaining that the latter has increased its height, nor from enjoining the maintenance of such increase, by the fact that he failed to object while the adding of the wall was in progress, if there is no evidence to show that he had

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knowledge of the work, except testimony that he might have discovered it by going upon the roof of the house and looking down. (p. 772.)

ESTOPPEL.—If the Truth is Known to Both Parties, or if they have equal means of knowledge, neither can be estopped. Hence if the conveyance under which one claims title shows that a party-wall is on the land of the adjacent proprietor, the former cannot acquire any right by estoppel to maintain an addition or extension in height of such wall, on the ground of the failure to make any protest during its construction. (pp. 772, 773.)

MANDATORY INJUNCTION Should Issue Against the Maintenance of an extension or addition to the height of a wall constructed by the defendant on the wall existing on the lands of the complainant. (p. 773.)

Suit to enjoin an obstruction of a right of way and also the use of a dividing wall between the property of the plaintiffs and the defendant. From a decree in the plaintiffs' favor against the obstruction of their right of way the defendant appealed, and the action of the court was affirmed in an opinion reported in 203 Pa. St. 386. The plaintiffs' prayer for injunction against the maintenance of the wall was denied, and they appealed.

E. D. Smith and Guy E. Farquhar, for the appellants.

R. H. Koch, for the appellee.

³⁹⁶ **POTTER, J.** This is an appeal from the same decree just considered on the appeal of Thomas G. Allan. Complaint is here made of the finding of fact by the court below that the part of the wall forty-seven feet eight inches in length between the original brick building was a party-wall, and it is alleged that the court ³⁹⁷ was in error in its conclusion of law that the use made of this wall was proper.

It appears from the evidence that this wall was built prior to 1848, and has been used as a party-wall from that time to the present. It was built by Silliman, who was at the time the owner of both lots, and while it probably stands entirely upon what is now plaintiffs' ground, yet it was evidently built with the intent that it should serve as a party-wall.

We do not understand that plaintiffs dispute the right of defendant to make a certain use of the wall as a party-wall. The only question is as to the extent of that use. The enlarged use by defendant, of which complaint is made, consists in building upon this wall, and raising it along its entire length by a height varying from three feet to twelve feet; and in removing joists that formerly rested in it, and inserting new joists at

other places. The court below has, however, found as a fact, that the defendant has not materially increased the burden on the wall or weakened it.

The facts in *Western National Bank's Appeal*, 102 Pa. St. 180, seem to be analogous to those in the present case. Under that authority, we think the court below was right in its conclusion here. The cases of *Barry v. Edlavitch*, 84 Md. 95, 35 Atl. 170, and *McLaughlin v. Cecconi*, 141 Mass. 252, 5 N. E. 261, cited by plaintiffs, may be distinguished in that they contain nothing from which it can be presumed that either party intended that the wall should be a party-wall. They do make a distinction between an easement of a party-wall, and a right of support by prescription, obtained by adverse user. In case of the prescription the right is of course limited to the extent to which the wall has been used; but where there is an implied grant of an easement of a party-wall, the easement must be according to the nature of the thing; and that nature includes the right to increase the height of the wall, and make such other changes in it as the owner of the dominant tenement may find to his advantage. This line of reasoning is clearly set out in *Everett v. Edwards*, 149 Mass. 588, 14 Am. St. Rep. 462, 22 N. E. 52.

We agree, therefore, with the court below, that the defendant ~~was~~ had a right to build on that part of the wall which was originally built as a party-wall between the two houses, and was so used for a long period of time.

But the case is different with regard to the part of the wall twelve feet six inches in length, which is immediately in the rear of the wall between the original brick buildings. This portion was built in 1860, and there is nothing to show that it was ever intended for use as a party-wall. In the plaintiffs' sixth request for conclusions of law, they asked the court to say that the act of the defendant in building on this portion of the wall for twelve feet six inches in length was a trespass by the defendant on the Bright lot, and was illegal. To this the court answered: "This request is affirmed, but we further find that it was the duty of the complainants to protest to the use of their ground or wall by respondent at the time he was erecting a wall upon same, and failing to object and having knowledge that the respondent was erecting the wall complained of, they are estopped by their silence, and cannot ask the court to take action in reference to said wall after the respondent has used same in erecting his new hotel building at a great expense."

This portion of the wall was built wholly upon the land of the complainant, and the court has found as a fact that the act of the defendant in building thereon was a trespass and was illegal. Accepting this finding of fact as supported by evidence, we cannot see that there is any room for the application of the doctrine of estoppel. The trial court was influenced by the testimony that before the wall was erected, defendant had a conversation with plaintiff, and defendant was then unable to say whether or not he would use the wall; that plaintiff gave no notice at that time not to use it; that the wall was afterward built upon by defendant, and he concludes plaintiffs must have been aware of its erection, as it was done where they could readily see it. This conversation was, however, denied by the plaintiffs, and at most it amounted to nothing more than an inquiry of defendant if he was going to use the wall, and a reply that he did not know.

Admitting the fact of this conversation, inferences equally as favorable to plaintiffs as to defendant may be drawn from it. There was no intimation from defendant that he intended to use the wall, and the plaintiffs might have notified him not to ~~see~~ do so, if any such intention had been expressed. Defendant should have informed plaintiffs of his determination to use the wall, so that they might object or protect themselves. The statement that plaintiffs must have been aware of the use of the wall by defendant finds no support in the evidence, beyond a showing that the situation was such that plaintiffs could have discovered it only by going upon the roof and looking down upon it.

A material fact in the case which seems to have been overlooked is that the defendant's own deed described that line of his property as running "thence eastwardly along said ground bought by Bright and Lerch, at right angles with Center street, eighty-five feet, passing along the south wall of a former arched alleyway, now occupied as a barber shop, to the westwardly side of Center street." This gave the defendant full knowledge that the wall was entirely on plaintiffs' property, and he needed no further notice.

We can see no evidence of any act upon the part of plaintiffs to encourage defendant to build on this portion of the wall. The doctrine of the cases cited does not sustain the conclusion reached. Thus, in *Hill v. Epley*, 31 Pa. St. 331, it appears plainly that the doctrine of estoppel can only arise where the conduct of a party has been such as to induce action by another;

that the party setting up the estoppel must have acted on the faith of such conduct; that he must have been positively encouraged to act, or that he must have had a mistaken opinion respecting his title, and that the party to be estopped must have been aware of this mistake, and if he had not such knowledge his silence does not estop him. And, further, it is said: "If, therefore, the truth be known to both parties, or if they have equal means of knowledge, there can be no estoppel."

To the same effect is *Woods v. Wilson*, 37 Pa. St. 379, which puts it thus: "When both parties are aware of their respective rights, it [the doctrine of estoppel] has no place in law or equity."

In the present case, defendant made no claim of right to build upon this portion of the wall, unless it be held that such claim was manifested by the act and operation of building in itself. If so, the plaintiffs should have had notice of such claim prior to its exercise on the part of defendant. He should ⁴⁰⁰ not have proceeded without some color of title, or some reasonable claim to a right to the use of the wall. No such right having been shown, and the act of the defendant appearing to have been willful, the only adequate remedy is to compel the removal of that portion of the wall built upon the rear wall of plaintiffs' addition to his building.

The complainants were entitled to an absolute affirmance of their sixth request for conclusions of law. The court found as a fact that the maintenance of the brick wall twelve feet six inches in length and thirteen inches in thickness is a trespass by the defendant on the Bright lot, and illegal. Its maintenance should therefore be enjoined.

The twenty-second assignment of error is sustained, and the record is remitted to the court below for further proceedings, in accordance with this opinion.

Party-walls.—The right to increase the foundation, length, or height of party-walls is considered in the monographic note to *Duncomb v. Randolph*, 89 Am. St. Rep. 930-933.

No Estoppel in Pacts arises when everything is equally known to both parties, although they are mistaken as to their legal rights: *Estis v. Jackson*, 111 N. C. 145, 32 Am. St. Rep. 784, 16 S. E. 7. A party setting up estoppel by conduct must show that he exercised good faith and due diligence to know the truth; and if such circumstances are brought to his notice as would put a prudent man on inquiry, and the means of satisfying such inquiry are readily accessible, but are not used, he cannot be held to have exercised good faith or due diligence to know the truth: *Morgan v. Farrell*, 58 Conn. 413, 18 Am. St. Rep. 282, 20 Atl. 614.

LEWIS v. HUNLOCK'S CREEK AND MUHLENBURG
TURNPIKE COMPANY.

[203 Pa. St. 511, 53 Atl. 349.]

DEATH—Damages for—What Children Entitled to Participate in.—Under the Pennsylvania statute providing that the persons entitled to recover damages for an injury causing death shall be husband, widow, children, or parents of the deceased, children who are over age, and whose family relations, therefore, have been severed, are not entitled to share in moneys recovered by the widow, because, not being members of the decedent's family at the time of his death, they are not entitled to recover on their own account. (pp. 775, 776.)

Trespass to recover for the death of the plaintiff's husband. After a verdict had been returned in her favor, a son and daughter of the decedent, both of whom were married, and neither of whom had been members of his family for several years prior to their father's death, sought to intervene. Their right to do so was denied, and they appealed.

George K. Powell, for the appellants.

John McGahren, for the appellee.

⁵¹² MITCHELL, J. Section 1 of the Act of April 26, 1855 (Pub. Laws, 309), provides that "the persons entitled to recover damages for any injury causing ⁵¹³ death shall be the husband, widow, children or parents of the deceased, and no other relative; and the sum recovered shall go to them in the proportion they would take in his or her personal estate in case of intestacy." The claim of appellants is founded on too broad and too literal an application of the concluding clause of the sentence. Appellants are children of the deceased, and as such would share in his estate in case of intestacy, therefore the argument that they are entitled to share in the sum recovered as damages for his death. But the provision read in connection with the whole act and the act of 1851 in *pari materia* is not so broad as this. The "sum recovered shall go to them" is the phrase, and by "them" is meant the persons entitled to recover it. The provision is not for a further right of action, but only for distribution in an action previously given. Such right is wholly statutory, and under the act of 1851 was vested in the widow "or if there be no widow, the personal representatives." By the act of 1855, *supra*, the right is re-

stricted to certain relatives and their priority among themselves is defined. They cannot all claim jointly, but each class in its own right and its own order. The parents, for example, have no standing at all except in the absence of husband or widow and children. The act first gives the right of action, and then prescribes the mode of distribution of the sum recovered, but that necessarily means distribution among those entitled to sue. It would be absurd to suppose that in the same sentence the statute meant to give part of the damages to those to whom it had denied the right of action. This was expressly decided in *Lehigh Iron Co. v. Rupp*, 100 Pa. St. 95, a case which in principle rules this. There a minor son was killed leaving a widow but no child. The widow brought suit, which was compromised for a sum paid her. Then the father brought suit for the loss of his minor son. The trial court instructed the jury that, as under such circumstances the father would take half the personal estate, he was entitled to half the damages for the death of his son, and that his suit could not be barred by the widow's settlement of hers. The father got a verdict, but the judgment was reversed, this court saying: "The right is limited in all cases to the family; first, to the husband or widow; second, to the children; and last to the parents. Where the deceased left children, his parents have no right; ⁵¹⁴ nor have they where he left a widow and no children": See, also, *Huntington etc. R. R. Co. v. Decker*, 84 Pa. St. 419.

The appellants in the present case, though children of the deceased, were over age, and the family relation had been severed. They had, therefore, no right of action. All of the cases from the passage of the act have uniformly held that the damages recoverable under it are compensation for direct pecuniary loss only, and unless such loss be shown there can be no recovery. In the case of minor children the reciprocal legal rights of support and to receive the earnings raise a presumption of loss, unless it appear that the children have been emancipated and put on the pecuniary footing of adults. But if the children are of full age, the direct pecuniary loss must be affirmatively shown. The rule as most commonly expressed is that the family relation must be shown to have existed. "Parents and children" in the section seem to be words used with an intention to indicate the family relation in point of fact as the foundation of the right of action without regard to age. . . . Under age the law presumes the relation to exist, and

that stands for proof until the contrary appears. Over age no doubt but the relation must be shown to exist in point of fact": *Pennsylvania R. R. Co. v. Adams*, 55 Pa. St. 499. And "if there be a reasonable expectation of pecuniary advantage from a person bearing the family relation, the destruction of such expectation by negligence occasioning the death of the party from whom it arose will sustain the action": *North Pennsylvania R. R. Co. v. Kirk*, 90 Pa. St. 15.

No case has departed from this rule, and the most liberal application of it was in *Schnatz v. Philadelphia and Reading R. R. Co.*, 160 Pa. St. 602, 28 Atl. 952, where it was held that the family relation might be deemed to exist, though the parent and children did not live in the same place, if the latter had received pecuniary benefits in the way of entertainment, contributions of money or clothing or food, etc., so regularly and for so many years as to justify a reasonable expectation of continuance. But even in that case it was said that "occasional gifts made or services rendered by a parent to daughters who had long before her death left her home and established homes of their own are not sufficient proof on which to found a pecuniary loss."

Appellants rely largely on *North Pennsylvania R. R. Co. v. Robinson*, 44 Pa. St. 175, where an action in the joint names of four ⁵¹⁵ children was sustained, though there was proof of pecuniary loss only as to one. The subject was then (1863) new, and there are some expressions in the opinion which would probably not be used now, since the law has been more fully developed and distinctly defined. But there is no substantial departure in the case. The judge below had charged the jury that the joint action being for the benefit of all under the statute could be sustained if any one of the plaintiffs was entitled to recover, but that the damages must be confined to the loss shown by that one. This court held that that instruction, whether correct or not, did the defendant no harm, *Thompson, J.*, saying: "Although the question is raised by the plaintiffs in error as to the right of all the children to join in the suit, yet I cannot see how they have any concern in the matter. It is enough for them that the children are the parties, for if they recover jointly they never can again recover."

The appellants having no right of action in themselves, acquired none from the right of the widow. It would be absurd to say that if the father had been a widower, appellants would have had no claim, but if he had married the day before his

death, they would have become entitled to two-thirds of what the widow might recover in her own right under the statute. The language of Trunkey, J., in *Lehigh Iron Co. v. Rupp*, 100 Pa. St. 95, already cited, is peculiarly apposite. "If the parents take equally with the widow, the main object of the statute is in part defeated. Besides, in some cases the parents would share with her, when, if the deceased had not been married, they would have no right at all. In such case as the present, by sharing with the widow they take half what the loss was to her, when, if their son had been single, they would only be entitled to the value of his services for less than two years. Results so preposterous are not within the intendment of the statute."

The appellee makes certain very serious preliminary objections to this proceeding, particularly to the attempt of a stranger to the record coming in after judgment by summary rule, not only against the plaintiff, but also against a purchaser without notice. But, as the court below decided the case in favor of the appellee on the merits, these objections are not before us. We may say, however, that the proper remedy is by bill, as in *Allison v. Powers*, 179 Pa. St. 531, 36 Atl. 333.

Judgment affirmed.

Death of Human Being.—Under a statute allowing an action by a child for the death of its parent, the word "child" does not include a minor who is the head of a family. Nor can parents sue for the death of a child, free by age or emancipation, who contributed in no way to their support: See the monographic note to *Brown v. Electric Ry. Co.*, 70 Am. St. Rep. 680. But adult children may recover for their parent's death, although benefited thereby through inheriting a large estate: *Stahler v. Philadelphia etc. Ry. Co.*, 199 Pa. St. 383, 85 Am. St. Rep. 791, 49 Atl. 273.

CRARY v. LEHIGH VALLEY RAILROAD COMPANY.

[203 Pa. St. 525, 53 Atl. 363.]

RAILWAYS—Acceptance of Condition of Ticket, When Inferable.—When a ticket is purchased at a reduced rate, on which is printed certain conditions, and there is stamped on it, before delivery, that all its conditions are fully understood and agreed to, evidence of the consent of the purchaser is as complete as if he had signed the ticket. (pp. 778, 779.)

RAILWAYS—Limitation of Liability by Ticket Sold at Less than the Regular Rates and Subject to Printed Conditions.—By accepting a ticket at less than the regular rates, indorsed that the purchaser will assume all risks of accident and damage to his person, he agrees that the common-law rule making the common carrier insurer of his safety shall be set aside, except that the carrier is not relieved from liability for its negligence. (p. 779.)

RAILWAYS—Presumption of Negligence—Effect Upon of Accepting a Ticket with Conditions.—One who accepts a ticket with a condition thereon that he will assume all risks of accident and damage to his person, while he may, nevertheless, recover for negligence, is not entitled to the presumption that negligence is to be inferred from the accident, but must affirmatively establish the specific negligence complained of. (p. 780.)

Trespass for personal injuries. The plaintiff, while riding on an excursion ticket, was injured by the door of a passing freight train, which became loose and was thrown against the car in which he was riding. The jury, under the instructions of the court, returned a verdict for the defendant, and the plaintiff appealed.

William S. McLean, George R. McLean and William R. Gibbons, for the appellant.

H. W. Palmer and Woodward, Darling & Woodward, for the appellee.

527 BROWN, J. On July 3, 1896, the plaintiff purchased, at a reduced rate, from the Lehigh Valley Railroad Company, a ticket, designated an "employés excursion ticket." It was for a passage from Wilkesbarre to New York and return. Upon it there was the following, among other conditions: "The person accepting and using this ticket thereby assumes all risk of accident and damage to person or property." There was nothing on the ticket requiring that it be signed by the passenger to make the conditions upon which it was issued binding upon him; but it was accepted by him with the indorsement plainly stamped on it that all of the conditions imposed by the company were "fully understood and agreed to." The

evidence of the assent of the ⁵²⁸ appellant to the conditions is, therefore, as complete as if he had signed the ticket: Illinois Cent. R. R. Co. v. Read, 37 Ill. 484, 87 Am. Dec. 260; Wells v. New York Cent. R. R. Co., 24 N. Y. 181; Fonseca v. Cunard S. S. Co., 153 Mass. 553, 25 Am. St. Rep. 660, 27 N. E. 665.

By the purchase and acceptance of the ticket at a reduced rate, with the condition indorsed on it that he the appellant, in using it, would assume all risks of accident and damage to his person, there was an agreement between him and the railroad company that the common-law rule, making the common carrier an insurer of his safety, should be set aside, and that he would be bound by the agreement between them as the law defining the duty and liability of the appellee in carrying him to New York and bringing him back: Farnham v. Camden & Amboy R. R. Co., 55 Pa. St. 53. That such an agreement may be made has long since been settled: Atwood v. Reliance Transp. Co., 9 Watts, 87, 34 Am. Dec. 503; Laing v. Colder, 8 Pa. St. 479, 49 Am. Dec. 533; Powell v. Pennsylvania R. Co., 32 Pa. St. 414, 75 Am. Dec. 564; American Exp. Co. v. Sands, 55 Pa. St. 140; Adams Exp. Co. v. Sharpless, 77 Pa. St. 517; Pennsylvania R. R. Co. v. Miller, 87 Pa. St. 395; Clyde v. Hubbard, 88 Pa. St. 358; Buck v. Pennsylvania R. Co., 150 Pa. St. 170, 30 Am. St. Rep. 800, 27 Atl. 678. But it is equally well settled that, by such an agreement, the common carrier cannot relieve itself from liability for its negligence. "The reason for this qualification of the power to limit liability rests on public policy. At common law if property was lost or injured while in the hands of the carrier, the burden of proof was on the carrier to show the existence of such circumstances as were sufficient to excuse him from liability. Such is still the general rule, but when a special contract is entered into between the shipper and the carrier, the contract takes the place of the common-law rule and fixes the liability of the carrier": Pennsylvania R. R. Co. v. Raiordon, 119 Pa. St. 577, 4 Am. St. Rep. 670, 13 Atl. 324. The liability of the common carrier being, by such an agreement, confined to its negligence, there is no reason why the ordinary rule, that negligence is not to be presumed, but must be proved, should not apply. The agreement of the parties is, that there shall be no liability at all by the common carrier for injury to the passenger; but, on grounds of public policy,

the law says to the passenger that he cannot contract to relieve the carrier from ⁵²⁹ negligence, and the carrier cannot for any consideration be absolved from its duty to exercise proper care in carrying its passengers. If, however, injury results from the negligence of the common carrier to one with whom such an agreement is made, the injured party, having taken himself out of the protection of the common law, which makes the railroad company that carries him an insurer of his safety, and which, in case of accident resulting in injury, is presumed to have been negligent, must show affirmatively, as in all other cases of negligence, the specific negligence complained of. The law, in the face of his agreement to the contrary, gives him the protection against negligence; but, when so given to him against his will, and he afterward calls for it, he ought, in good conscience, to be compelled to show that negligence existed; and this is the law's requirement, established by authority: "A contract limiting their liability as carriers does not relieve them from ordinary care in the performance of their duty; and the most that it can do is to relieve them from those conclusive presumptions of negligence which arise when the accident is not inevitable, even by the highest care, and to require that negligence be actually proved against them": *Goldey v. Pennsylvania R. R. Co.*, 30 Pa. St. 242, 72 Am. Dec. 703. "The respondents having succeeded in restricting their liability as carriers by the special agreement, the burden of proving that the loss was occasioned by the want of due care or by gross negligence lies on the libelants, which would be otherwise in the absence of any such restriction": *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344. The same principle is laid down in *Marsh v. Horne*, 5 Barn. & C. 322; *Farnham v. Camden & Amboy R. R. Co.*, 55 Pa. St. 53, *Patterson v. Clyde*, 67 Pa. St. 500.

We are not to be understood as holding that there may not be cases in which the proof of the accident carries with it the presumption of the common carrier's negligence. Such, by way of illustration, was the case of *Camden & Atlantic R. R. Co. v. Bausch* (Pa.), 7 Atl. 731, where the plaintiff was seriously injured while riding on a train of the defendant company, in consequence of a collision between that train and another moving in the opposite direction upon the same track. Another illustration can be found in *Buffalo etc. R. R. Co. v. O'Hara*, 3 Penne. 190, where the train on ⁵³⁰ which the passenger was riding was run into by a special train, the en-

gine of which plunged into the rear coach. In these two cases, and others that might be cited, the only inference to be drawn from the accident itself was that the common carrier had been negligent. But the present is not such a case; for the mere proof of the accident does not carry with it the presumption or inference of the appellee's negligence. The falling of the door of the freight-car may have been due to the sudden breaking of a lock or hinge, of a defect in which the company may have known nothing; the bricks with which the car was loaded may have been jolted and thrown against the door by some sudden, but unavoidable, violent motion of the train, causing the door to break; or the door may have fallen from other causes which may have existed, but of which the company had neither actual nor constructive notice, nor ought reasonably to have been aware of, and it could not, therefore, as the learned judge below properly held, have been presumed to be guilty of negligence against this specially contracting passenger. The burden was upon him to submit some proof of it, and in the absence of any, the jury ought not to have been allowed to guess that the appellee had been negligent.

Judgment affirmed.

The Binding Effect of Conditions in unsigned passenger tickets is considered in the monographic note to Walker v. Price, 84 Am. St. Rep. 397-408. The limitation of carriers' liability by bills of lading is considered in the monographic note to Chicago etc. Ry. Co. v. Calumet etc. Farm, 88 Am. St. Rep. 74-134. A carrier cannot stipulate with a passenger for immunity from liability for its negligence: Richmond v. Southern Pac. Co., 41 Or. 54, ante, p. 694, 67 Pac. 947.

SCHMALTZ v. YORK MANUFACTURING COMPANY.

[204 Pa. St. 1, 53 Atl. 522.]

JURISDICTION Incidentally Affecting Property in Another State.—Though the situs of property in dispute is in another state, and a decree of the court of this state cannot operate upon or directly affect it, yet a court of equity in this state, having jurisdiction of the parties, may determine their rights to the property and enforce them by proper process in personam. (p. 786.)

EQUITY—Jurisdiction to Prevent Interference with Property in Another State.—Where the complainant and the defendant both reside in this state, a court of equity here may enjoin the defendant from removing from property in another state certain fixtures thereof which, under the laws of that state, he has no right to remove. (p. 789.)

SALES—Conditional Which can be Enforced Against Mortgagees.—If personal property is sold subject to the condition that the title shall not pass until the full payment of the purchase price, as evidenced by certain promissory notes, and such property is intended to be and is sent to another state, whose statutes declare that all conditions and reservations in a contract for the sale of personal property, accompanied by immediate delivery, shall be void as against subsequent mortgagees in good faith, and, as to them, shall be deemed absolute unless the contract, or a copy thereof, is filed in the office of the town clerk of the town where the vendee resides, or if a nonresident, of the town or city where the property is situated at the execution of the agreement, a mortgagee in good faith in the state to which the property is sent, and where it is installed in and becomes part of a manufacturing plant, is entitled to treat the sale as absolute, and its conditions cannot be enforced against him. (p. 791.)

INJUNCTION—Threat to Remove Property—When Justifies Granting of.—Where a refrigerating machine is attached to and is a part of a brewery plant, the claimants of which threaten to remove it immediately, and ask that work be stopped to facilitate such removal, an injunction against the removal should not be denied on the ground that it does not appear that it is intended to be accomplished otherwise than by legal proceedings. (pp. 792, 793.)

INJUNCTION—Irreparable Injury Against Which may Issue. If a refrigerator is attached to and is an essential part of a brewery plant necessary to its operation, its removal must be deemed an irreparable injury which, if wrongful, should be enjoined. (p. 793.)

INJUNCTION—Injury—When Irreparable.—Equity will interfere when the injury threatened will occasion damages estimable only by conjecture, and not by any accurate standard, or will be ruinous to the property in the manner in which it has been enjoyed, or will permanently impair its future enjoyment. (p. 794.)

Suit for an injunction to prevent the York Manufacturing Company, a Pennsylvania corporation doing business in that state and also in New York, from removing from the brewery of the Deer Park Brewery Company at Port Jervis, New York, a certain ice machine and refrigerating plant. After this

machine and appliances had been sent to the place where it was intended to be used and had been made a part of a brewery, it was included in a mortgage of which the complainant had become the assignee. The bill was dismissed, and the complainant appealed.

Joseph De F. Junkin and J. S. Black, for the appellant.

H. C. Niles and George S. Schmidt, for the appellee.

10 MESTREZAT, J. The trial judge has found and stated the facts very fully in his opinion and a summarized restatement of them here will be sufficient.

By an agreement in writing, dated April 5, 1900, the York Manufacturing Company, one of the defendants, the appellee and a corporation of this state, agreed with Kurt Rudolph Sternberg, a resident of Maryland and president and manager of the Deer Park Brewing Company, a New York corporation, to furnish him for use in a brewery situate in the state of New York "one York refrigerating machine of the standard 'York' style and patented system, together with the apparatus mentioned and described in the attached specifications." The consideration was fifteen thousand dollars of which three thousand dollars were to be paid in cash with the order, and the balance "in four equal six per cent interest-bearing bankable notes." The agreement contains the following: "The title to said machine and apparatus shall not pass from, but shall remain in the York Manufacturing Company until full settlement is made for the same, until the same is fully paid for, and in the meantime the party of the second part agrees to fully indemnify the York Manufacturing Company against any and all loss or damage to said machine and apparatus by fire or other cause whatsoever, and also agree to keep the same fully insured for the benefit of the York Manufacturing Company, as its interests may appear, until fully paid for. In the case of failure, or refusal to make any of the payments when due, or to ¹¹ make settlement as agreed, or to pay any note that may be given when it falls due, the whole of the unpaid indebtedness arising under this agreement shall thereby, at the option of the York Manufacturing Company, become immediately due and demandable." The agreement was signed by Sternberg and the agent of the York Manufacturing Company in Maryland and was subsequently approved by the company at York, Pennsylvania, and a duplicate sent to Sternberg in Maryland. During the three months succeeding the agreement, the York

Manufacturing Company manufactured the different parts of the refrigerator, purchased pipes for the completion of the machine, and when finished shipped it to Port Jervis, New York, and installed it in the brewery of the Deer Park Brewing Company, "placing it upon proper foundations, affixing its parts to the building and placing the boilers, walled in, in an adjoining building, and put said brewery in operation." The cash payment was made and the notes were given by Sternberg as provided in the agreement.

After the refrigerating machine had been installed and the brewery put in operation, the brewing company on October 25, 1900, mortgaged the plant, including the refrigerator, to the National Bank of Port Jervis to secure a bond of even date with the mortgage, which with the bond was given as collateral security for moneys to be advanced to the brewing company on notes to be thereafter discounted. The mortgage was duly recorded as a real estate and chattel mortgage in the county where the property was situated.

After the delivery of the collateral security, the National Bank of Port Jervis discounted the brewing company's notes to an amount exceeding the sum named in the bond and mortgage, and said amount is unpaid and is due to Herman Schmaltz, the plaintiff, a citizen of this state, by virtue of an assignment of the bond and mortgage dated January 10, 1902. The Deer Park Brewing Company became bankrupt, was closed out under the United States bankrupt law, and, as a reorganization, the Deer Park Brew Company, a New York corporation, and one of the defendants, owns its plant and is engaged in the brewing business at Port Jervis, New York. The brew company was not served with the bill in this case, but filed an answer and submitted itself to the jurisdiction of the court.

¹² On January 20, 1902, the York Manufacturing Company, by its agent, gave to the plaintiff the following notice: "We represent the York Manufacturing Company, which owns the ice plant, and beg to notify you that unless this transaction is closed at once we shall be compelled to remove the plant immediately." On February 15, 1902, it also gave to the owners of the Deer Park Brew Company this notice: "You are hereby notified that during the week commencing February 17th, the ice plant belonging to the York Manufacturing Company will be removed by their employes. We would ask you to have work stopped to facilitate such removal, as their workmen will be there during the week named."

The trial judge found that the "said refrigerator was a constituent part of said brewery plant of the Deer Park Brewing Company (afterward Deer Park Brew Company), attached to, and necessary for, the operation of the same."

The statutes of the state of New York provide that all conditions and reservations in a contract for the sale of personal property, accompanied by immediate delivery and continued possession, shall be void as against subsequent mortgages, in good faith, and as to them the sale shall be deemed absolute, unless such contract or a copy thereof shall be filed in the office of the proper clerk of the town or city where the vendee resides, or if he is a nonresident of the state, of the town or city where the property is situate at the execution of the agreement. Neither the contract involved in this litigation nor a copy thereof was filed at Port Jervis, New York, as required by the statutes of that state. The bank in good faith, without notice of the contract, took the mortgage and advanced the money, and assigned the mortgage in good faith, for a valuable consideration to the plaintiff.

After the service of the notice above referred to the plaintiff filed this bill. It prays that the York Manufacturing Company be enjoined from removing the refrigerating plant and apparatus from the brewery, and that the Deer Park Brew Company be enjoined from permitting it to be removed. In its answer the York Manufacturing Company avers that the notes given in part payment of the refrigerating plant had not been paid, and that therefore, by reason of the provisions of the contract, the title to the machine did not pass to the purchaser,¹³ and the manufacturing company was entitled to the possession of it. The brew company filed an answer submitting itself to the jurisdiction of the court, and denying the right of its codefendant to the property in dispute.

The learned trial judge refused an injunction on the ground, as we understand from his opinion, that under the defendant's testimony the York Manufacturing Company had no intention of removing the refrigerating plant from the brewery by any means other than the legal process of the state of New York and because "the manager of the defendant company testified that the company never intended forcibly, without resort to the court, to remove said plant from the said brewery."

The plaintiff and one of the defendants, the York Manufacturing Company, are residents of this state, and the Deer Park

Brew Company, the other defendant, although not served with the bill, voluntarily submitted itself to the jurisdiction of the court. The important and a controlling question in the case is one of jurisdiction, which received but little consideration at the hands of the trial court and the counsel. It is not free from doubt, but reason and the weight of authority sustain the jurisdiction. The plaintiff is the assignee of a mortgagee and the principal defendant who resists the relief prayed for is a claimant to a part of the mortgaged premises, found by the court below to be a fixture. The other defendant is the owner in possession of the premises, whose interests in the controversy are not antagonistic to the plaintiff. While the situs of the property in dispute is in another state, and a decree of a court of this state cannot operate upon or directly affect it, yet we think that a court of equity in this state, having jurisdiction of all the parties, can determine their rights to the property, and by proper process enforce them in personam: *Penn. v. Lord Baltimore*, 1 Ves. Sr. 444; *Carroll v. Lee*, 3 Gill & J. (Md.) 504, 22 Am. Dec. 350; *Mitchell v. Bunch*, 2 Paige, 606, 22 Am. Dec. 669; *Hayden v. Yale*, 45 La. Ann. 362, 40 Am. St. Rep. 232, 12 South. 633; *Massie v. Watts*, 6 Cranch. 148; *Pennoyer v. Neff*, 95 U. S. 714; *Phelps v. McDonald*, 99 U. S. 298. In the last cited case it is said: "Where the necessary parties are before a court of equity it is immaterial that the rest of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all ¹⁴ things necessary, according to the *lex loci rei sitae* which he could do voluntarily, to give effect to the decree against him. Without regard to the situation of the subject matter, such courts consider the equities between the parties, and decree in personam according to those equities, and enforce obedience to their decrees by process in personam." In *Allen v. Buchanan*, 97 Ala. 399, 38 Am. St. Rep. 187, 11 South. 777, it is held that a "suit in equity may be maintained, and remedies granted which affect and operate upon the person of the defendant, and not upon the subject matter when it is situated in another state or country, but the parties are within the jurisdiction of the court, although such subject matter is referred to in the decree, and the defendant is ordered to do, or to refrain from doing, certain acts toward it, and it is thus ultimately but indirectly affected by the relief granted." In *Carroll v. Lee*, 3 Gill & J. 504, 22 Am. Dec. 350, *Earle, J.*, speaking for the

court, says: "Where property in controversy is within the limits of the state, and the claimant resides abroad, the chancery court has an undeniable jurisdiction over the case. So where the party defendant is within the state, and the land or other property in contest is beyond its limits, although the proceeding is in rem, we apprehend there is no want of jurisdiction in the chancellor. To enforce a decree in a case of this kind the proceedings may be in personam, as well as by injunction, to recover the possession of the thing disputed."

In *Jennings v. Beale*, 158 Pa. St. 283, 27 Atl. 948, it is held that where a court of equity has jurisdiction of a person, it may issue an injunction against him to prevent trespass upon lands in another county. In *Clark v. Clark*, 180 Pa. St. 186, 36 Atl. 747, a party held the title to real and personal estate as trustee and was required to account in a court having jurisdiction over him but not over the property. Our brother Mitchell, speaking for the court, said: "By it [the writing] the appellant clearly constituted himself a trustee, and became liable to account in any court having jurisdiction over him, not by virtue of any statute as to tenants in common, but by the general jurisdiction of chancery to compel performance of equitable duties or the enforcement of equitable rights wherever the same may be found without reference to the locality of the land." In *Clad v. Paist*, 181 Pa. St. 148, 37 Atl. 194, it was held that a court of equity in ¹⁵ Philadelphia county at the instance of a resident of Chester county might restrain the obstruction of a right of way in Chester county by a resident of Montgomery county. The present chief justice delivering the opinion and citing many authorities, English and American, in support of the rule, said: "The parties being within the jurisdiction of the court, the court will under ordinary circumstances grant relief even in reference to a subject matter beyond the territorial cognizance of the court." It was held in *Vaughn v. Barclay*, 6 Whart. 392, that this court had jurisdiction of a bill brought to compel the conveyance, by a trustee residing within the state, of the outstanding legal estate in lands situate in other states. And in *Kendall v. McClure Coke Co.*, 182 Pa. St. 1, 61 Am. St. Rep. 688, 37 Atl. 823, it was held that a court of equity in this state will enjoin a creditor of an insolvent estate who proves his claim and files exceptions to the assignee's account from prosecuting a suit instituted in another state to secure a preference over other creditors as to the lands there situated, al-

though the question of the validity of the assignment in such other state involves the law of the situs of the property.

In *Sutphen v. Fowler*, 9 Paige, 280, the bill was filed for specific performance of the contract for sale of land in another state. It was held that the court had jurisdiction not only to decree specific performance of the contract and to authorize the plaintiff to take and hold possession of the land until the transfer to him of the legal title, but also, in the meantime, the court could grant a perpetual injunction restraining the defendant from disturbing the plaintiff in such possession, or from doing any act whereby the title should be transferred to any person, or in any way impaired or encumbered.

The case of *Great Falls Mfg. Co. v. Worster*, 23 N. H. 462, is directly in point and sustains the jurisdiction of the court below. The plaintiff company in that case was a New Hampshire corporation and had its cotton-mills on the Salmon river, which at this point was the dividing line between that state and Maine. It used the waters of the river to operate its mills and for this purpose it maintained a dam across the river, a part of which was in each state. The defendant, also a citizen of New Hampshire, claimed an interest in some ¹⁶ land in Maine which was flowed by the water of the pond created by the dam. The plaintiff company denied the defendant's claim to the land. He destroyed a part of the dam and threatened to remove the whole of it above a certain height so that it would not cause the water to flow his land. The bill prayed for an injunction, and, as stated in the report of the case, "the only question now raised, being whether the court had jurisdiction to restrain a citizen of this state, from going into another state, and committing acts injurious to the property of the orators situated there." It was held that the court had jurisdiction to issue an injunction restraining the defendant from destroying the plaintiff's dam in Maine. Chief Justice Gilchrist delivered the opinion of the court in which he cites and reviews the numerous authorities, English and American, on the subject. Of the relief sought by the plaintiff, he says: "Nothing more is asked than that the respondent, a citizen of New Hampshire, and residing within her limits, shall be subject to her laws, and that, being within reach of the process of this court, he shall be forbidden to go elsewhere and commit an injury to the property of other citizens, situated here, and entitled to the protection

of our laws." The chief justice concludes his opinion as follows: "It would be a great defect in the administration of the law, if the mere fact that the property was out of the state could deprive the court of the power to act. As much injustice may be perpetrated in a given case, against the citizens of this state, by going out of the jurisdiction and committing a wrong, as by staying here and doing it. The injustice does not lose its quality by being committed elsewhere than in New Hampshire, and as the legislature has conferred upon the court the power to issue injunctions whenever it is necessary to prevent injustice, it is the duty of the court to exercise that power upon the presentation of a proper case, and when it can be done consistently with the acknowledged practice in courts of equity. As the principle which is sought to be applied here has been recognized for nearly two hundred years, we have no hesitation in holding that the court has jurisdiction to issue the injunction prayed for."

The same principle is laid down by text-writers. "Where the subject matter is situated within another state or country, ¹⁷ but the parties are within the jurisdiction of the court," says Mr. Pomeroy (Pomeroy's Equity Jurisprudence, section 1318), "any suit may be maintained and remedy granted which directly affect and operate upon the person of the defendant and not upon the subject matter, although the subject matter is referred to in the decree, and the defendant is ordered to do or to refrain from certain acts toward it, and it is thus ultimately but indirectly affected by the relief granted."

The rule thus announced by the text-writers, supported by the decisions of the courts, sustains the authority of the court below in protecting the rights of the mortgagee or his assignee against their infringement by the York Manufacturing Company, if the facts warranted the intervention of a chancellor. All the parties were within the jurisdiction of the court. "Aquitas agit in personam." This maxim is the basic principle of equitable jurisdiction. The decree operates upon and is enforced against the person and not the property. The purpose of the decree here is to control the action of the defendant, the York Manufacturing Company, a citizen of this state and amenable to the process of its courts, and to prevent it from doing an act which is illegal and would result in irreparable injury to the plaintiff, also a citizen of the state. For a chancellor in this jurisdiction to deny aid under the circumstances would be to refuse to enforce the law in a contest be-

tween citizens of this commonwealth, and, therefore, for the state to abdicate its sovereignty. So long as an individual is a citizen of a state he is subject to the process and decrees of its courts of equity, regardless of the locus of the subject matter indirectly affected by the litigation. It is conceded that the decree here will not affect the mortgaged premises in New York, nor could an officer acting in obedience to our process redeliver the property to the plaintiff if the defendants should violate the injunction. The lack of such authority, however, does not oust the jurisdiction. As held in all the cases, the remedy for disobedience of the restraining order would be directly against the defendants, as in other cases where the commands of a court of equity are disregarded. In *Penn v. Lord Baltimore*, 1 Ves. Sr. 444, a bill for the specific performance of a contract executed in England, concerning the line between the colonies of Pennsylvania and Maryland, Lord Hardwicke said in reply to the argument that the ¹⁸ decree could not be enforced: "If they could not at all, I agree it would be in vain to make a decree, and that the court cannot enforce their own decree in rem in the present case. But that is not an objection against making a decree; for the strict primary decree in this court, as a court of equity, is in personam."

We are inclined to agree with the court below, although it is not necessary to determine the question here, that this is a Pennsylvania contract, to be performed in the state of New York, and that the law of that state must prevail in ascertaining the rights of the parties under the conditional sale and mortgage: *Story's Conflict of Law*, 7th ed., sec. 280, and authorities cited to sustain the text. *Knowles' Loom Works v. Vacher*, 57 N. J. L. 490, 31 Atl. 306, is similar in principle to this case and it sustains the ruling of the trial court. There it is said: "The situs of the property, and not the *lex loci contractus*, determines the validity of such sales. The contract in this case was made in New York, but the property was to be delivered, and was delivered, to and held by the purchaser in this state. Great contention and uncertainty as to the title to personal property would be produced if purchasers and mortgagees were bound to ascertain whether the vendor or mortgagor acquired title in another state before they could contract with safety in reference to it." It is unquestionably true that under the law of Pennsylvania the conditions imposed by the contract would be void as against the

mortgagee, and that the York Manufacturing Company could not enforce them here: *Forrest v. Nelson*, 108 Pa. St. 481. Were the property in this state, the refrigerator would be a fixture, a part of the brewery, and consequently bound by the mortgage: *Otto v. Sweatman*, 166 Pa. St. 217, 31 Atl. 102.

Nor do we think the conditions imposed by the contract are valid and can be asserted against the mortgagee under the New York statute. We agree with the learned trial judge in his conclusion on this point. The decisions of the lower courts of New York, holding a contrary view, are not binding upon us in the absence of a decision of the court of last resort of that state. The construction of a statute of a state by its highest tribunal will ordinarily be received as conclusive in the courts of other states: *Van Matre v. Sankey*, 148 Ill. 536, 39 Am. St. Rep. 196, 36 N. E. 628; *Walker v. State Harbor Commrs.*, 17 Wall. 648. New Jersey has a statute similar to the New York statute involved in this controversy requiring contracts for the conditional sale of personal property to be recorded. In construing the statute the supreme court of New Jersey, in *Knowles' Loom Works v. Vacher*, 57 N. J. L. 490, 31 Atl. 306, says: "The manifest purpose of the act is to render inefficacious the conditional sale of all goods held in this state where the contract of sale is not recorded. . . . The object of the statute is to get rid of secret and latent equities. Public policy as asserted in the extension of the registry laws, requires that the public record should show the ownership of personal property, and a construction which is favorable to that end should be given to the act." Such is clearly the purpose of statutes requiring a public record to disclose the ownership of personal property. Here the property was a refrigerating machine, which was to be manufactured and delivered by the York Manufacturing Company to Sternberg at Port Jervis, New York. So far as appears by the evidence, it was delivered immediately after it was made, and its possession has since been in the purchaser or those holding under him. It was installed in the brewery and became a part thereof prior to the date and recording of the mortgage given the National Bank of Port Jervis. By the failure to observe the recording act of New York, the York Manufacturing Company misled the mortgagee, which advanced its money on the faith of the brewing plant, an important and necessary part thereof being the refrigerator. If the contention of the appellee is to prevail, the very purpose of the New York statute requiring notice of conditional sales

of personal property to be given by the records, will be defeated as to the title to a large class of personal property in that state. Public policy and the rights of creditors, as well as the plain intention of the legislature in the enactment of the act in question forbid such a construction of it, and until the court of last resort in New York so decides, we will adhere to a contrary construction.

The interpretation we have given the New York statute makes the law of the state the same as that of Pennsylvania as to the effect of the conditional sale. In neither state where the conditions or reservations in the contract effective against the mortgagee or its assignee, and hence it is immaterial whether ²⁰ the contract be construed by the laws of New York or Pennsylvania.

This is not a bill to restrain the York Manufacturing Company from bringing suit in the state of New York for the recovery of the refrigerating machine, but the object of the bill is to enjoin that company from removing the machine from the brewery. The learned judge seemed to think that the York Manufacturing Company did not intend to remove the refrigerator by force, but only by legal proceedings, and therefore held there was no "imminent danger of the violation of the rights of the plaintiff" or of irreparable injury to him which required the intervention of a court of equity. In this we think the court erred. The written notices given the plaintiff and the owners of the brewing plant were not denied by the manufacturing company. Their construction was for the court. They clearly and positively assert the intention of the York Manufacturing Company "to remove the plant immediately"; that the plant "will be removed by their employés" during the week commencing February 17, 1902; and that "we would ask you to have work stopped to facilitate such removal, as their workmen will be there during the week named." There is not even an intimation in either of the notices that legal proceedings were to be resorted to for the removal of the refrigerator; on the contrary, the intention of the manufacturing company, as plainly stated in the notices, was to remove it by their workmen without any prior legal proceedings. This intention is reasserted in the answer in the following language: "The York Manufacturing Company claims and intends to assert its legal title to, and will remove or cause to be removed, said refrigerating plant and apparatus from the place where it was erected." It is idle for the York Manufacturing Company to

say, in the face of these positive declarations, that it had no intention of removing the refrigerator until its right to do so had been legally determined. The courts of New York have been, and are, open to it, and so far as appears in this record no action has yet been commenced there to determine its rights to the property. We must, therefore, regard the declarations and acts of the company as evincive of an intention to forcibly take possession of the property in dispute, which would invade the clear legal rights of the plaintiff and entitle him to injunctive relief.

²¹ The other reason assigned by the court for refusing equitable interference is that the removal of the refrigerator would not cause irreparable injury to the plaintiff. In view of the finding of the trial judge that "the refrigerator was a constituent part of the brewery plant, was attached to, and necessary for the operation of the same," we are unable to see by what method of reasoning he reaches his conclusion. Equally untenable, we think, is his finding that "it [the refrigerator] was capable, however, of being removed without serious permanent injury to the walls and other parts of the brewery, and by the substitution of another refrigerator of the same or other manufacture, operations could be continued, as conducted before the removal of the refrigerator in question." The same could be said with equal force of any other part of the machinery necessary for the operation of the brewery. Any or all of the different parts constituting the plant could be supplied, and hence, on this theory, all the machinery might be removed and no irreparable injury be done to the plant or to the owner. The same logic would permit the destruction of any building or manufactory by force, as restitution would prevent irreparable injury. Removing a constituent and necessary part of the plant prevents its operation and results in a loss of the business compensation for which would be determinable solely by conjecture. In one sense this may not be irreparable injury, but in the legal sense it is, and will authorize the interference of a chancellor. Equity will interfere when the injury threatened would occasion damages, estimable only by conjecture and not by any accurate standard: *Commonwealth v. Pittsburg etc. R. R. Co.*, 24 Pa. St. 159, 62 Am. Dec. 372; or would be ruinous to the property in the manner in which it has been enjoyed, and would permanently impair its future enjoyment: *Jerome v. Ross*, 7 Johns. Ch. 315, 11 Am. Dec. 484; *Echelkamp v. Schrader*, 45 Mo. 505; *Mayor etc. of Frederick v. Groshon*, 30

Md. 436, 96 Am. Dec. 591; Ryan v. Brown, 18 Mich. 196, 100 Am. Dec. 154.

We have discussed the controlling questions in the case, and our conclusion is that the plaintiff is entitled to the relief he seeks in this suit. The trial court had jurisdiction, and was invested with ample power to determine and enforce the rights of the parties. The refrigerator plant being a constituent part²² of and necessary to the operation of the brewery, is unquestionably subject to the mortgage now held by the plaintiff, and its removal by the defendants would result in irreparable injury which could not be adequately compensated in damages. It, therefore, follows that the prayer of the plaintiff's bill should have been allowed.

The decree is reversed, the bill is reinstated, and the court below is directed to issue the injunction in accordance with the prayer of the bill, the costs to be paid by the York Manufacturing Company, the appellee.

A Suit in Equity may be maintained, and remedies granted which affect and operate upon the person of the defendant, and not upon the subject matter when it is situated in another country or state, but the parties are within the jurisdiction of the court, although such subject matter is referred to in the decree, and the defendant is ordered to do, or refrain from doing, certain acts toward it, and is thus ultimately, but indirectly, affected by the relief granted: Allen v. Buchanan, 97 Ala. 399, 38 Am. St. Rep. 187, 11 South. 777; Hawkins v. Ireland, 64 Minn. 399, 58 Am. St. Rep. 534, 67 N. W. 73; Hayden v. Yale, 45 La. Ann. 362, 40 Am. St. Rep. 232, 12 South. 633; Vaught v. Meador, 99 Va. 569, 86 Am. St. Rep. 908, 39 S. E. 225; monographic note to Newton v. Bronson, 67 Am. Dec. 95-101.

Irreparable Injury, within the meaning of the law of injunctions, is considered in the monographic note to Dudley v. Hurst, 1 Am. St. Rep. 374, 379; Deegan v. Neville, 127 Ala. 471, 85 Am. St. Rep. 137, 29 South. 173.

The Effect of Conditional Sales as against subsequent bona fide purchasers of the vendee is considered in Triplett v. Mansur etc. Co., 68 Ark. 230, 57 S. W. 261, 82 Am. St. Rep. 284, and cases cited in the cross-reference note thereto.

KINTER v. PENNSYLVANIA RAILROAD COMPANY.

[204 Pa. St. 497, 54 Atl. 276.]

NEGLIGENCE is the Absence of Care Under the Circumstances. The more imminent the danger the greater the care should be exercised in its presence. (p. 796.)

NEGLIGENCE—Railways—Stop, Look, Listen.—One about to cross a railway track with a team must stop, look, and listen at a place where he can have a view of the tracks which will enable him to see approaching trains, and must, if necessary, get out and lead his horses. Failing to do so, he is guilty of contributory negligence, and cannot recover if, because of such failure, he is injured. (p. 797.)

Action of trespass to recover for the death of plaintiff's husband, in which a judgment of nonsuit was granted, and the plaintiff appealed.

Joseph A. Langfitt, H. W. McIntosh and S. J. Telford, for the appellant.

M. W. Acheson, Jr., Thomas Patterson and James R. Sterrett, for the appellee.

498 **BROWN, J.** The deceased was killed at a most dangerous railroad crossing in the borough of Wilkinsburg. The train that struck him was coming from the east. He approached the crossing on South avenue, and to his left—the direction from which the train was coming—the street makes an acute angle with the railroad, on which there were five tracks. In this angle there was a plumbing shop, which obstructed the view of the railroad. It was eight feet and ten inches from the first rail. The through passenger train, which collided with the deceased, was rapidly approaching on the first track. When about three hundred and fifty feet from South avenue it crossed over on a switch to the middle, or third, track, on which it ran into the team. In the direction from which the train came there was a straight stretch of over half a mile from the crossing, but there was no point nearer than five feet from the first rail where there could be a view of it. Kinter was driving a two-horse wagon loaded with coal. He was sitting about in the middle of it, and a man named Musser, who was to put the coal away, was on the rear end. There was no view of the tracks to their left as they approached them. When the heads of the horses were at the first rail of the track nearest to him Kinter stopped them. From their positions on the wagon, with the

plumbing-house alongside of them and cutting off the view to the left, neither man could see the coming train, and their view of the track on which it was rapidly coming was for but two hundred and forty feet. They could not even see Wilkinsburg station, barely a square away; but there was a point beyond the house, five feet from the track, from which the deceased could have seen the danger. Neither he nor the man with him went forward to look from this, the only point from which they could see what was coming upon them, and, in an unguarded moment, the driver started his team and drove on to his death. As soon as he passed the plumbing-house, Musser jumped and his life ⁴⁹⁹ was saved; but it was too late for Kinter to escape from the deadly peril. With these facts developed, the court below entered a judgment of nonsuit on the ground of the contributory negligence of the deceased.

Negligence is the absence of care under the circumstances. The more imminent the danger, the greater should be the care exercised in the presence of it. The rule upon one about to cross the tracks of a railroad is that he must stop, look and listen. Some crossings are much more dangerous than others, and many of them in towns, with views on either side obstructed by buildings, are, as in the present case, notoriously so. Railroad companies may be regardless of their duty in protecting the public from the constant danger that besets them at such crossings, but the man who drives over them is not, on that account, relieved from the duty of exercising care himself. On the contrary, the very highest degree of it is wisely required of him; and there could be no better illustration than that given by the present case of the wisdom of the rule, that if one approaches a railroad in a vehicle, and cannot, from his seat in it, have a view of the tracks, he must get down from it and walk to where he can. The observance of this rule by Kinter would manifestly have saved his life. Our enforcement of it may save many others; departure from it would send many victims into these death traps.

The duty of Kinter was to stop and look and listen at a place where he could have a view of the tracks which would enable him to see the approaching train: *Central R. R. Co. v. Feller*, 84 Pa. St. 226; *Ely v. Pittsburg etc. Ry. Co.*, 158 Pa. St. 233, 27 Atl. 970. He did not stop at such a point, and, concededly not having been able to see where he did stop, it was for the court to say that he had not observed the rule requiring him to look. "Where there is a doubt as to the proper

place to stop, look and listen, as a general rule such question will be referred to the jury. But where there is no such doubt, where the deceased stopped at a point where he could not see, it is for the court to determine whether it was a proper place": *Urias v. Pennsylvania R. R. Co.*, 152 Pa. St. 326, 25 Atl. 566.

When it must have been manifest to the deceased as he approached the tracks that he could not have a view to his left, he might have protected himself by exercising ordinary prudence. ⁵⁰⁰ Instead of driving his horses on until their feet nearly touched the first rail of the tracks and then stopping and trying to look from his seat in the wagon, where he could not see the danger that was almost upon him, he ought, as a prudent man, to have stopped further back, got down from his wagon, walked forward beyond the obstruction and looked. That this was his duty is clear from the standpoint of prudence and proper care; and that we have so repeatedly declared is not uncertain. His failure to observe this duty cost him his life, and has left his widow and children without remedy for the serious consequences which may have resulted from the defendant's negligence.

In *Pennsylvania R. R. Co. v. Beale*, 73 Pa. St. 504, 13 Am. Rep. 753, where, as here, there was an obstruction to the view of the railroad, we held that, if one driving and about to cross a track cannot have a view of it by looking out from his vehicle, it is his duty to get out, if necessary, and lead his horse and wagon. This principle has been uniformly recognized in later cases. It was reaffirmed the same year, in *Pennsylvania R. R. Co. v. Ackerman*, 74 Pa. St. 265, by the same member of this court that had announced it. In *Ellis v. Lake Shore etc. R. R. Co.*, 138 Pa. St. 506, 21 Am. St. Rep. 914, 21 Atl. 140, attention is called to the rule "that it is the duty of a traveler, when about to cross a railroad, if he cannot see the track, to stop, look and listen, and, if necessary, to get out and lead his horse"; and in *Lehigh Valley R. R. Co. v. Brandtmaier*, 113 Pa. St. 610, 6 Atl. 238, we held: "It was the duty of the plaintiff before crossing to stop, look and listen for the approach of trains; it was his duty to do so immediately before crossing, and, as the learned court instructed the jury, 'if he could not see up and down the track from any point upon the road before reaching the rails, it was his duty to go upon the track itself, and look and listen before attempting to drive his team across.'" The case before us calls for the application of this rule, and it must be enforced. That Kinter passed safely over the first track and was struck on the third can make no difference in the ap-

plication of the rule, for, if he had observed it, he would have seen not only the train coming toward him on the first track, but the switches as well, leading to the other tracks, over which the train in its regular course might go, and, as a matter of fact, did.

Judgment affirmed.

One About to Cross a Railroad track must look and listen, and if there are any difficulties in the way of his seeing and hearing, must stop. If, by acting in accordance with such duty, he could have discovered the approach of a train, he is guilty of negligence contributing to any injury received from a failure to perform such duty: Weller v. Chicago etc. R. R. Co., 164 Mo. 180, 64 S. W. 141, 86 Am. St. Rep. 592, and cases cited in the cross-reference note thereto; Day v. Boston etc. R. R. Co., 96 Me. 207, 52 Atl. 771, 90 Am. St. Rep. 335, and cases cited in the cross-reference note thereto.

HERRON v. PITTSBURG.

[204 Pa. St. 509, 54 Atl. 311.]

MUNICIPAL CORPORATIONS Using Highly Dangerous Agents must exercise care commensurate with the danger to prevent injury to persons and property, and the fact that the agent is used and supervised by the police does not excuse negligence in such use. (p. 799.)

NEGLIGENCE—Notice of Danger and Probable Injury.—Where a police-call wire breaks, and, though not in itself dangerous, it is naked and strung on poles close to other wires carrying strong and dangerous currents of electricity, such break is notice that the wire may become dangerous, and imposes on the city the duty of examination. (p. 799.)

NEGLIGENCE—Contributory—When a Question for the Jury. Whether a father who, seeing on the sidewalk a wire, avoids stepping on it, apprehending that it may be dangerous, should have returned to his house close by and warned his son, is a question for the jury in an action brought by the father and son to recover because of injuries received by the latter by coming in contact with such wire, and cannot be declared to be contributory negligence by the court as a matter of law. (p. 800.)

Action by Vincent Herron and his father, Hugh Herron, to recover damages for injuries received by the boy when about seven years of age by coming in contact with a dangerous current of electricity. The wire broke at about 8 o'clock in the morning, at which hour the father saw it, on his way to his work, and carefully avoided it; but though he knew his son would soon pass the same way, did not return to warn him.

During the progress of the trial evidence was received tending to prove that the police knew of the break within an hour after it happened. Against the objections of defendant, the court admitted in evidence ordinances of the city, and rules of the police department concerning the inspection and use of such wires. Verdict and judgment in favor of the father for eight hundred and sixty-four dollars, and of the son for six thousand three hundred and sixty-four dollars.

W. A. Blakeley and Thomas D. Carnahan, for the appellant.

Joseph Howley and W. A. Hudson, for the appellee.

513 MITCHELL, J. It is the duty of all parties using a highly dangerous agent to use care commensurate with the danger, in order to prevent injury to persons or property exposed to its influence: *Fitzgerald v. Edison Electric Illuminating Co.*, 200 Pa. St. 540, 86 Am. St. Rep. 732, 50 Atl. 161. Cities are not excepted from the rule, and the fact that the agent is used or supervised under the police power does not excuse negligence in such use: *Mooney v. Luzerne Borough*, 186 Pa. St. 161, 40 Atl. 311. The cases deciding that municipal corporations are not liable for errors of judgment or discretion rest on entirely different principles.

The wire in this case was a police call wire, and broke as early as 8 o'clock in the morning. The fact of the break was known to the police officials presumably at or near that time, and, according to the evidence, certainly as early as 9 o'clock. The wire was very lightly charged and not in itself dangerous, but it was a naked wire and strung on poles in close proximity to other wires, some of which carried strong and dangerous currents of electricity. The fact of the break, therefore, was notice that it might become dangerous, and imposed the duty of examination. Whether that duty was properly met under all the circumstances, the lapse of time, the condition and population of the neighborhood, the urgency of the possible danger, etc., was a question for the jury.

The evidence as to the ordinance, police regulations, etc., though not important, was not incompetent. It merely tended to make more clear and definite the responsibility for due care which existed outside of them.

The father saw the wire on the pavement as he went to work in the morning, and knew that his son would shortly pass the same place on his way to school. He testified that he avoided

stepping on the wire, though he did not know whether it was dangerous or not. This was the act. of a prudent man. Whether he ought further to have returned to his house which was close ⁵¹⁴ at hand, to warn his son, was not so clear a duty that the court could declare it as a matter of law. It was a question of reasonable prudence or contributory negligence which was properly left to the jury.

Judgment affirmed.

Electrical Companies are held to a high, if not the highest, degree of care to prevent injuries to persons coming in contact with their wires: *Mitchell v. Raleigh Electric Co.*, 129 N. C. 166, 39 S. E. 801, 85 Am. St. Rep. 735, and cases cited in the cross-reference note thereto; *Fitzgerald v. Edison Electric etc. Co.*, 200 Pa. St. 540, 50 Atl. 161, 86 Am. St. Rep. 732, and cases cited in the cross-reference note thereto. It has been held that when a wire falls from its place, and comes in contact with a man in the street, killing him, a prima facie case of negligence is raised: *Snyder v. Wheeling Electrical Co.*, 43 W. Va. 661, 64 Am. St. Rep. 922, 28 S. E. 733.

Municipal Corporations are liable for injuries due to their negligence, unless incidental to the performance of governmental duty: *Judd v. Hartford*, 72 Conn. 350, 77 Am. St. Rep. 312, 44 Atl. 510; *Williams v. Town of Greenville*, 130 N. C. 93, 89 Am. St. Rep. 860, 40 S. E. 977; *Beall v. Seattle*, 28 Wash. 593, 92 Am. St. Rep. 892, 69 Pac. 12.

LINN v. DUQUESNE BOROUGH.

[204 Pa. St. 551, 54 Atl. 341.]

DAMAGES for Humiliation and Regret.—In an action by a married woman to recover for personal injuries which to some extent impaired the use of her hands, an instruction which permits the jury to consider, in addition to physical and mental suffering caused by the injury and the disability resulting from it, the humiliation and regret she may have felt because of her inability to attend to her household duties and to perform services she had before performed for her husband, is erroneous. (p. 803.)

Trespass for personal injuries. Judgment and verdict for the plaintiff for two thousand dollars, from which the defendant appealed.

J. S. Ferguson, E. G. Ferguson and Fred W. Scott, for the appellant.

R. H. Jackson and J. R. McQuaide, for the appellee.

553 *FELL, J.* The plaintiff, a married woman, fell into an unguarded opening in a street, and fractured both wrists. The permanent injury caused by the fall was to her hands, the use of which was to some extent impaired. The instruction on the measure of damages allowed the jury to consider, in addition to the physical and mental suffering caused by the injury and the permanent disability resulting from it, the humiliation and regret that the plaintiff might thereafter feel because of her inability to attend to her household duties, and to perform the services she had before performed for her husband. The latter part of the instruction is assigned as error.

Mental suffering has not generally been recognized as an element of damages for which compensation can be allowed, unless it is directly connected with a physical injury or is the direct and natural result of a wanton and intentional wrong. Where a claim is for mental suffering that grows out of or is connected with a physical injury, however slight, there is some basis for determining its genuineness and the extent to which it affects the claimant. But as the basis of an independent action, mental suffering presents no feature by which a court or jury can determine either its existence or its extent, and claims founded on it have generally been regarded as too uncertain and speculative for consideration. In *Ewing v. Pittsburg etc. Ry. Co.*, 147 Pa. St. 40, 30 Am. St. Rep. 709, 23 Atl. 340, it was held that fear and nervous excitement and distress caused by a collision of cars on a railroad, producing mental and physical pain and suffering and permanent disability, but unaccompanied by any injury to the person, afforded no ground of action. In *Wyman v. Leavitt*, 71 Me. 227, 36 Am. Rep. 303, recovery was denied for fright and anxiety caused by apprehension of personal injury. In *Spade v. Lynn etc. R. R. Co.*, 168 Mass. 285, 60 Am. St. Rep. 393, 47 N. E. 88, it was held that there could be no recovery for fright and mental suffering nor for bodily injury resulting solely from mental distress. In the last-named case, on a review of the authorities on the subject, the exemption from liability is based not on the ground that fright and anxiety do not constitute actual injury, or that mental and physical effects may not be directly traceable as a consequence of unintentional negligence, but on the ground that in practice it is impossible to administer any other rule without opening a wide door to unjust claims which cannot satisfactorily be met. Excepting cases in some jurisdictions where recoveries have been had for the failure to deliver telegrams

announcing illness or death, or other matters of personal concern, but not of pecuniary importance, the instances are very few in which an independent action has been sustained for mental suffering alone. The decided trend of decision both in this country and in England is against the maintenance of such an action, or the allowance for mental suffering as an element of damages when distinct from physical injury.

The cases in which mental suffering has been considered as an element of damages are those in which the suffering was caused by the sense of peril at the time of the physical injury, or was incident to the physical pain, and formed a part of the actual injury. *Pennsylvania etc. Canal Co. v. Graham*, 63 Pa. St. 290, 3 Am. Rep. 549, and *Scott Township v. Montgomery*, 95 Pa. St. 444, are instances of such cases in this state. In *Chicago etc. Ry. Co. v. Caulfield*, 93 Fed. 396, 27 U. S. App. 358, an action by a boy for injuries, it was said that the instruction that the jury in assessing damages might consider his mental suffering because of his crippled condition was erroneous. In *Bovee v. Danville*, 53 Vt. 183, and in *Augusta etc. R. R. Co. v. Randall*, 85 Ga. 297, 11 S. E. 706, it was held that mental suffering because of disappointed hopes caused by the premature birth of a child as a result of an injury was not a subject of compensation. In *Chicago etc. R. R. Co. v. Hines*, 45 Ill. App. 299, the plaintiff's sorrow because of his crippled condition was rejected as an element of damage. In the opinion in this case it was said: "While in this state it is a well-settled rule of law that damages may be allowed in cases like this for the pain and anguish of mind caused by the personal injury, yet we are not aware of any case holding that anguish of mind, wholly sentimental, arising from a contemplation of a disfigurement of person, can be considered for the purpose of swelling such damages. The words 'pain and anguish of mind' are used in a popular sense to denote such as may arise from any cause, and are not necessarily restricted to that arising from personal injury. But the legal meaning of such words found in the reports of decided cases in this state, as will plainly appear from their reading, confines such meaning of the words to such pain and anguish of mind as occur necessarily and spontaneously from any injury of, or shock to, the nerves of sensation, or such pain and anguish as remain during the continuance of the original and exciting cause and arising therefrom. But where the injury only comes about by reflection or contemplation, then, in the legal sense, it

is not caused by the injury, but arises from and is produced by a combination of causes other than the injury."

The first part of the instruction on the measure of damages allowed a recovery for permanent disability resulting from the injury and for the mental suffering that was a natural incident of the physical pain and inseparable from it. This was as far as the instruction should have gone. The objections to making mental suffering the sole ground of recovery apply with equal force to allowing it as an element of damages when it is not a part of the actual injury, but arises afterward from regret, disappointment or anxiety. There are the same opportunities for establishing fanciful or fraudulent claims by testimony which it is impossible to contradict or impeach, and the injustice of holding a defendant responsible for the unforeseen consequences ⁵⁵⁶ of mere neglect is as great in one case as the other. The distress of mind occasioned by regret and disappointment and arising after the injury was not an element of damage to be considered by the jury. The assignment relating to the instruction on this subject is sustained, and the judgment is reversed with a venire facias de novo.

The Humiliation Suffered by one through the wrongful act of another is a proper element of damages: *Cleveland etc. Ry. Co. v. Kinsley*, 27 Ind. App. 135, 87 Am. St. Rep. 245, 60 N. E. 169. Disfigurement or mutilation of person may be considered in personal injury cases: *Newbury v. Getchel etc. Mfg. Co.*, 100 Iowa, 441, 62 Am. St. Rep. 582, 69 N. W. 743; *Western etc. R. R. Co. v. Young*, 81 Ga. 397, 12 Am. St. Rep. 320, 7 S. E. 912; *Heddles v. Chicago etc. Ry. Co.*, 77 Wis. 228, 20 Am. St. Rep. 106, 46 N. W. 115.

CASES

IN THE

SUPREME COURT

OF

TEXAS.

LIPSCOMB v. HOUSTON AND TEXAS CENTRAL RAIL- WAY COMPANY.

[95 Tex. 5, 64 S. W. 923.]

CARRIERS—Express Companies—Liability of for the Death of a Human Being.—A statute creating a cause of action when death is due to the negligence of the proprietor, owner, charterer, or hirer of a steamboat, stagecoach, or other vehicle for the conveyance of goods or passengers, or by the negligence of their servants or agents, does not apply to express companies carrying goods upon or in cars furnished by a railway company. (pp. 808, 809.)

DEATH of Human Being—Statute Creating Liability for—Construction of.—An action commenced under a statute creating a cause of action for the death of a human being must stand or fall by the terms of the statute, which cannot be extended to a cause omitted from its provisions. (p. 809.)

MASTER AND SERVANT—Test of Master's Liability.—The rule of respondeat superior does not make the master's liability depend upon the question whether the injury inflicted by the servant was willful and intentional or unintentional, but upon the question whether the servant, when he did the wrong, acted in the prosecution of his master's business, and within the scope of his authority. (pp. 809, 810.)

NEGLIGENCE—Master and Servant.—If a servant does not exercise due care in executing the instruction or rendering the service, he is guilty of negligence for which his master is answerable. (p. 810.)

RAILWAY CORPORATIONS—Liability of for the Killing of a Person Supposed to be a Burglar.—If a person is instructed to watch a station and catch burglars, this involves the exercise of a discretion to distinguish burglars from innocent persons, and, in making an arrest, to determine the degree of force called for by the circumstances. If, through want of proper care, he mistakes an innocent man for a burglar, and uses a degree of force not justified by the situation, his act may be deemed a negligent exercise of the authority derived from the master, who may be held liable if such innocent person is killed. (p. 810.)

MASTER AND SERVANT—Power of Servant to Delegate His Authority.—The authority of an employé of a railway corporation to act for it in guarding its depot and property does not involve the authority to employ for it other servants and substitute them in his place, and where such authority is claimed to have existed, it should be proved as a fact. (pp. 811, 812.)

RAILWAY CORPORATIONS—Duty of to Guard Their Employes from Danger.—Whether, when guards were placed in a railway station to catch and arrest burglars, it was the duty of the corporation to give such instructions to the guards as would protect other of its servants against danger in going to such station, and whether such other servants should have been warned of the presence of such danger, are questions which should be submitted to the jury. (p. 812.)

RAILWAY CORPORATIONS—Knowledge of Station Agent.—When imputed to.—If a station agent places guards in a station to watch for and to catch and arrest burglars, his knowledge that they are so placed and of the purpose is the knowledge of the corporation, whether the guards are to be deemed its servants or not. (p. 812.)

EVIDENCE.—The Opinion of a Witness Respecting the Duties of a railway station agent is not admissible. (p. 812.)

EVIDENCE—Powers of Railway Station Agent.—If the duties and authority of railway station agents are largely evidenced by usage rather than by express instructions, a witness may be permitted to state what powers he had known such agents to habitually exercise; but it is not competent for him to deduce from what he has seen the possession of further powers, the exercise of which he has not known. (pp. 812, 813.)

DAMAGES—Subjects Too Remote for Consideration.—That the decedent was a member of a church, and did not use profane language, is too remote to be of value in determining the pecuniary loss resulting from his death. (p. 813.)

DEATH OF HUMAN BEING—Damages not Lessened by Insurance.—In an action by a widow and minor children for negligently causing the death of the husband and father, evidence that they had received money on a policy of insurance on his life is not admissible. (p. 813.)

Carden & Carden and M. M. Parks, for the plaintiffs in error.

R. De Armond and W. J. J. Smith, for the defendant in error.

¹⁵ WILLIAMS, A. J. This action was brought by plaintiffs, the widow and minor children of John Lipscomb, to recover damages for the killing of John Lipscomb by persons alleged to have acted in such killing as the servants of the two companies. In the district court, upon a trial before a jury, a verdict for the plaintiffs against both ¹⁶ companies was directed, the only question left to the jury being as to the amount of the damages. Upon appeal to the court of civil appeals,

it was held by that court that the express company was not shown to be one of the classes of persons made liable by the statute for a killing by its servants, and that the railroad company was not made liable for the killing in question by its servants, held to have been an intentional and not a negligent one, without allegation and proof of the unfitness of such servants; and the judgment of the district court was reversed and the cause remanded. This writ of error was granted upon the allegation in the application of the plaintiffs that the decision of the court of civil appeals practically settled the case against them, and all the questions raised on the appeal are before this court.

The evidence showed that Lipscomb was shot at the station of the railroad company at Rice about 5 o'clock in the morning of October 10, 1899, by one Gatlin, who had been stationed in the building by one Moore, the station agent of the railroad company and the local agent, also, of the express company, to keep watch for and catch burglars. The station had been entered several times and goods in the possession of the express company had been stolen, and Moore, for several nights before the killing of Lipscomb, had kept watch in the station until 12 or 1 o'clock and had caused Gatlin and one West to arm themselves and guard the station for the remainder of the night. His only instructions to them were to catch the burglars. Lipscomb and Davenport were the engineer and fireman, respectively, upon a freight train of the railroad company which was traveling northward through Rice to Ennis. At a point south of Rice the boiler became so impaired as to render it impracticable to carry the train through, and, upon telegraphic orders from headquarters at Ennis, those in charge of it left the cars composing the train at one of the stations and proceeded northward with only the engine and caboose. When Rice was reached, the boiler had failed so that it was impossible to carry it farther, and the engine and caboose were carried past the station and backed into the switch north of it. The engineer and fireman then went together to the station to report the condition and get orders, which, according to some of the evidence, was in the line of their duty. Finding the doors of the waiting room locked, they went to the window and made a noise which awakened Gatlin, who, with West, was asleep in the room, and he, mistaking them for burglars, fired his gun at Lipscomb, whom he saw at the window, and inflicted the wounds from

which he died. The acts and appearance of Lipscomb and Davenport immediately preceding the shooting are told in detail by the witnesses with some differences, the purpose on the one hand being to show that there was nothing to occasion Gatlin's mistake, and, on the other hand, to show that the appearance and movements of the parties were such as to reasonably justify his belief that they were burglars trying to enter the depot, and that, just before he fired, the party at the window, Lipscomb, was preparing to shoot him.

¹⁷ No notice had been given to employes of the presence of armed guards in the station or of any dangers to be encountered in approaching it at night. Some of the evidence tends, however, to show that Rice was not a night office, that the operator was not expected to be there at such hours as that at which Lipscomb went to it, that it was the duty of conductors to attend to such matters, and that the one in charge of this train did not go to this office because he knew the operator would not be there.

Moore was paid a salary by the railroad company for his services to it, and, as compensation for his services to the express company, received a commission upon moneys taken in for it. While he was the common agent of the two companies, he was not employed by them jointly, but his ordinary duties to one were distinct from those due to the other. Whether or not he was authorized to employ guards for such purposes as that for which he secured the services of Gatlin and West, and, if so, whether he in fact employed them in behalf of either or both of the companies and of which one, were disputed questions in the trial.

There was the testimony of one witness, of the admissibility of which we shall treat further on, which tended to show that Moore's authority as station agent embraced that of enlisting the aid of others to guard and protect the station and other property in his charge. Besides this, there was no evidence which went further than to show that it was Moore's duty and that he had the authority, himself, to take care of the property and secure it against depredation; and there was direct testimony that he and other station agents were not empowered to employ extra help for any purpose without the permission of their superiors, which was not obtained in this instance.

Gatlin had previously worked at intervals about the station in handling freight, but was not a regular employé for any purpose, nor was West. They were not hired by Moore, but volunteered their services to aid him in catching the burglars. Nothing was said between the parties to indicate that they were employed for the one company or the other, but their services were simply accepted by Moore in the general way stated, and he assisted them in procuring arms.

The evidence does not show that any of the cars used by the express company belonged to it or that it had hired or chartered any of them, or that it had the exclusive actual control of any of them. The cars used by it were in the trains run by the railroad company and were owned, carried and controlled by the latter company, except that the express company, under contract with the railroad company, had a particular car in the train, or, if its business did not require a whole car, a portion of one, provided for its use, to be occupied by its agent with the matter carried by it. There was no pleading or evidence that this company owned or had chartered or hired any other vehicle. Under the contract, the express company also had the right to receive and store its ¹⁸ goods in the depot building and to have its agent transact its business there so as not to interfere with the business of the railroad company.

We are of the opinion that the court of civil appeals properly held that the pleading and evidence failed to show that the express company was liable, for the reason that it is not made to appear that such company comes within the provisions of the statute giving actions for injuries resulting in death: Rev. Stats., art. 3017.

The first subdivision of the article referred to gives such an action "when the death is caused by the negligence or carelessness of the proprietor, owner, charterer or hirer of any railroad, steamboat, stagecoach, or other vehicle for the conveyance of goods or passengers, or by the unfitness, negligence or carelessness of their servants or agents." The express company is not shown to be either one of these. The most that is pleaded and proved is that it had engaged space on cars otherwise wholly controlled by the railroad company, in which goods, in charge of its agents, were transported by the latter company. No sense of any of the words used in this subdivision of the statute would include it. It is true, other provisions of the statute declare express companies to be common carriers, but article 3017 does not create the liability against

common carriers eo nomine, but only declares it against the classes named.

The second subdivision gives an action when the death is caused by the wrongful act, negligence, unskillfulness or default of another. It is held in the case of *Hendrick v. Walton*, 69 Tex. 192, 6 S. W. 749, upon full consideration, that this gives no action against the principal or master for a death caused by the act of the agent or servant; and although it is held in *Fleming v. Texas Loan Agency*, 87 Tex. 238, 27 S. W. 126, that under this subdivision a corporation may be made responsible for a death caused by its own act or omission, this in no way changes the rule stated in the former case. The only contention here is that the express company should be held liable for the act of its servants.

The action must stand or fall by the terms of the statute, which cannot be extended to include cases omitted from its provisions: *Turner v. Cross*, 83 Tex. 218, 18 S. W. 578. The plaintiffs have admitted in their application for writ of error, in order to give jurisdiction to this court over a reversed and remanded cause, that they can produce no additional facts to make a case against the express company; and it is therefore the duty of this court to render final judgment in favor of that company.

The railroad company is made liable for a death caused by its own negligence or that of its servants, and the next question is as to the correctness of the holding of the court of civil appeals, as matter of law, that the shooting of Lipscomb was the willful and intentional act of Gatlin, and that therefore the railroad company is not responsible for it. In discussing this question, we shall assume for the present that Gatlin was the servant of the railroad company.

The statute making such company responsible for the negligence of its servants at once brings into consideration the relation of master and ¹⁹ servant and some part, at least, of the common law governing that relation. The master or principal is made responsible for the negligence of the servant or agent—that is, for negligence of the latter happening while they are acting in such capacity. The rule of respondeat superior, to some extent at least, is thus imported by the statute into such cases. As it is established by the better authorities and enforced in this court, that rule does not make the responsibility of the master depend on the question

whether an injury inflicted by the servant was willful and intentional or unintentional, but upon the question whether the servant, when he did the wrong, acted in the prosecution of the master's business and within the scope of his authority, or had stepped aside from that business and done an individual wrong. *International etc. Ry. Co. v. Cooper*, 88 Tex. 610, 32 S. W. 517, and authorities there cited; *Haehl v. Wabash etc. Ry. Co.*, 119 Mo. 325, 24 S. W. 730. There is much authority, however, for the proposition that, under the common law, the master is not liable for the malicious and intentional torts of the servant, although committed while engaged in forwarding the master's business; and it is by no means clear that the rule of respondeat superior as first stated is made to apply in its full force in actions given by our statute for injuries resulting in death. Assuming for the purposes of this case that it does not, and that a killing by a servant which is willful and not negligent is not within the statute, it is still true that if the killing in question can be regarded as a negligent one, there is a case for the determination of the jury under the statute. The servant acts for the master in executing instructions or rendering service. If he does this without the exercise of due care, he is guilty of negligence. The act which he does may be intentional, but if it is done without the observance of precautions necessary to a due execution of his instructions or exercise of his authority, this absence of care makes his act a negligent one. In the present case, Gatlin's instruction was to watch the station and catch burglars. This necessarily involved the exercise of the discrimination necessary in distinguishing burglars from innocent persons, and in making the arrest and determining the degree of force called for by the circumstances. If, through want of proper care, he mistook Lipscomb for a burglar and used a degree of force not justified by the situation, his act may justly be deemed a negligent exercise of the authority derived from his master.

This view is sustained by both classes of authorities just referred to: *McManus v. Crickett*, 1 East, 67; *Croft v. Alison*, 4 Barn. & Ald. 590. In the latter case, the doctrine is thus stated: "If a servant driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person and produce the accident, the master will not be liable. But if, in order to perform his master's orders, he strikes but injudiciously and in order to extricate himself from a difficulty, that will be negligent and careless conduct for which

the master will be liable, being an act done in pursuance of the servant's employment." In that case, the act of the servant in striking the horses was intentional, but, as it was "injudiciously" done, it was held that it was also ²⁰ a negligent performance of his duty as servant. It seems to us that this brings the case of a shooting by a servant, which was intentionally done because of mistake resulting from want of proper care in carrying out the master's orders, within the word "negligence" used in the statute. The act is negligent because it is a careless performance of the duty of the servant. We are therefore of the opinion that the court of civil appeals took an erroneous view of this question.

We are also of the opinion that the trial judge erred in directing a verdict for the plaintiff, since there were several questions of fact which the parties had the right to have the jury pass on. One of these was the question whether or not Gatlin was the servant of the railroad company. That Moore was its servant and had authority to represent and act for it in guarding the depot and the property in it may be conceded. It does not follow that he had authority to employ for it other servants and substitute them in his place. No implication of such power of employment would arise from the mere fact that he himself could have done the things which he engaged them to do. On the contrary, it would have to be proved as a fact that he had received such power from his employer, and whether he had or not was a controverted question upon which the jury would have to pass: *Woods on Master and Servant*, 185. We cannot anticipate the evidence upon another trial, but it may be proper also to submit to the jury, among others which need not be discussed, the question whether, if Moore had authority to employ the guards, they were employed in behalf of the railroad company or of the express company only. If it was Moore's duty to the railroad company to do that which he allowed Gatlin and West to do, and if he had authority from such company to so employ them, and they were thus discharging a duty which Moore owed to it, the fact that they were not to be paid would not be material.

A distinct ground upon which it is claimed that the railroad company would be liable is that it owed to its servants the duty of giving to the guards such information and instruction as would protect the other servants against danger in going to the station, and also of giving to such other servants warning of the presence of such danger. This is a theory that should

have been submitted to the jury, but the facts were not such as authorized the court to declare a liability as matter of law. Whether or not such instructions and warning were called for was a question for the jury and depended upon the further questions, whether or not the presence of other employés and danger to them at the depot ought reasonably to have been foreseen by the company, and whether or not the omission of such precautions constituted negligence of which the shooting of Lipscomb was the proximate result: *Texas etc. Ry. Co. v. Bigham*, 90 Tex. 225, 38 S. W. 162; *Dawson v. St. Louis etc. Co.*, 94 Tex. 424, 59 S. W. 847, 61 S. W. 118. In determining this issue, the knowledge of Moore that the guards were in the station for the purpose for which they were put there would be treated as the knowledge of the railroad company, whether the guards were its servants or not. He represented the company in keeping the ²¹ station, and if a condition of such peril to employés existed there, from any cause, as required him in the exercise of ordinary care for their safety to take measures for their protection, his omission to do so would be the omission of a duty owed by the master to the servants, for which it would be liable.

Many other grounds were urged in the court of civil appeals for the reversal of the judgment of the district court, of which such as may be of importance in another trial will be considered.

One Francis testified as to the authority and duties of railroad station agents, giving them, in general, as they have been above stated, and added: "In the event the local or station agent at such depot should have reasonable grounds for believing the depot of which he was in charge was about to be robbed or burglarized of freight or express matter, if any therein, or was about to be stolen, he should watch the property himself, and if he thought it necessary, he could hire others to care for and protect it." The form of this statement indicates that it is a mere opinion or deduction of the witness from the duties generally incumbent upon agents, and not the statement of a fact which he had observed or knew. As an opinion, it was not admissible. The evidence indicates that the duties and authority of station agents are largely evidenced by usage rather than by express contract or instructions, and the witness, after testifying that he was familiar with these usages, could properly state, as he did, what powers he had known such agents to exercise habitually; but it was not competent for him to de-

duce from what he had seen the possession of further powers of the exercise of which he had not known. The question of authority *vel non* was one of fact to be determined by the jury and not proved by the opinions of witnesses. This will dispose also of the assignments upon the exclusion of answers of Daffan and Smith upon the same subject.

Upon the measure of damages, evidence that deceased was a member of the church and did not use profane language was too remote to be of value in determining the pecuniary loss of plaintiffs.

The court did not err in excluding evidence that plaintiffs had received money upon policies of insurance. This court has heretofore passed upon that question in considering applications for writs of error in the cases of *Railway Co. v. Rasberry* (Tex. Civ. App.), 34 S. W. 794, and *Railway Co. v. Weaver* (Tex. Civ. App.), 41 S. W. 846, and has held that such evidence is not admissible.

The judgment of the court of civil appeals, so far as it reverses the judgment of the district court, is affirmed; judgment is here rendered in favor of Wells-Fargo Express Company; and the cause between the plaintiffs and the other defendant is remanded for further proceedings in accordance with this opinion.

Reversed and rendered in part and remanded in part.

In an Action for the Death of a human being, the plaintiff must bring himself within the statute authorizing such actions: See the monographic note to *Brown v. Electric Ry. Co.*, 70 Am. St. Rep. 675; *Citizens' St. Ry. Co. v. Cooper*, 22 Ind. App. 459, 72 Am. St. Rep. 319, 53 N. E. 1092; *Webster v. Norwegian Min. Co.*, 137 Cal. 399, 92 Am. St. Rep. 181, 70 Pac. 276. The amount recoverable is not affected by the fact that the life of the person killed was insured: See the monographic note to *Louisville etc. Ry. Co. v. Goodykoontz*, 12 Am. St. Rep. 380. Consult, also, *Stahler v. Philadelphia etc. Ry. Co.*, 199 Pa. St. 383, 85 Am. St. Rep. 791, 49 Atl. 273.

Master's Liability for Servant's Act.—The rule as to the extent of the liability of a master for the acts of his servant is, that if the act is done without the authority of the master, and not for the purpose of executing his orders or doing his work, then he is not responsible; but if it is done in the execution of the authority given by the master, and for the purpose of performing what he has directed, then he is responsible, whether the act is negligent or willful: *McCarthy v. Timmons*, 178 Mass. 378, 86 Am. St. Rep. 490, 59 N. E. 1038; *Guille v. Campbell*, 200 Pa. St. 119, 49 Atl. 938, 86 Am. St. Rep. 705, and cases cited in the cross-reference note thereto; monographic note to *Goodloe v. Memphis etc. R. R. Co.*, 54 Am. St. Rep. 85-89. In *Golden v. Newbrand*, 52 Iowa, 59, 35 Am. Rep. 257, 2 N. W. 537, it is held that where an armed watchman, employed by the

owners of a brewery to guard their property and preserve the peace, pursues a person acting on the premises in a drunken and disorderly manner, and, while he is retreating, kills him, the employers are not liable. This decision is placed on the ground that the killing is not done in the line of duty the watchman was employed to perform.

The Relations of Express Companies and their employes to other common carriers are considered in the monographic note to *Pittsburg etc. Ry. Co. v. Mahoney*, 62 Am. St. Rep. 513-525. The duties of such companies as common carriers are considered in the monographic note to *Bullard v. American Express Co.*, 61 Am. St. Rep. 360-385.

TAFFINDER v. MERRELL

[95 Tex. 95, 65 S. W. 177.]

PARTITION—Description in Decree of.—For the purpose of sustaining a decree in probate partitioning real property, it is proper to look to the inventory and the report of the commissioners. If, from all these documents, it appears that the property is two lots in a designated town, which were owned by T. and his wife as community property, the description is sufficient if other evidence shows what lots were so owned. (p. 817.)

GUARDIANS' SALES are not Invalid Because the Petition Therefor does not Show a Statutory Cause of Sale, where the order of sale does not show on its face that it was made for the reasons stated in the application, or that facts not therein set up did not exist which, under the law, authorized the sale. (p. 818.)

GUARDIANS' SALES.—The Fact That a Conveyance was Made by a Guardian for Part of a Lot to a Person Other Than One Named as Purchaser in the report of the sale and the order for its confirmation does not entitle the minors to avoid the sale and conveyance by a collateral attack, if the purchase price for the whole lot was received and accounted for by the guardian. (p. 819.)

GUARDIAN'S SALE.—The Failure of a Guardian in His Report of a Sale of a Lot to State the Purchase Price is an irregularity which does not avoid the sale. (p. 819.)

GUARDIAN'S SALE.—The Entering of the Order of Confirmation Before the Time After the Report was Filed Which the Statute Requires to Elope between the report and the action on it is an error which does not render the order void. (p. 819.)

EVIDENCE—When not Limited by an Agreement.—An agreement that the defendant may use an abstract of title as evidence without producing the record does not preclude him from offering in evidence the record itself, and showing therefrom that the abstract is incorrect. (p. 819.)

M. Logan, G. R. Freeman and C. E. Spalding, for the plaintiffs in error.

J. C. Main, for the defendants in error.

90 WILLIAMS, A. J. This was an action of trespass to try title which, by the pleadings under which the last trial was had, involved a controversy between the plaintiffs in error, who, as heirs of James C. and Martha C. Taffinder, were plaintiffs, and W. M. Merrell, as defendant, over the title to the north half of lot No. 5 in block No. 5, in the town of Hamilton. James C. and Martha Taffinder were husband and wife, and owned the whole of the lot as their community property. James C. Taffinder died, and his widow, Martha C., married A. Bivens and afterward died, leaving children by both marriages, and these, or their representatives, are the plaintiffs. After the death of Martha C., her surviving husband, A. Bivens, administered on her estate and procured in the probate court a partition of the property, which had belonged to her and her first husband, between the children of the two marriages, in which the property in controversy is claimed by the defendant to have been set apart, with other property, to the Bivens children. Thereafter Bivens was appointed guardian of his children, and, as such, sold the land belonging to them, and the defendant claims the property in controversy under that sale. The principal questions raised are: 1. As to the sufficiency of the partition proceedings to vest the title in severalty to lot No. 5 in the Bivens children; and 2. As to the validity of the sale by the guardian.

The objection to the partition is that the decree of the county court gave no description of the property in question sufficient to identify it. Upon this point it appears that James C. Taffinder, when he was the husband of Martha C., received a deed conveying the whole of lot 5, in block 5, in the town of Hamilton. Bivens, as administrator of his deceased wife's estate, filed an inventory "of all the property, both real and personal, belonging to said estate," among which the following appeared: "Two vacant lots in Hamilton, Hamilton County, Nos. of lot and blocks not known, twenty-five dollars."

The application by Bivens and the order appointing commissioners for partition are not found in the record and it is not known how the property was therein described. But a report of commissioners, of date May 22, 1878, is shown, which recites that they were appointed by the county court on the twenty-fifth day of January, 1878, to partition the estate (of Martha C. Bivens) among the heirs and distributees thereof, and states such property, among which appears "two lots in the town of Hamilton valued at forty dollars each," and reports

that they have made the division, setting apart to the Taffinder children named property, and to the Bivens children other property, including these lots.

There also appears an order of the county court, of date May 23, 1878, in the estate of Martha C. Bivens, showing that it is made in a proceeding by Bivens, administrator thereof for a partition between the children of the two marriages of the decedent, reciting that the property was community property of James C. and Martha C. Taffinder, afterward ¹⁰⁰ Mrs. Bivens, stating the shares to which the two sets of children are entitled, and confirming the report of the partition, and adjudging to the Taffinder children certain property and to the Bivens children other property, including "two town lots in the town and county of Hamilton." It was shown by oral testimony that the location and identity of the two lots in Hamilton which had belonged to Taffinder and wife were well known at the time of these proceedings and since, and that they owned no other lots in that town.

The objections to the sale made by Bivens, as guardian of his children, are: 1. That it appears from the record of the probate proceedings that such sale was made for a purpose for which a sale was not authorized by law; 2. That no sale to one Emmett, to whom the guardian made the deed under which defendant claims, was ever confirmed by the court; 3. If there were an attempted confirmation, it was made at a time when the court had no jurisdiction to make it, the time required by law between the filing of the report and action upon it not having elapsed; and 4. The deed from Bivens, guardian, to Emmett gave no sufficient description.

The proceedings for sale were begun by the guardian filing an application therefor, December 4, 1878, in which he asks for authority to sell the property of the minors, describing it, at private sale for cash or on credit, and states that "it would be greatly to the interest of his said wards for said property to be sold, because said property is unimproved and cannot be rented for anything and the taxes will soon consume the entire amount." No reason but this is given for the sale. The court, on January 10, 1879, granted the authority to sell all the real estate at public or private sale for cash or on credit, and, if on credit, the vendor's lien to be retained, the order reciting that it appeared to the satisfaction of the court that "it is for the best interests of the minors that said real estate be sold."

At the January term, 1879, Bivens made a report of sale

of all of the property, stating that he had sold lot No. 5 in block No. 5, in the town of Hamilton, to T. C. Bivens, on credit. On January 14, 1879, the court entered an order confirming in general terms the sale thus reported.

On the fourteenth day of March, 1879, A. Bivens, as guardian of his children, executed a deed to T. C. Bivens for the south half of lot No. 5 in block No. 5 in the town of Hamilton, Hamilton county. On the same day, Bivens, as "guardian of the minor heirs of Martha T. Bivens, deceased," executed a deed to Thomas Emmett for the north half of the same lot, reciting a consideration of thirty dollars. Both Bivens and Emmett testified that the property in controversy (the north half of lot No. 5) was sold by Bivens to Emmett under an order of the county court, and that Emmett paid for it. Emmett took possession soon after his purchase, and conveyed it to the party under whom, through a number of mesne conveyances, Merrell claims, actual possession having been held by various owners. The court of civil ¹⁰¹ appeals found as a fact that the sale to Emmett "was by proper order of court confirmed."

1. We are of the opinion that the description of the two lots in Hamilton in the decree of partition in estate of Mrs. Bivens was sufficient. Under the decisions of this court, it is proper to look not only to the order itself but to the inventory and to the report of the commissioners. By these documents and by the order taken together, the property is referred to, not merely as two lots in the town of Hamilton, but as the two lots in that town owned by Taffinder and wife as community property. All that it was necessary to do in order to identify the property was to ascertain the lots which were thus owned, and the evidence shows that this was easily done. The stated ownership of the lots was in itself a circumstance of description which led to their identification. That this was true is held in *Herman v. Likens*, 90 Tex. 448, 39 S. W. 282, and whatever doubt may have previously existed as to the sufficiency of such descriptions is removed by that decision. There the land was described in the inventory and the proceedings through which it was sold as "half interest in and to eight hundred and ninety-three acres of the P. W. Rose survey in Harris county." The Rose survey was a league and labor, and the particular part of it intended to be sold was not otherwise identified. But this court held that the description meant a tract of eight hundred and ninety-three acres belonging to the

estate, and that the land could be identified by evidence that the estate did own a half interest in such a tract and no other part of the league. Here the lots in Hamilton were necessarily distinct pieces of land, and in this the description was therefore more definite than that given in the case cited.

2. The first objection to the guardian's sale, above stated, is likewise answered by the opinion of this court in the case of *Weems v. Maserson*, 80 Tex. 45, 15 S. W. 590. Under the rules laid down in that case, the jurisdiction of the county court did not depend upon the showing in the application of one of the statutory causes for such sale. The absence of such a showing, or the statement of a reason which would not authorize a sale, might make the order of sale erroneous; but it does not follow that it was not within the power of the court to make such order. In the language of the opinion referred to, the application for the sale "was sufficient to invoke the exercise of the jurisdiction the court possessed over the subject matter; those interested must be conclusively presumed to have had notice of the application such as the law prescribes, and the decrees of the probate court in this collateral proceeding must be deemed conclusive of the fact that the sale was made for a lawful purpose and in a lawful manner in the absence of some evidence in the record showing to the contrary, other than that the application was defective": See, also, *Pelham v. Murray*, 64 Tex. 477. The order of sale does not show on its face that it was made for the reasons stated in the application, or that facts not therein set up did not exist, which, under the law, authorized the sale.

¹⁰² The second objection to the guardian's sale, that none to Emmett was ever confirmed, was one upon which the writ of error was granted, our impression being that while the probate court had confirmed a sale to T. C. Bivens of the whole lot, the defendant claimed under a sale made by the guardian of the whole lot to Emmett upon which the probate court had never acted; and that, as it was not shown that Bivens had ever complied with the terms of sale, it did not appear that the title was divested out of the minors. But upon a more thorough examination of the record, we think the facts stated show, sufficiently to support the findings of the court of civil appeals, that in fact the north half of the lot was sold to Emmett and the south half to Bivens, and that the guardian reported the sale of the whole to Bivens.

The probate court confirmed the sale of the whole lot, and the guardian was thus charged with the price received for it. The fact that the sale was reported as made to Bivens when it was to Bivens and Emmett is immaterial in this collateral proceeding. The minors were entitled, after the consummation of the sale, only to have the full price received and accounted for, the authority of the guardian to convey the whole of the lot being thus complete. The report of the guardian did not state the price for which the lot was sold, but that was an irregularity which does not affect the validity of the sale in this collateral proceeding.

The remedy of those interested in the estate was to require him to account for the price of the property in the probate court and not against the purchasers at a sale authorized and confirmed by the probate court to recover the property. The facts substantially support the finding of the court of civil appeals that the sale made was confirmed, although it was reported as made to Bivens alone.

The fact that the order of confirmation was entered before the expiration of the time after the report was filed which the statute requires to elapse between the report and action on it was merely an error which did not render the order void.

The fourth objection to the guardian's conveyance to Emmett, that it failed to describe the half lot conveyed, is based upon the fact that defendant filed an abstract of his title in which the deed was stated as describing lot 5 in block 5, in the county of Hamilton, but not stating the town in which it was situated, and this abstract was, by agreement, used as evidence. Defendant produced also the record of the deed showing the description to be complete. There was no error in admitting it in evidence, plaintiff having waived the production of the original deed. The defendant was not confined to the use of the abstract as evidence because it had been agreed that he might use it without producing the record.

Affirmed.

Guardian's Sale.—Statutory proceedings by a guardian to divest his ward of his real estate must be pursued strictly: *Leuders v. Thomas*, 35 Fla. 518, 48 Am. St. Rep. 255, 17 South. 633. The authority to sell must be found in the statute: *Myers v. McGavock*, 39 Neb. 843, 42 Am. St. Rep. 627, 58 N. W. 522. To give the court jurisdiction to order a sale of the real estate of a ward, on the application of his guardian, enough must appear, either in the application or in the order, or somewhere upon the face of the record or

proceeding, that the contingency exists, or at least is alleged, which authorizes it to proceed under the statute, and make the order. But when that does appear, the court has properly acquired jurisdiction: *Young v. Lorain*, 11 Ill. 624, 52 Am. Dec. 463; *Fitzgibbon v. Lake*, 29 Ill. 165, 81 Am. Dec. 302. As to whether the fact that a ward receives and enjoys the proceeds of a sale estops him from questioning its validity, see *Bachelor v. Korb*, 58 Neb. 122, 76 Am. St. Rep. 70, 78 N. W. 485.

Guardian's Sale.—*The Description of the property sold, though not definite, if sufficient to identify the property, will not avoid a guardian's sale:* *Myers v. McGavock*, 39 Neb. 843, 42 Am. St. Rep. 627, 58 N. W. 522. A defective description in the petition for an order of sale, and also in the order to show cause, does not affect the jurisdiction of the court nor the validity of the sale, if the property is sufficiently described in the order of sale: *Scarf v. Aldrich*, 97 Cal. 360, 33 Am. St. Rep. 190, 32 Pac. 324.

The Common-law Powers of Guardians are considered in the monographic note to *Schmidt v. Shaver*, 89 Am. St. Rep. 257-316.

THOMPSON v. COBB.

[95 Tex. 140, 65 S. W. 1090.]

TRUSTEES' SALES—Days on Which may be Made.—A trust deed to secure the payment of a debt authorizing the trustees, on default, to make sale within lawful hours, does not refer to the statute prescribing the days on which execution sales may be made. Hence a sale thereunder cannot be held invalid because made on a day not authorized for execution sales. The provision must be construed merely as prohibiting the making of a sale at such an unusual or unreasonable hour of the day as might cause a sacrifice of the property. (p. 822.)

TRUSTEES' SALES—Statutes Respecting are not Retroactive.—A statute prescribing the hours or days on which trustees' sales must be made does not apply to sales under trust deeds executed prior to the enactment. Such a statute cannot be applied to pre-existing deeds without impairing the obligation of the contract. (p. 822.)

TRUST DEEDS—Misdescribing Notes Secured Thereby.—A trustee's sale will not be declared void because the deed under which it was made misdescribed the note in respect to its date, time of payment, and times of payment of interest coupons, where the evidence showed that but one note was executed by the grantor of the trust deed to the beneficiary named therein. It is not necessary in such a case that the trust conveyance be reformed by a decree in equity before the trustee can exercise the power conferred. (p. 823.)

McCormick & Spence, for the plaintiff in error.

Cobb & Avery and Watts & Aldredge, for the defendants in error.

¹⁴⁶ WILLIAMS, A. J. This was an action of trespass to try title brought by plaintiff in error, as executor of the estate of James Thompson, deceased, to recover of defendants in error the land in controversy. Judgment was rendered for the defendants in the district court and affirmed in the court of civil appeals. The plaintiff claimed through a deed of trust executed by W. P. Ellison to F. L. Irvine, trustee, September 20, 1886, to secure a note given by Ellison to James Thompson, and a deed from F. W. Angell, substitute trustee thereunder, to plaintiff, as executor of the will of the beneficiary, executed in pursuance of a sale of the property, made Wednesday, June 1, 1898. The sale was held void by the court below and the judgment for the defendants resulted.

The objections to the trustee's sale are two: 1. That it was made on Wednesday, instead of the first Monday in the month; 2. That no such note as that described in the deed of trust was in existence at the time of sale, and hence there was no power of sale in the trustee.

The first objection is based, firstly, upon the language of the deed of trust requiring the sale to be made within "lawful hours," the contention being that, as there was then in force no statute fixing the hours for sales of real estate, except that requiring sales under execution to be made within certain hours on the first Tuesday in the month, the deed had reference to that provision and only authorized a sale within those hours on that day; and, secondly, upon the statute subsequently passed requiring sales under trust deeds to be made as sales under execution, the proposition here being that as the deed fixed no definite time at which the sale should take place, the legislature had power to prescribe one even after its execution.

The deed authorized the sale to be made "at any time" after default, "within lawful hours," no reference being made to the law regulating execution sales nor to any particular day. The notice to be given and the place where the sale is to take place are carefully stated in the deed, and, if it had been the purpose of the parties to require the ¹⁴⁷ sale to be made on a particular day, they would probably have specified it. If the words "lawful hours" could be held to refer to such time of the day as was prescribed by a statute, not referred to, for sales of a different kind, it would not follow that those hours in a particular day were meant. The sole limitation upon the power to sell at any time is the requirement that it be done within lawful hours; and if this were held to mean the hours

between 10 and 4 prescribed by statute, a further one fixing a certain day could not be added by construction. But we are not prepared to hold that the parties had reference to the statute at all. They were providing by contract for a sale in accordance with a power defined in the deed itself, and expressed no intention that the statute in existence, regulating sales under legal process, should in any way affect the exercise of the power. The language employed means no more than that the sale should be made at an hour when it would be lawful to make such a sale as that provided for. A trustee, in executing such a power, could not, consistently with principles of equity, cause a sacrifice of the property by selling at an unusual and unreasonable hour; and it was against such injuries as this the provision was probably directed.

Nor can it be held that the subsequent statute restricted the power of the trustee and required the sale to be made on the first Tuesday in the month. The effect of the statute upon deeds of trust executed before its enactment was considered in the case of the International Bldg. etc. Assn. v. Hardy, 86 Texas, 610, 40 Am. St. Rep. 870, 26 S. W. 497. The deed there in question required a notice differing from that prescribed by the subsequently enacted statute; and the question was whether or not the statute so applied as to require the notice prescribed by it to be given. It would seem that both the statute and the deed could have been complied with, but it was held in effect that it was not in the power of the legislature to take away the right of the parties created by the contract to have the property sold upon the terms and conditions and in the manner which they had agreed upon.

The gist of that decision is that the parties, by their contract, had acquired the right to have the property sold by complying with the provisions of the deed; that this constituted a part of the obligation of the contract which could not be impaired by subsequent legislation, and that the imposition of additional conditions upon the exercise of the right would be such an impairment. The principles there laid down control this case. By omitting to fix a day upon which the sale should be made, and empowering the trustee to sell at any time, the parties gave him, as their common agent, a discretion to select a day when, in his judgment, the sale could be made to the best advantage of all concerned: *Hess v. Dean*, 66 Tex. 668, 2 S. W. 727. It was their right to have this done in accordance with their contract "at any time" after default. The

statute, if held to take away the power to make it at any other time than on the first Tuesday in the month, would ¹⁴⁸ not only add an additional condition, but would restrict the power defined in the deed and the consequent rights of the parties to it.

The second objection to the trustee's sale is the one which was sustained by the court of civil appeals. It grows out of a misdescription in the deed of trust of the note secured by it. The description of the note therein was that it was No. 16, of even date with the deed, for the principal sum of seven hundred dollars, made by W. P. Ellison, payable to the order of James Thompson, at the First National Bank, Davenport, Iowa, two years after date, with interest at twelve per cent per annum, payable semi-annually on the twentieth days of March and September (according to the terms of four interest coupons thereto annexed), with agreement for maturity of the whole at the option of the holder, upon default in payment of any installment. It was shown that at date of sale Thompson's estate owned no note answering all of the particulars given in the deed, but plaintiff produced a note which corresponded with the deed in every respect, except that it bore date July 19, 1886, instead of September 20, 1886, the date of the deed, and was payable two years from its date, instead of two years from the date of the deed, and the interest coupons were payable on the nineteenth days of January and July instead of the twentieth days of September and March, as stated in the deed. Plaintiff offered to show that this was the only note ever executed by Ellison to Thompson, and was the one intended to be secured, and that the statement in the deed of the date and times of payment of the principal and coupons was due to a mistake of the draftsman. This was excluded, and the deed held insufficient to support the action of the trustee.

The view taken by the district judge and the court of civil appeals was that, until the mistake had been corrected by proper proceeding in equity to reform, the trustee had no power to sell, and the note offered would not support plaintiff's claim of title under the deed of trust. It may be that this would be true had there been in the deed of trust such a total misdescription of the note intended to be secured that it would afford no means of identifying that actually in existence. The cases relied on to support the judgment are *Follett v. Heath*, 15 Wis. 601; *Jewett v. Preston*, 27 Me. 405; *Bramhall v. Flood*, 41 Conn. 68. In the case first cited, the mortgage was

given to secure a note for five hundred and thirty dollars, dated November 16, 1858, payable one year after date. The note relied on to support it was for six hundred and sixty dollars, dated March 15, 1859, and payable thirty days after date. It was held that it could not be shown, in an action involving title to the mortgaged property, that the note produced was the one intended to be secured, for the reason that the evidence was in writing, and gave no description of the note relied on and could not be varied by parol. In the second case, the mortgage recited two notes, one for five hundred dollars, and one for seven hundred dollars, of given dates. The only evidence of the existence ¹⁴⁹ of any notes held by the mortgagee was of three notes, one for eight hundred dollars, one for one thousand dollars, with a credit indorsed of five hundred dollars, and one for seven hundred dollars, none of which corresponded in date with those mentioned in the mortgage. The court decided against the mortgagee on the ground that the mortgage had never been delivered, and then referred to the state of the evidence as a further difficulty in the way of enforcing it. It does not appear that any attempt was made to show that either of the notes actually held by the mortgagee was intended to be secured by the mortgage, and it must be conceded that there would have been difficulty in making the mortgage apply to any two of the three notes. This case did not, therefore, involve the question now before us, and besides, the question there before the court was not definitely decided.

Barrows v. Turner, 50 Me. 127, was a case in which a note, subsequent in date to the mortgage, was produced differing in all particulars from those given in the mortgage, and it was held that such note would not support the mortgage without proof that it was given in renewal of that described.

Bramhall v. Flood, 41 Conn. 68, has no application here. The mortgage in that case was held void as against creditors of the mortgagor, under a rule existing in that state and said to be exceptional, by which such instruments, in order to affect creditors, are required to describe the debt secured with accuracy and certainty. The effect of the mortgage as between the parties was not considered, nor do the facts bear such resemblance to those of this case as to make the decision of any value in determining the question before us.

It may be conceded that the Wisconsin case and the second case from Maine were correctly decided. The notes produced differed from those described in the mortgage in all of the par-

particulars given in the latter instruments to identify the debt secured. There were, therefore, in the mortgages no circumstances specified by which the notes produced could be identified as the ones secured, after rejecting the particulars in which the mortgage differed from the notes held by the mortgagee. This distinction is sharply drawn in the subsequent case of *Paine v. Benton* 32 Wis. 495, where the mortgage described a note by many particulars, among which were the statements that it was executed "on or about" the eighth day of August, 1867, and payable on or before one year from date. The note produced bore date August 6, 1867, and was payable on or before the first day of September, 1868, about twenty-five days more than a year from its date. In all other respects it corresponded with the note described in the mortgage. Chief Justice Dixon said: "The rule in *Follett v. Heath*, 15 Wis. 601, is not to be extended beyond the facts in the case then before the court. The facts there were that the mortgage gave a totally false description of the note intended to be secured or which was so claimed." After arguing that what were claimed in the case before him to be misdescriptions were really not such, he proceeds: "Nor is it indispensable that all the facts stated or particulars of description given ¹⁵⁰ should precisely correspond with the instrument for the security of which the mortgage is executed. The maxim, '*Falsa demonstratio non nocet*,' applies; and if to a description already adequate and sufficient to point out with convenient certainty the note intended to be secured, there be added that which is inapt and erroneous, the latter will not vitiate the former." With reference to the admissibility of parol evidence to identify the debt, the same opinion says: "The case of *Follett v. Heath*, 15 Wis. 601, only holds that such proof is inadmissible in an action at law, when the note produced is totally variant from that described in the mortgage. It is well settled, where the note agrees in some respects with that described in the mortgage though it differs in others, that it may be proved by parol to be the note intended to be described in the mortgage." That this is the true rule, when the mortgage correctly gives sufficient particulars to enable the court by the application of them to identify the instrument produced, after rejecting the false particulars, is recognized without conflict in a great number of authorities in which almost every variety of mistake in description is found: *Sweetser v. Lowell*, 33 Me. 446; *Bourne v. Littlefield*, 29 Me. 302; *Williams v. Hilton*, 35 Me. 554, 58 Am. Dec. 729; Part-

ridge v. Swazey, 46 Me. 414; Johns v. Church, 12 Pick. 557, 23 Am. Dec. 651; Hall v. Tufts, 18 Pick. 455; Pierce v. Parker, 4 Met. 80; Jackson v. Bowen, 7 Cow. 13; Boody v. Davis, 20 N. H. 140, 51 Am. Dec. 210; McKinster v. Babcock, 26 N. Y. 378; Hurd v. Robinson, 11 Ohio St. 232.

The principle is clearly applicable here. Many circumstances are given in the mortgage by which the note secured may be known. The number itself removes all doubt as to its identity when it is ascertained that there was but one note; and all the other numerous particulars agree with the note produced except the date and times of payment, the errors in which flowed naturally from the erroneous recital that the note was of even date with the mortgage. These errors are to be rejected and the note identified by the remainder of the description, there being enough for the purpose; and parol evidence is admissible, if indeed it be necessary, for the purpose of identification.

It is urged that, while the rule may be as stated in proceedings in court to foreclose a mortgage, it cannot be applied in a case like the present, in which the plaintiff in trespass to try title relies on a sale, under the mortgage containing the misdescription, made by a trustee out of court; that, while a court, upon proof of the facts, might enforce the mortgage, the trustee would have no power to enforce it without a previous reformation. The authorities, in effect, answer this contention. Many of them were actions at law of trover or replevin, in which the mortgagee had taken possession of the property upon breach of the condition of the mortgage and set it up in support of his title; and the question thus came up without any effort to procure either a reformation or a foreclosure in court. If the mortgagee, under a mortgage containing an erroneous description of the debt, may thus assert his right without reformation, it is difficult to see why a trustee, ¹⁵¹ acting as the agent chosen by both parties, may not enforce it in the manner prescribed in it. His power comes from the deed of trust, properly construed with the aid of facts legally admissible in explanation of it. When the deed, considered with these facts, is found to secure a particular note, by the same process the power to sell is established, because it is given to enforce the payment of such note. The power to sell existing and being duly followed, the sale could not be void. If such uncertainty as to the existence of a debt secured by such a deed should arise as to create doubts in the minds of intending purchasers and embarrass the sale and threaten a sacrifice of the property, relief

might be found in equity against such a consequence, where the mortgagor could not otherwise protect himself. Such complications would not necessarily arise, but could ordinarily be easily avoided; and hence the danger of their occurrence could furnish no reason for holding a sale absolutely void. No one but the debtor or those succeeding to his rights would have cause to complain of any such injurious result that might flow from a sale; and therefore they alone should be heard to complain by application to stay or set it aside; whereas if the sale were held void, the consequence would be that trespassers and other third parties could defeat it in any proceeding in which it might come up.

Our conclusion is that the court erred in excluding the evidence offered. It is contended in argument that by lapse of time after default in payment and before the sale, the claim had become stale and the power to sell had ceased, and we are urged to so hold. The question has not been tried in the court below, and is not properly up for decision now.

Reversed and remanded.

Sales and Conveyances by trustees are considered in the monographic note to *Tyler v. Herring*, 19 Am. St. Rep. 266-267. And sales under powers in mortgages and trust deeds are discussed in the recent extended note to *Houston v. National etc. Loan Assn.*, 92 Am. St. Rep. 573-598.

LORD v. NEW YORK LIFE INSURANCE COMPANY.

[95 Tex. 216, 66 S. W. 290.]

EVIDENCE.—The Declarations of the Owner of a Life Insurance Policy are admissible to prove a gift thereof. (p. 831.)

GIFT OF LIFE INSURANCE POLICY.—What Sufficient to Establish.—The declaration of the holder of a policy of insurance on his own life that it was his sister's justifies the jury in inferring a gift from him to her, and the delivery of the property given. (p. 831.)

M. H. Royston and Kleberg & Neethe, for the appellant.

Pruitt & Smith and R. W. Flournoy, for the appellee.

218 BROWN, A. J. "In the above-entitled cause, on appeal from the district court of Galveston county for the tenth judicial district to the court of civil appeals for the first supreme

judicial district, judgment was rendered on the seventh day of November, 1901, affirming the judgment of the court below. From said judgment Associate Justice Pleasants dissented, and upon the motion of the appellant, the point is certified to the supreme court for decision.

"The controversy was as to the ownership of the proceeds of a policy ²¹⁹ of insurance for ten thousand dollars upon the life of Richard Lord, deceased, issued by the New York Life Insurance Company. Upon its face the policy is payable to the executors, administrators, or assigns of the insured.

"Richard Lord died September 8, 1900, leaving a will in which he devised all his property of whatever character to his wife, Margaret G. Lord. Kate Lord, a sister of the deceased, claimed the policy of insurance as a gift from her brother, and brought this suit against the insurance company and Margaret G. Lord to require the proceeds to be paid to her. The insurance company admits liability upon the policy for the sum of fourteen thousand four hundred and twenty-eight dollars, and offers to pay the money to whichever of the parties the court shall adjudge entitled to it. A trial by jury in the court below resulted in a judgment in favor of the plaintiff, Kate Lord, against the insurance company for the amount above stated. From that judgment Margaret G. Lord has appealed.

"Richard Lord and the defendant, Margaret G. Lord, were married June 29, 1899. He was about forty-three years of age at the time of his marriage, and his sister, the plaintiff, was then about twenty-seven years of age. When Kate Lord was about twelve or thirteen years old her mother died. Not long after the death of her mother their father went to South America, where he died within a short time. After the death of her mother and until his death, Kate Lord was supported entirely by her brother, Richard Lord. She had no property except an interest in some shares of mining stock inherited from her father, and it yielded no income. The relations between the brother and sister were of the most affectionate nature, and he provided liberally for her support and education. After she left school she lived with him until his marriage, and until his death had permission to draw against his bank account. At his death, Richard Lord left but little property except some policies of life insurance. These policies were all contained in a box which was locked and left by him in the custody of Adoue & Lobit, bankers, in Galveston, in whose possession it was at the time of his death. Among the policies were two pay-

able to the wife, amounting to twenty thousand dollars; an accident policy for five thousand dollars, payable in case of death, to Kate Lord, and three policies payable to the estate of the deceased, one of which was the one in controversy. All of them were issued after the marriage of Richard Lord and the defendant, Margaret G. Lord, except the one claimed in this suit by the plaintiff, Kate Lord. It bears date October 31, 1894, and was the only insurance Lord ever had upon his life prior to his marriage. The policy is set out at page 62 of the transcript, and either party, if it is deemed necessary, may file with this certificate a copy thereof. It is on the twenty years accumulation plan, and, among other benefits at the option of the insured, it had a cash surrender value at the end of the period and entitled the insured to procure loans during the period.

"The plaintiff introduced several witnesses as to declarations made by Richard Lord in his lifetime to show that he had given her the policy in suit. Emma J. McLellan testified that some time in 1894, before the issuance of the policy, Richard Lord told her that he would leave his ²²⁰ sister provided for with life insurance; and in 1896 he said that he had taken out this policy for her; that he was not a man to save money, and that he had left her provided for in life insurance. Charles Vidor, an insurance agent, testified that he was well acquainted and intimate with Lord; that five or six years ago he had asked Lord why he did not take out a life policy, and that Lord replied that he had a policy for ten thousand dollars, and that was all he wanted, as he only had his sister to care for; that the policy was for the benefit of his sister, and that he did not care to have any more. Louis Wortham, also an insurance agent, had a conversation with Lord in 1899, prior to his marriage, and also in 1896 or 1897, with reference to insurance. They were friends and their relations were intimate. The witness said that Lord told him that he had a policy in the New York Life for the benefit of his sister, of whom he spoke as 'Kitty'; that the policy was here. A. A. Green, Jr., testified that he was a life insurance manager and knew Richard Lord in his lifetime quite well; that in August, 1898, he had solicited him for insurance. That he said that he had one policy for ten thousand dollars in the New York Life Insurance Company; that that policy was his sister Kitty's, and that he would like to have ten thousand dollars additional insurance if he could stand the examination. Witness wrote his application,

but the company applied to declined to issue the policy. This witness also testified: 'When I came to ask him to whom he wanted this policy payable, he said: "This policy in the New York Life is Katie's. . . . You know I am educating a girl. . . . Just make that payable to myself and I will arrange for that."' James Irwin, also an insurance agent, testified that Lord applied to him for insurance in December, 1899, about six months after his marriage; that the witness asked him if he had any insurance, and he answered 'Yes,' he had some for his sister 'Katie.' Witness suggested that he ought to take out some insurance for his wife, and he said: 'If I thought you could get me through I would.' Witness submitted Lord's name to the company represented by him, and it wrote the twenty thousand dollars for the benefit of his wife. Neil P. Anderson testified that he resided in Fort Worth, and was a general agent for McFadden Brothers in the cotton business; that Richard Lord had been in the employ of the firm from about 1891 or 1892 until his death; and that he had known him since 1887 or 1888. They were in business touch with each other every year, but Lord's office would be changed from year to year. The witness said: 'I think it was in 1894, the latter part of that year, . . . Mr. Lord gave me some valuable papers in a sealed envelope to be cared for for him, asking me if I could take care of them in my safe. I told him yes, I would put them in my private till. When he handed them to me he says: 'In this is a policy for my sister Kate.' Witness kept the papers for about a year, when Lord called for them, and he delivered them to him. The attention of the witness was not directed to any other paper in the package, and the matter was never mentioned again. It appeared from the evidence that Lord was a man of good business qualifications and understood the effect of the language ²²¹ of the policy and knew what would be necessary to make it payable to his sister.

"In affirming the judgment of the court below, this court sustained the verdict of the jury and held that there was sufficient legal evidence to support the finding of the jury that Richard Lord gave the policy of insurance to his sister, and that actual delivery thereof might be implied from the evidence. Associate Justice Pleasants dissented from the conclusion of the majority upon the ground that the evidence was insufficient in law to sustain the finding of the jury that the policy was given by Richard Lord to the appellee. The question is there-

fore certified to the supreme court for decision, whether or not there was any evidence legally sufficient to support the verdict of the jury that Richard Lord had given the policy to his sister, Kate Lord."

In order to sustain the judgment of the trial court and the majority of the court of civil appeals, the evidence must be sufficient to justify the finding that Richard Lord gave the policy of insurance in controversy in this suit to his sister Kate and delivered it to her in such manner as to pass the title thereto so that he had no control over the title thereafter. Whether or not there was such a delivery was a question of fact to be tried by the jury, and was capable of proof in the same manner and by the same character of evidence as would establish the gift itself, or any other issuable fact in the case. The declarations of Richard Lord introduced in evidence were competent to prove both the gift and the delivery: Thornton on Gifts, sec. 230; Hansell v. Bryan, 19 Ga. 167; Sprouse v. Littlejohn, 22 S. C. 358. The appellant cites as authority to the contrary of this proposition the case of Chambers v. McCreery, 106 Fed. 368. That case holds squarely that the delivery of a gift cannot be proved by the declarations of the donor, but no authority is cited in support of that proposition, and we have found none agreeing with it. We see no reason why the fact of delivery could not be as well proved by a declaration as the fact of gift itself, or any other fact about which a party had made a declaration against his own interest.

The declarations made by Richard Lord being admissible and admitted in evidence, the question arises, What probative force are they entitled to? To Louis Wortham, insurance agent, Lord stated the policy in this suit "is hers," meaning Miss Kate Lord; and speaking to Mr. Green of this policy, said: "It is Kate's." These statements were equivalent to saying the policy was the property of his sister Kate, from which the jury might infer that Richard Lord had given it to his sister, and that he had actually delivered it into her possession, or done that which was equivalent to such act of delivery and every other act necessary to transfer it to her. It could not be true that it belonged to his sister Kate, or, in the language used, that it was hers, or Kate's, as stated by one witness, unless Lord had given it to her and had actually delivered it, because the right of property could not have passed without such act of delivery: 2 Taylor on Evidence, sec. 800; 1 Greenleaf on Evidence, 16th ed., secs. 222 561-563; Hancock v. Tram Lumber

Co., 65 Tex. 225; *Stephens v. Masterson*, 90 Tex. 417, 29 S. W. 292, 921; *Howard v. Perry*, 7 Tex. 259; *Hunt v. Hunt*, 119 Mass. 474; *Kelly v. Maness*, 123 N. C. 236, 31 S. E. 490; *Sprouse v. Littlejohn*, 22 S. C. 358; *Hansell v. Bryan*, 19 Ga. 167.

In *Howard v. Perry*, 7 Tex. 259, it was necessary for the plaintiff to prove that the certificate by which the land was located had been presented to the land board and approved, or suit filed and judgment of approval entered, and the court said: "It appears that the plaintiffs admitted on the trial that it was a good certificate. By this it must have been intended that it was a certificate which had been duly recommended; for otherwise it could not have been said to be a 'good' certificate. No other sensible meaning can be attached to the word 'good,' as here employed than that it was used to denote a certificate which was good in law in contradistinction to such as are deemed fraudulent and void." The supreme court of South Carolina, in passing upon a similar question, said: "It is true that delivery must be proved, but this is a question of fact for the jury, and inasmuch as there can be no complete and legal gift without delivery, the very use of the term 'gift,' or 'I have given,' may sometimes be intended to include the delivery, and where, therefore, such declarations have been used by the donor and they are admitted by the court as competent, we think it ought to be left to the jury to say whether the gift has been proved, including the delivery, and it ought not to be laid down as a rule of law to govern the jury, that such declarations in themselves are insufficient to prove the gift": *Sprouse v. Littlejohn*, 22 S. C. 358.

In the case of *Chevallier v. Wilson*, 1 Tex. 161, the supreme court held that the declaration of the donor that she had given the property in question to the donee was not sufficient to sustain the judgment, but in that case the court was acting with power to review the facts as well as the law, and the question now presented was not before that court. The following language shows that the supreme court decided the case on the preponderance of the evidence: "We have heretofore considered the claim of the petitioners on the acknowledgment of Mrs. Wadlington that she had given the property to her daughter, and have seen the effect of such acknowledgment counteracted by all the facts of the case. This, however, was but the evidence of one of the witnesses, and the question must be decided, not on his, but on the testimony of the others, which

goes only to the extent that the mother intended the slave for her daughter, at her [the mother's] death." It has been frequently said by judges on delivering opinions upon questions of parol gifts that the evidence must be clear and satisfactory, and it has not been infrequently the case that they have refused to sustain judgments based upon evidence as strong as that presented in this case; but those decisions are made upon the weight of all the evidence and are the results of the influence the testimony had upon the mind of the court. They are therefore not authority in the determination of the question submitted.

The rule by which this court must be governed is, "if the testimony ²²³ is of such a character that there is no room for ordinary minds to differ as to the conclusions to be drawn from it," that there was no evidence of delivery, the question must be answered in the negative. The converse of that proposition is just as true—if upon the evidence in the record ordinary minds might differ as to the conclusion to be drawn upon the issue of delivery, the answer must be in the affirmative. We are of opinion that the evidence in this case is not of the character which would have justified the district judge in taking the question from the jury—in other words, the evidence was sufficient to raise an issue of fact whether there had been an actual delivery of the policy or not.

We answer that the facts present sufficient evidence as a matter of law to support the finding of the jury that Richard Lord did give the policy to his sister, Kate Lord.

Opinion of majority sustained.

A Gift may be Proved by the declarations of the donor: Reid v. Colcock, 1 Nott & McC. 592, 9 Am. Dec. 729; Blake v. Jones, 1 Bail. Eq. 141, 21 Am. Dec. 530; Alger v. North End Sav. Bank, 146 Mass. 418, 4 Am. St. Rep. 331, 15 N. E. 916; First Nat. Bank v. Holland, 99 Va. 495, 86 Am. St. Rep. 898, 39 S. E. 126.

The Assignment of Life Insurance policies is considered in the monographic note to Chamberlain v. Butler, 87 Am. St. Rep. 484-519.

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MISSOURI, KANSAS AND TEXAS RY. CO. v. WOOD.

[95 Tex. 223, 66 S. W. 449.]

INFECTIOUS DISEASE—Right of Action in Favor of Person Contracting.—When the duty to prevent the spread of a contagious disease rests upon a corporation or private person, an obligation arises in favor of each member of the community and a right of action accrues in favor of him who suffers from its breach. (p. 838.)

RAILWAY CORPORATIONS Maintaining Hospitals—Liability of for the Escape of Persons Suffering from Contagious Diseases.—If a railway corporation maintaining a hospital for its employes suffers one of them, while delirious from smallpox, to escape from the detention camp and thereby to communicate the disease to another, the latter may recover of the corporation for the damages thus inflicted on him, if it or any of its employes was guilty of negligence to which such escape was due. (p. 839.)

NEGLIGENCE in Permitting the Escape of Smallpox Patients—What is.—The diligence required of a railway corporation maintaining a hospital or detention camp in which one of its employes was confined while suffering from smallpox depends on the character of the disease and the danger of communicating it to others. It assumes the duty of using ordinary care to prevent him from exposing himself in delirium or being exposed otherwise so as to communicate the disease to others. (pp. 839, 840.)

T. S. Miller, W. C. Jones, Craddock & Looney and Head & Dillard, for the appellant.

Evans & Elder, for the appellees.

²²⁹ **BROWN, A. J.** The court of civil appeals for the fifth district has certified to this court the following statement and questions:

“The appellant, the Missouri, Kansas and Texas Railway Company of Texas, enters into agreements with its employes, in consideration of deducting a stipulated sum from their wages each month, that in case any one of them should become sick or injured while in its service, it would furnish them surgical and medical attention. Appellant entered into a contract with Alonzo Dickson, an employé, whereby it was agreed, in consideration of deducting twenty-five cents from his wages each month, that if he should become injured or sick it would take charge of him and treat him for such injury or sickness. On August 1, 1899, and for many years prior thereto, the appellant was operating and controlling a hospital department for the purpose of treating its sick and injured employes. The Missouri, Kansas and Texas Railway Company of Texas, and ²³⁰

the Missouri, Kansas and Texas Railway Company constitute what is known as the Missouri, Kansas and Texas Railway System. Said companies operate, in connection with and as a part of the claim and legal departments, their hospital department, under one general management, for the mutual benefit and interest of the companies and their respective employes.

"The Kansas company owns a hospital at Sedalia, Missouri, that is used by the two companies, where some of the employes of appellant are sent for treatment when sick or injured.

"During the latter part of July, 1899, Alonzo Dickson, who was then in the employment of appellant as a section-hand, and had been in such employment for four years in Hunt county, received a slight injury in such service and was sent to the Sedalia hospital, arriving there on August 1, 1899. At the time he was placed in the hospital he was placed in a ward with some colored patients, who were broken out with smallpox—smallpox having existed in the hospital from the tenth day of July previous. He complained to the surgeon in charge and told him that those negroes had smallpox, and that he desired to leave the hospital. He was told by the surgeon that it was only chickenpox, but to come around the next morning and he would give him a pass back to Greenville. On the next morning, August 2, 1899, he was discharged from the hospital, sent back to Hunt county, and placed at work for appellant under James Ewing, section foreman.

"George McNeil was the house surgeon of said hospital. It was his duty to examine, admit, treat, and discharge patients sent to the hospital, and to keep a register showing the names and address and the dates of admission and discharge of all patients sent to the hospital for treatment. This surgeon was inexperienced in the treatment of smallpox, never having treated a case prior to this time, there never having been a case of smallpox in the hospital since he had been in charge, he being put in charge in 1890, the same year he graduated from college. It was not determined that there was smallpox in the hospital until August 2, 1899, the day that Dickson was discharged from and after he left the hospital.

"On that day the city of Sedalia quarantined the hospital on account of the prevalence of smallpox in the hospital, and it remained under quarantine until September 11, 1899. Prior to the second day of August, appellant did not know that smallpox existed in the hospital, but learned it on that day and that

Dickson had been exposed thereto and was liable to break out with the disease in about fifteen days. No precautions were taken to protect him, or the public against him, until the nineteenth day of August, when he broke out with the disease. On August 3, 1899, the division superintendent of appellant, A. D. Bethard, at Denison, Texas, sent to A. W. Baxley, at Greenville, Texas, the roadmaster of the Mineola division of appellant's lines, the following telegram: During quarantine at Sedalia hospital, local surgeons will look after ²³¹ sick or injured employes except those who desire to go to hospital, who may be sent to Dallas, Fort Worth, or Houston infirmary.'

"When Dickson broke out with smallpox and this fact was made known to the company's local surgeon, Dr. Garnett, he wired to Dr. Yancey, the chief surgeon, to know what to do with him and the chief surgeon wired him: 'Isolate and quarantine him, secure a nurse at reasonable wages and give him such attention there as he will need. Write me particulars and daily expenses. Attend to vaccination and watch anyone who may have been exposed by him.'

"When R. M. Chapman, who was then the mayor of Greenville, learned that Dickson had smallpox, and before he learned that he was an employe of appellant and had been exposed to the disease at its hospital, he purchased a tent and arranged with the owner of some lands preparatory to taking charge of Dickson. This was Sunday afternoon, August 20, 1899. But before taking charge of Dickson, Dr. Garnett showed Chapman his instructions from Yancey, at which time Dr. Garnett, acting under the said instructions of Dr. Yancey, took charge of Dickson and undertook to isolate and quarantine him. He placed him in the tent and on the land that had already been secured and designated by Chapman as a quarantine camp, and Chapman took no further steps until after Dickson had escaped, which was on Tuesday morning, August 22d. On that afternoon, the mayor, acting on the understanding that the railway company would defray the expenses, hired one additional guard for the pest camp and established a detention camp near the pest camp and confined in it all who had been exposed to Dickson. Dr. Garnett having taken charge of Dickson, undertook to isolate and quarantine him on behalf of the railroad company, neglected to employ a sufficient number of attendants or guards to restrain him, but negligently employed an incompetent Mexican and placed him in charge of Dickson to guard and nurse him for the first two days. At the time

the Mexican was put in charge of Dickson, he (Dickson) was delirious with fever, and it was known that persons thus suffering would likely escape. While Dickson was in a delirious condition, the Mexican went to sleep and negligently permitted him to escape from the camp and to wander upon the premises of appellees and communicate to them and their child the disease, inflicting the injuries complained of by appellees. Appellants exercised due care in the selection of their surgeons and physicians.

"Questions: Under the foregoing facts, did the negligence of appellant's local surgeon in employing an incompetent nurse or attendant for Dickson, and the negligence of said attendant in permitting said Dickson to escape while delirious, render appellant liable for the damages sustained by appellee by reason of the smallpox being communicated to him and his family by said Dickson? 2. Is the appellant liable for the damages sustained by appellee by reason of having exposed Dickson to the smallpox at the hospital at Sedalia and afterward assuming care of him, in failing to isolate and ²²² have him properly guarded to prevent his escape and communicating the disease to appellee and family?"

The contract between appellant and Dickson and the acts of the railroad company in sending him to the hospital at Sedalia, where he became infected with smallpox, were pertinent to the issues in this case only to the extent they tend to show that Dr. Garnett, in taking charge of the sick man and undertaking to care for him, acted as appellant's agent and within the scope of his authority. The court of civil appeals having found that Dr. Garnett was authorized by the appellant to take charge of Dickson, it will be unnecessary for us to notice the relative rights and liabilities of the railroad company and Dickson.

Counsel for appellant claim that the quarantine of Dickson was a public duty which the city of Greenville might have taken in hand without liability for the acts of its officers, from which the conclusion is drawn that for performing the same acts the railroad company is entitled to the same immunity. *White v. City of San Antonio*, 94 Tex. 313, 60 S. W. 426, is cited to support the proposition. It is sufficient to say that the appellant occupied a very different position to that of the city of San Antonio, for the latter was engaged in the enforcement of a law of the state discharging a duty enjoined upon it by the statute, while the appellant voluntarily undertook to do what

the city might have done, being neither authorized nor required by law to do so. It did not represent the state of Texas and was not entitled to the immunity from liability which is accorded to the state.

Counsel urge the proposition that the railroad company owed no duty to the appellee; therefore, there was no liability for Dickson's escape. *House v. Houston Waterworks Co.*, 88 Tex. 233, 31 S. W. 179, is relied upon to sustain that position, but the cases are so dissimilar that the principles announced in that case are not applicable in this. In *House v. Houston Waterworks Co.* the two classes of cases are distinguished upon authorities cited and discussed. Nonliability for a failure to perform a duty due to the public as such is there commented upon and contrasted with the class of duties which are intended to benefit the individuals composing the public. This case belongs to the latter class, because whatever affects the health of the community necessarily affects the individual members thereof; and when the duty to prevent the spread of a contagious disease rests upon a private corporation or person, an obligation arises in favor of each member of the community, and a right of action exists in favor of him who suffers from its breach.

But counsel for the railroad company earnestly insist that it is not liable for the act of Dickson in going away from the camp, although he was at the time delirious to the extent of being incapable of self-control. In *Tunbridge Wells Local Board v. Bisshopp*, L. R. 2 C. P. Div. 192, *Duncan, J.*, stated and answered the question thus: "Can a man be said to 'expose' or to 'be in charge of' one who is of full age and a free agent? A man weakened by disease may fairly be said to be 'exposed' by the person who is attending upon him. The statute cannot be limited ²³³ to legal control or it will become a dead letter." That case proceeded before the court upon the ground that the defendant had exposed one infected with a contagious disease by going with him through the streets and in public places, but the defendant was acquitted because he had used proper care in doing so. The case answers the objection made that the escape of Dickson and his going upon the premises of the appellee could not be charged to the railroad company.

Whenever the duty of restraining another arises and the power of control over him exists, liability will follow upon a failure to perform the duty. In *Metropolitan Asylum Dist. v. Hill*, 6 App. Cas. 204, Lord Blackburn said: "When the

disease is infectious, there is a legal obligation on the sick person and on those who have the custody of him not to do anything that can be avoided which shall tend to spread the infection; and if either do so, as by bringing the infected person into a public thoroughfare, it is an indictable offense, though it will be a defense to an indictment if it can be shown that there was a sufficient cause to excuse what is *prima facie* wrong." The same principle obtains in reference to animals of known vicious character which the owner is required to restrain to prevent them from inflicting injury upon others; and the owners of animals known to be infected with contagious diseases must control them in such manner as to prevent them from communicating the disease to the animals of other persons: *Clarendon Land etc. Co. v. McClelland*, 89 Tex. 490, 59 Am. St. Rep. 70, 34 S. W. 98, 35 S. W. 474. If the railroad company had undertaken to keep a horse known to be affected with a contagious disease at the same place and by the same means, and the horse had been permitted, through the negligence of the attendant, to escape and had communicated the disease to a horse the property of the appellee, there would be no doubt of the liability of the railroad company for the damages. If there be a sound reason for denying to Wood as great security for his wife and children against the diseased man as would have been accorded to him in favor of his beasts against a diseased horse, it has not been suggested by counsel for the appellant, and we are unable to discover any tenable basis for the distinction.

The quantum of diligence which was required of the appellant depended upon the character of the disease and the danger of communicating it to others. "If the business be hazardous to the lives of others, the care to be used must be of a nature more exacting than required where no such hazard exists; the greater the hazard the more complete must be the exercise of care": *Galveston etc. Ry. Co. v. Hewitt*, 67 Tex. 478, 60 Am. Rep. 32, 3 S. W. 705. Smallpox is commonly known to be a highly contagious disease and very dangerous to human life, and isolation of the infected person is generally recognized as necessary to afford protection to the community in which he may be found. The court of civil appeals found as a fact that it is a characteristic of smallpox, known to appellant's agent, that the patient is liable to become delirious to the degree of irresponsibility and to wander from the place of confinement, being thereby liable to come into contact with

persons in the neighborhood. The object of placing Dickson in the ²⁸⁴ tent and supplying a nurse and guard for him was not alone to care for and to provide for him, but also to protect the public against infection by contact, and when the railroad company undertook to treat Dickson for the disease and to care for him at the place designated by the mayor of Greenville, it assumed the duty of using ordinary care to prevent Dickson from exposing himself in delirium, or from being exposed otherwise so as to communicate the disease to other persons, and having failed, through the negligence of its employes, to use such care, and by reason of its negligence Dickson having escaped and communicated the disease to the appellee's family, the railroad company was liable for the damage caused thereby: *Rex v. Vantandillo*, 4 Maule & S. 75; *Rex v. Burnett*, 4 Maule & S. 273; *Haag v. Board of Commissioners*, 60 Ind. 511, 28 Am. Rep. 654; *Smith v. Baker*, 20 Fed. 709; *Metropolitan Asylum Dist. v. Hill*, 6 App. Cas. 204.

To both questions, we answer that under the facts stated the railroad company was liable to the appellee Wood for the damages caused to him by reason of the smallpox being communicated to him and his family by Dickson through the negligence of the agent of the railroad company.

LIABILITY OF PERSONS COMMUNICATING CONTAGIOUS OR INFECTIOUS DISEASES TO OTHERS.*

I. Civil Liability.

a. Grounds of.

1. Negligence.

A. General Rule.

B. Necessity of Scienter.

C. Contributory Negligence and Assumption of Risk.

2. Breach of Contract or Fraud.

b. Instances.

1. In General.

2. Physicians.

3. Master and Servant.

A. Liability of Master to Servant.

B. Liability of Master to Third Persons.

4. Landlord and Tenant.

5. Sale of Diseased Animals.

6. Public Officers.

7. Municipal Corporations.

***REFERENCES TO MONOGRAPHIC NOTES.**

Quarantine and health laws and regulations: 47 Am. St. Rep. 533-552. Liability for spreading contagion, 549-552.

Powers which may be delegated to boards of health: 30 Am. St. Rep. 212-234. Power to make quarantine regulations, etc., 227-234.

What health regulations of interstate commerce are constitutional: 37 Am. St. Rep. 565, 567.

Power of municipalities and other public bodies in case of contagion to establish pesthouses and enforce quarantine regulations, and to compel those sick with contagious diseases to remove to pesthouses or to isolate themselves: 32 Am. Dec. 76-80.

- A. For Nuisances.
- B. For Negligence of Public Officers.
- 8. Public Policy as Affecting Recovery.
 - A. Communication of Venereal Diseases in Illicit Intercourse.
 - B. Contracts the Enforcement of Which Would Expose Persons to Contagion.

II. Criminal Liability.

- a. Exposing Public to Contagious Disease.
- b. Communication of Venereal Disease.

I. Civil Liability.

a. Grounds of.

1. Negligence.

A. General Rule.—The liability of a person who exposes another to a contagious or infectious disease rests ordinarily upon negligence. It is but a particular application of the very general proposition that all are under "to observe under varying circumstances an appropriate measure of prudence to avoid causing harm to one another." The general principle is well established that "one who negligently—that is, through want of ordinary care—exposes another to an infectious or contagious disease, which such other thereby contracts is liable in damages therefor, in the absence of contributory negligence or assumption of risks": *Kliegel v. Aitken*, 94 Wis. 432, 59 Am. St. Rep. 901, 69 N. W. 67.

What amounts to ordinary care in any case is a question of fact, and dependent upon all the circumstances of that case. The nature and malignity of the disease, the probability of others exposed to it contracting it, the facilities present for preventing its spread, and innumerable other facts are all to be considered in determining whether in any case due care has been exercised: *Missouri etc. Ry. Co. v. Wood* (principal case), 95 Tex. 223, ante, p. 834, 66 S. W. 449. Beyond the statement that the case demanded is that which a reasonably prudent and careful man would exercise under the circumstances, no general rule as to what constitutes actionable negligence can be laid down. We shall hereafter consider the various instances in which such negligence has been held to exist.

B. Necessity of Scienter.—In many of the cases in which liability is sought to be fastened upon one for negligently exposing another to a contagious or infectious disease it is said that in order to show negligence it must be proved that the defendant knew of the presence of the contagious disease. Thus in *Long v. Chicago etc. R. R. Co.*, 48 Kan. 28, 30 Am. St. Rep. 271, 28 Pac. 977, where the defendant was sued for damages incurred by plaintiff from smallpox contracted by him from the defendant's ticket agent while the latter was selling tickets, the court cited the cases in which scienter was held essential to fasten a liability on a landlord for letting infected premises, and said: "In this case it is not charged that the railroad company knew that its agent at Anness was afflicted with

any disease, contagious or otherwise. We do not think that a master or a railroad company is liable in damage to a third person because such person has contracted a contagious or infectious disease from an agent when the master or company has no knowledge that the agent is afflicted. Proof of scienter is necessary."

The cases cited by the court as holding that knowledge by the lessor of real property that the premises leased were infected is necessary to charge him with liability were all cases in which the lessor was found to have actual knowledge, and the question whether it was necessary was therefore not involved: See post, 1, b, 4. Whatever the general rule, however, it is undoubtedly true that the relations of the parties may impose liability on a person for exposing another to a contagious disease even though the person so liable had no actual knowledge of the presence of the disease. Where, for instance, a master is bound to furnish a safe place for a servant to work, he cannot shield himself from liability by proof that he did not know the place was infected, where he failed to employ reasonable care to determine its safety and healthfulness. In such a case he is liable if he knew, or in the exercise of reasonable care ought to have known, of the danger. Ignorance of a danger of which one ought to know is itself negligence, and not an excuse for exposing another to that danger: See *Kliegel v. Aitken*, 94 Wis. 432, 59 Am. St. Rep. 901, 69 N. W. 67. As to what is a sufficient allegation of knowledge in a criminal case, see post, 11, a.

C. **Contributory Negligence and Assumption of Risks.**—The liability being in general based upon negligence may, of course, be avoided by proof either that the defendant was contributorily negligent or that he knowingly assumed the risk: *Kliegel v. Aitken*, 94 Wis. 432, 59 Am. St. Rep. 901, 68 N. W. 67. The question of contributory negligence, like that of the plaintiff's negligence, is essentially one of fact, and for the jury. It cannot, for instance, be said as a matter of law that under all circumstances vaccination is a necessary precaution to be taken by a person exposed to smallpox. The duty of the plaintiff, like that of the defendant, is to be measured by "such precautions as a man of ordinary care and prudence would take under like circumstances." Failure to vaccinate is not, therefore, necessarily contributory negligence: *Minor v. Sharon*, 112 Mass. 477, 17 Am. Rep. 122; *Missouri etc. Ry. Co. v. Wood* (Tex.), 68 S. W. 802 (affirming the principal case, 95 Tex. 223, ante, p. 834, 66 S. W. 499). The same is true of the question whether one is contributorily negligent who, hearing rumors of the existence of smallpox in a hotel, nevertheless goes there and becomes a guest without further inquiry as to the truth of the rumors. It is a question of fact for the jury: *Gilbert v. Hoffman*, 66 Iowa, 205, 55 Am. Rep. 263, 23 N. W. 632.

One who knowing of the facts which make it probable that certain premises are infected, yet who, without any assurance that they are healthful, leases them or goes to work in them, cannot recover

in the event that he contracts the disease. Whether regarded as contributory negligence or as an assumption of risks, the result is the same. Where, however, the plaintiff enters such premises on the express assurance of the defendant that they are healthful, the question whether the facts were such that a reasonably prudent person would have relied on such assurances is one for the jury. If the answer is affirmative, mere knowledge on the part of the plaintiff that there had been illness of a contagious or infectious nature on the premises will not bar recovery: *Span v. Ely*, 8 Hun, 255; *Snyder v. Gordon*, 46 Hun, 538. In *Gilbert v. Hoffman*, 66 Iowa, 205, 55 Am. Rep. 263, 23 N. W. 632, it is said that where a hotelkeeper has his hotel open for business it is in effect a representation that it is a reasonably safe place in which to stop, and that while the question of the guest's prudence is one of fact, the hotelkeeper is "hardly in a position now to insist that one who accepted and acted on this representation and was injured because of its untruth, shall be precluded from recovering against him for the injury on the ground that she might by further inquiry have learned of its falsity."

2. **Breach of Contract or Fraud.**—While, as we have seen, the basis of the liability for exposing another to a contagious disease is ordinarily negligence, it may rest upon other bases. If, for instance, a landlord expressly represents a house to be sweet and healthy for the purpose of inducing a prospective tenant to rent it, if the elements of fraud are present, the action may be brought as one of deceit: *Cutter v. Hamlen*, 147 Mass. 471, 18 N. E. 397.

In *Piper v. Menifee*, 51 Ky. (12 B. Mon.) 465, 54 Am. Dec. 547, a physician suing for the value of services rendered was met by proof that in violation of a promise to defendant's wife he had visited smallpox patients while treating the defendant and had communicated the disease to the latter. The court held that the proof offered in defense was at least proper to reduce the amount of plaintiff's recovery, and treated it not as a case of negligence, but as one of breach of contract or else of fraudulent representations. In the language of Marshall, J.: "When, in the very commencement of the services for which a considerable portion of the charges now in question was made, he was expressly warned by the defendant's wife, acting presumably for her husband as well as herself and the rest of the family, that if he attended smallpox patients, he must not come there, but they would employ another physician, his promises of compliance, constituting, as they did, the inducement and condition of his further employment, entered into and formed a part of the consideration of the contract on which he sues. And whether they be regarded as being in the nature of a warranty that the family should not be subject to the risk of smallpox by his visits, or as having been intended to lull their apprehensions, and thus to procure a continuance of his employment by a delusive statement, their violation and the consequent damage constitute, in our opinion,

an available ground for reducing the recovery for the services, in the performance of which the violation of these promises and the consequent damage occurred. . . . Indeed, there is some ground for saying that his right to charge the defendant for attendance on the first disease was made expressly dependent upon his not visiting smallpox patients." In the absence of such promises there would nevertheless be an action for negligence and this the court recognizes in its opinion.

b. Instances.

1. *In General.*—The misfortune of being the victim of a contagious or an infectious disease is not in itself a tort. Neither the person ill nor those who have him in charge are liable civilly or criminally, in the absence of negligence or a willful act, although other persons may be exposed and may contract the disease. In the words of Lord Blackburn, in *Metropolitan Asylum District v. Hill*, 6 App. Cas. 204: "Where those who have the custody of a person sick of an infectious disorder have not the means of isolating him from the other inmates, which is very commonly the case with the poor, and consequently those other inmates and the neighbors are exposed to the risk of infection, I think that the inability to isolate him would form a sufficient excuse to be a defense to any indictment, and I think also, though I am not aware of any authority on the subject, that the neighbors could not maintain any action for the damage which they would in such a case sustain from the proximity of the infected person, it being a necessary incident to the use of property for habitations in town that contagious sickness may befall their neighbors": See, also, *Boom v. City of Utica*, 2 Barb. 104.

When, however, there is negligence or willfulness in exposing another to infection unnecessarily, the liability is well established. Thus in the principal case (*Missouri etc. Ry. Co. v. Wood*, 95 Tex. 223, ante, p. 834, 66 S. W. 449), a railroad company having assumed to take charge of a smallpox patient was held responsible for the injury resulting from the negligence of the patient's attendant, employed by defendant, in permitting the patient while delirious to escape and thus communicate the disease to the plaintiff's children. The duty owing from defendant was owing to each individual member of the community, and it was not necessary to prove that it had legal control of the patient. In assuming to treat the latter the defendant railroad company assumed the duty to use ordinary diligence to prevent his exposing others to the disease, and it was held liable for a failure to use such care. The case is affirmed in *Missouri etc. Ry. Co. v. Wood*, (Tex.), 68 S. W. 802, with the additional holding that the failure of the plaintiff to have his children vaccinated did not show contributory negligence.

2. *Physicians.*—Similarly, if a physician, knowing that he has or is exposed to an infectious disease, continues to visit his patients without apprising them of the fact and without proper precautions

on his part, he is liable to one to whom he communicates the disease. This would undoubtedly constitute negligence, and from the relation of physician and patient might also be regarded as the breach of an implied undertaking: *Piper v. Menifee*, 51 Ky. (12 B. Mon.) 465, 54 Am. Dec. 547. In *Edwards v. Lamb*, 69 N. H. 599, 45 Atl. 480, a physician was held liable, where, while treating the plaintiff's husband and knowing a certain wound to be infectious, he directed the plaintiff to assist in dressing the wound, negligently assuring her that there was no danger. The fact that the infection was made possible by pricks and slight scratches in the plaintiff's finger did not excuse the defendant, since he was not justified in assuming that her hands were entirely free from any wounds.

In *Hand v. City of Philadelphia*, 8 Pa. Co. Ct. Rep. 213, the action was brought against the city by one who being attacked by the measles was pronounced a smallpox victim by his own physician, and taken to the smallpox ward in the city hospital, where, being negligently confined, he contracted smallpox. The city was held not liable (see post, I, b, 7, B); but the court in the course of the opinion refers to the fact that the plaintiff had already recovered a judgment against the physician making the wrong diagnosis. Where the error was not negligent, however, but was a mere error of judgment, the physician would not be liable: *Brown v. Purdy*, 54 N. Y. Super. Ct. (22 Jones & S.) 109, 8 N. Y. St. Rep. 143. (In the latter case it does not appear that the patient actually contracted the contagious disease, but simply that owing to the improper diagnosis by the physician the health authorities confined her in the smallpox ward of a hospital.) See generally as to the liability of physicians, the monographic note to *Gillett v. Frecker*, ante, p. 639.

3. Master and Servant.

A. Liability of Master to Servant.—The duty owed by a master to a servant not to expose him to latent or unreasonable risks and dangers applies as well where the danger is from an infectious disease as where it is from defective machinery. "It follows from this that if a servant is exposed by his master without warning to such a risk, and thereby contracts the disease, he being ignorant of the danger, and unable to know of it by the exercise of ordinary care, the master is liable if he either knew or in the exercise of ordinary care ought to have known of the danger": *Kliegel v. Aitken*, 94 Wis. 432, 59 Am. St. Rep. 901, 94 N. W. 67. In the case cited an employer was held liable for having hired the plaintiff as servant in his family without informing her that there was typhoid fever in the house, plaintiff having contracted the disease in consequence. Similarly, in *Span v. Ely*, 8 Hun, 255, a physician was held liable where he hired the plaintiff to whitewash a house in which one of the physician's patients had died of smallpox. The plaintiff knew of the death from smallpox, but entered the house relying on the defendant's assurance that it had been thoroughly

disinfected and was safe. It was held that there was no assumption of the risk, and that the plaintiff having contracted the disease, the defendant was answerable. For the liability of a municipal corporation to persons hired by public officers and thus exposed to contagious diseases, see post, I, b, 7, B.

B. Liability of Master to Third Persons.—In *Long v. Chicago etc. R. R. Co.*, 48 Kan. 28, 30 Am. St. Rep. 271, 28 Pac. 977, a master was sought to be held liable for damages resulting from a contagious disease contracted by a third person from its servant. The ticket agent of the defendant railroad company had there communicated smallpox to a purchaser of a ticket. It was, however, held that the defendant was not liable, no knowledge on its part of the agent's disease having been shown (ante, p. 841). The court further says: "The negligent or accidental act, if any, of the agent in imparting a contagious disease to Long, the purchaser of the railroad ticket, was not within the scope of his authority, so as to charge the company, his master. The sickness of an agent with a contagious disease cannot be presumed to be authorized or directed by the master, and is not an incident in any way to the employment of selling tickets, or acting as agent at a station."

4. Landlord and Tenant.—"Where the owner of a house, office, or other tenement, knowing that it is so infected by the smallpox or any other contagious disease as to be unfit for occupation, and to endanger the health and lives of the occupants, and concealing this knowledge from the person invited, induces him to live, occupy or visit it, and the person so hiring or invited takes a disease by reason of the infection, the owner is guilty of actionable negligence": *Long v. Chicago etc. R. R. Co.*, 48 Kan. 28, 30 Am. St. Rep. 271, 28 Pac. 977. To the same effect see *Minor v. Sharon*, 112 Mass. 477, 17 Am. Rep. 122; *Cutler v. Hamlen*, 147 Mass. 471, 18 N. E. 397; *Cesar v. Karutz*, 60 N. Y. 229, 19 Am. Rep. 164; *Snyder v. Gordon*, 46 Hun, 538. The same rule applies as between innkeeper and guest: *Gilbert v. Hoffman*, 66 Iowa, 205, 55 Am. Rep. 263, 23 N. W. 632, and note. As to whether actual notice by the landlord of the existence of the disease is necessary, see ante, I, a, 1, B. Knowledge of the source of danger is not enough, but the lessor must also know, or common experience should show, that it was dangerous. "He is bound at his peril to know the teachings of common experience, but he is not bound to foresee results of which common experience would not warn him, and which only a specialist would apprehend": *Cutler v. Hamlen*, 147 Mass. 471, 18 N. E. 397. In the case cited it appeared that while there had been diphtheria on the premises, and a death therefrom had occurred eight months prior to the lease to plaintiff, the house had been fumigated and pronounced healthful by the city board of health. This it was held was not sufficient evidence of negligence to warrant it being sub-

mitted to the jury, had it stood alone. So the court held that knowledge by the landlord that the drains were defective was not in itself sufficient. But the two facts put together seemed to the court to warrant the submission of the question of negligence to the jury.

The rule works both ways. The tenant or the guest in a hotel has no greater license to communicate a disease to the family of his lessor than the latter has to thus injure his tenant. Accordingly, if a guest negligently brings children with a contagious or infectious disease, such as scarlet fever or whooping cough, into a lodging or boarding house, and communicates the disease to children of the landlord, he is responsible for the injury thus caused: *Smith v. Baker*, 20 Fed. 709; *Best v. Stapp* cited in footnote to *L. R. 2 U. P. Div. 187*, as being referred to in a note to *Glen on Public Health*, 10th ed., 98.

5. *Sale of Diseased Animals.*—In *State ex rel. Hartlove v. Fox*, 79 Md. 514, 47 Am. St. Rep. 424, 29 Atl. 601, the vendor of a glandered horse, who sold it with knowledge that the horse was affected by this disease and that it was dangerous to man, but who represented to the vendee that the horse had a bad cold only, was sought to be held liable to the heirs of one who while caring for the horse contracted the disease and died. The court held that a vendor who "sells any property which he knows to be imminently dangerous to human beings, and likely to cause them injury, to an innocent vendee who is not aware of the danger and to whom false representations have been made as an inducement to the sale, may, under proper allegation and proof, be responsible not only to the vendee, but to such person or persons as the vendee may, in the ordinary course of events, call upon to take charge of the property for him." It was, however, held that the "proper allegation and proof" was not present in the case at bar. "The declaration should allege not only that the disease was imminently dangerous, or something to that effect, but that the natural consequences of human beings coming into contact was that they would contract it." An allegation that "it may easily be communicated to human beings," and that the decedent "while attending to said mare and using due care and not knowing that she had said disease contracted the same and died," did not, it was held, sufficiently show either the "imminently dangerous" nature of the disease or that the decedent contracted it as "the natural and probable consequence of his attending to the mare." While probably correct, the case certainly requires great particularity in pleading. The important point for the present purpose is that under proper allegations one who fraudulently sells property infected with a disease is liable to anyone who suffers as a natural and probable consequence of being brought into contact with the property. (See for criminal liability for taking glandered horse into the market place, *R. v. Henson*, *Deara* 24, 18 Eng. L. & Eq. 107; post, II, a; and for the liability of one who negligently allows diseased animals under his care or owned by him to infect

other animals, see monographic note to *Hurst v. Warner*, 47 Am. St. Rep. 533-552, at p. 549 et seq.)

6. **Public Officers.**—Where the duties of a public officer are ministerial only, he is liable for a failure or refusal to perform them or for any negligence in their performance. The cases are very few, however, in which public officers have been sued for negligence or neglect exposing a person to a contagious disease. *Clayton v. City of Henderson*, 103 Ky. 228, 44 S. W. 667, is such a case, but the liability there sought to be enforced was a statutory one. Under a statute making any officer of any city or town, or other person, who located a pesthouse within one mile of the corporate limits of such city or town, guilty of a misdemeanor and liable in damages to any person injured thereby, it was held that the mayor and keeper of the pesthouse might be held liable. It was held, however, that the surety of the latter was not liable under the statute, since he had not by the mere execution of the bond "aided or abetted" in the establishment or maintenance of the pesthouse within the prohibited limits.

More important is the holding in the case that while the statute in terms made "any officer" so liable, it was intended to apply only to executive and ministerial officers and not to legislative officers. The members of the board of councilmen were therefore held not to be affected by the statutory liability. "It would seem improbable," says the court, "that the legislature intended to create a statutory liability against a class of legislative officers based upon action taken by them in that capacity, without any specific mention of the class to which they belonged, which had uniformly been held exempt from such liability." In *White v. Marshfield*, 48 Vt. 20, the defendant town was sued for the failure of its selectmen to take charge of and provide for plaintiff while he was infected with smallpox. The court, after holding that the town was not liable, since the only provisions of statute as to smallpox imposed a duty not on the town but on the selectmen, said: "If there is any liability for default, in the duty prescribed by the statute, it is personal upon those who have been guilty of such default." The question not being involved, however, the court refused to determine whether the selectmen were liable.

7. Municipal Corporations.

A. **For Nuisances.**—The liability of municipal corporations for the negligence and other misconduct of its officers and agents has been made the subject of considerable discussion in the previous notes of this series: See the monographic note to *Goddard v. Inhabitants of Harpswell*, 30 Am. St. Rep. 376-413, and notes there referred to. In certain classes of cases, as where the city or town acting in its corporate capacity, although acting necessarily by officers and agents, establishes a nuisance, it is liable to the person

injured thereby. A municipal corporation acting as such has no more right to erect or maintain a nuisance than has a private person. If, therefore, in its corporate capacity, it erects or maintains a pesthouse so near a private dwelling as to communicate the contagious or infectious diseases there treated to persons living in the neighborhood, it is liable to such persons for what injury may be suffered: *Haag v. Vanderburgh Co. Commrs.*, 60 Ind. 511, 28 Am. Rep. 654; *Clayton v. City of Henderson*, 103 Ky. 228, 44 S. W. 667. It must, however, appear that the act was within the power of the municipality. If it had no authority to erect or maintain any pesthouse, the acts of its common council or board of supervisors in attempting to do so would be ultra vires and void, and whatever liability the individual members might incur, the city would not be liable: *Arnold v. City of Stanford*, 24 Ky. Law Rep. 626, 69 S. W. 726.

B. For Negligence of Public Officers.—The great majority of instances in which it has been sought to hold a municipal corporation liable for injuries suffered from exposure to infectious or contagious diseases are those in which the injuries were occasioned by the neglect or negligence of municipal officers in the performance of governmental duties. In such a case it is uniformly held that the city is not answerable for the torts of its officers or agents. While acting as health officers they are acting as governmental agents and the doctrine of respondeat superior is inapplicable to charge the municipality for their negligence. Thus it has been held that a municipal corporation is not liable for the negligence of its officers in hiring a person to tear down an infected smallpox hospital: *Nicholson v. City of Detroit (Mich.)*, 88 N. W. 695; or to handle the coffin of a person who had died of smallpox, where the officers failed to inform the person hired of the danger: *Ogg v. City of Lansing*, 35 Iowa, 495, 14 Am. Rep. 499. Similarly, the neglect of the city board of health to examine a person who had been exposed to smallpox and who, being received by plaintiff in his boarding-house, communicates the disease to him, does not subject the city to liability: *Gilboy v. City of Detroit*, 115 Mich. 121, 73 N. W. 128; nor is a municipal corporation answerable for injuries received from the negligence of public officers in vaccinating with impure and poisonous virus: *Wyatt v. City of Rome*, 105 Ga. 312, 70 Am. St. Rep. 41, 31 S. E. 188; or from their negligence in permitting a nurse in the city pesthouse to leave the place without disinfection and to mingle with persons who contract a contagious disease as the result: *Brown v. Inhabitants of Vinalhaven*, 65 Me. 402, 20 Am. Rep. 709; or from the wrongful act of the public authorities in negligently confining one afflicted with no contagious or infectious disease in a hospital with persons so afflicted, as a result of which the party confined contracts the disease: *Barbour v. City of Ellsworth*, 67 Me. 294; *Hand v. City of Philadelphia*, 8 Pa. Co. Ct. Rep. 213. (Compare

Tormey v. Mayor etc. of City of New York, 12 Hun, 542). And in *White v. Town of Marshfield*, 48 Vt. 20, it was held that the town was not liable for the failure of its selectmen to perform the duty imposed upon them by statute of taking charge of persons afflicted with contagious diseases, although as a result of such failure the disease of plaintiff (smallpox) was communicated to his wife and children.

This exemption from liability on the part of a city while acting as a governmental agent is not affected by the fact that it also bore the relation to the injured person of a master to a servant. "In a moral sense, those acting for the state owe the same duty toward persons employed upon its behalf as that due from the citizen. They should also be as careful to provide safe appliances and a safe place for employes as a private person should. But if they do not, the sufferer is remediless as against the state, for the reason that it has provided no remedy, although the state itself own the land when the injury occurred and make the contract of employment. . . . The true theory is that the township or city represents the state in causing these things to be done, and, like the state, it enjoys immunity from responsibility in case of injury to individuals leaving liability for such injuries to rest upon the persons whose misconduct or negligence is the immediate cause of the damage. . . . In imparting a portion of its powers, the state also imparts its own immunity": *Nicholson v. City of Detroit* (Mich.), 88 N. W. 695. If, however, a private person undertakes the care of a person having a contagious disease, the fact that the care of such persons is a public duty of a city, and that the latter would not be liable if, by the negligence of its officers, other persons were exposed to and contracted the disease, it does not follow that the private person will not be liable if his agent's negligence results in such injury to third persons. His action is voluntary; in undertaking the care of the sick person he does not represent the state, and is not, therefore, entitled to the immunity accorded the state: *Missouri etc. Ry. Co. v. Wood* (principal case), 95 Tex. 223, ante, p. 834, 66 S. W. 449.

8. Public Policy as Affecting Recovery.

A. Communication of Venereal Disease in Illicit Intercourse.—

We come now to a class of cases where the simple question of the liability of one person for communicating a contagious disease to another is complicated by a public policy, which prevents recovery. Where a husband in the act of sexual intercourse with his wife knowingly communicates a venereal disease to her, however grave his wrong and whatever his criminal liability (post, 11, b), the wife cannot sue him for a tort. Coverture is, in the absence of statute permitting such actions, a bar to actions between husband and wife for a personal injury: See *Bishop's New Criminal Law*, sec. 72, b, 2.

Where there is no relation of husband and wife between the parties, one of whom in illicit sexual relations communicates to the other

a venereal disease, the defense of coverture is, of course, inapplicable, but public policy presents quite as effective a bar to recovery. In *Hegarty v. Shine*, 14 Cox C. C. 124, affirmed on appeal in Irish court of appeals, 14 Cox C. C. 145, the plaintiff, while living as paramour with the defendant, became infected by him with a venereal disease, he concealing from her the fact of his being so infected. She brought an action for assault, and in the trial court recovered a judgment. This was set aside in the queen's bench division, and the judgment of the latter court was upheld on appeal by the court of appeals. The reasoning and the conclusion of the case is well expressed by Fitzgerald, J., in the queen's bench: "'Ex turpi causa non oritur actio' is a maxim of the law and a rule of public policy, and its due application tends, if not to repress, at least to discourage, vice and crime. To constitute *causa turpis* it is not necessary the transaction should amount to a crime or to a breach of positive law. Immorality is sufficient. No court should lend its aid to a plaintiff whose claim is founded on his or her immoral acts": See, also, 7 Cent. L. J. 295.

In *Deeds v. Strode*, 6 Idaho, 317, 55 Pac. 656, the facts were by no means as strong as in the Irish case just considered (*Hegarty v. Shine*, 14 Cox C. C. 124, 145). In the Idaho case, the plaintiff, supposing herself divorced from one Deeds, married the defendant Strode. Later it appeared that the divorce was null and void because of the lack of jurisdiction of the court which granted it. So far as the intent of the parties appears from the case, they were both innocent of any purposely illicit relations. Yet the court held that the second marriage being void because of the continued existence of the first, that the injury complained of "could scarcely have arisen but for the illegal relations existing between the parties, and such relations were entered into voluntarily by plaintiff, and were not induced by any fraud or misrepresentation on the part of the defendant; and the plaintiff's incapacity to enter into marriage relations constituted the illegality. The injury was consequent upon her own illegal act, and we know of no principle of law authorizing recovery for injuries in such a case." The court seems to lay great stress on the fact that the second marriage was not induced by any fraud of the defendant, and it is hard to determine from the opinion to what extent the illegality of the relationship and a consequent public policy entered into the decision. Whether or not the defendant fraudulently induced the marriage would not, it seems (leaving out of consideration, for the moment, the fact that the relations were, from the point of view of the law illicit), be material, if, after the so-called marriage, he knowingly infected her with a contagious disease. The liability, if any exists, is not because of his fraud in inducing the marriage, but because of his wrong in communicating a loathsome disease. Whether recovery for the latter wrong and the consequent injury is barred by any rule of public

policy where the relations between the parties, while technically illegal, were not intentionally wrong, is another question, and one upon the answer to which courts might well differ. (See generally as to this, Broom's Legal Maxims, "Ex dolo malo non oritur actio," pp. 729-745.) But in the case under consideration recovery seems to have been denied not so much because the relations were illegal, and could not, therefore, consistently with public policy, be made the basis of an action, but rather because no fraud of the defendant in inducing the marriage having been shown, there was no wrong on which to base liability. This, as has been said, leaves out of view the fact that the injury for which recovery is sought was the direct result of the defendant wrongfully communicating a loathsome disease to plaintiff (although, so far as appears from the report, the complaint would not have been sufficient to sustain a recovery on this latter ground, since there is no allegation that the defendant knew of his condition when he infected the plaintiff).

B. Contracts, the Enforcement of Which would Expose Persons to Contagion.—While not, strictly speaking, within the scope of this note, the case of *City of Baltimore v. Fairfield Imp. Co.*, 87 Md. 352, 39 Atl. 1081, may well be noted in this connection. In that case it appeared that the health authorities of Baltimore had made a contract with a laborer and his wife that the latter should take charge of and care for a woman afflicted with leprosy, using for this purpose certain property belonging to the city. The court held, however, *inter alia*, that the contract was "on its face unreasonable," and (it seems) void as endangering the public health. "Its tendency is to cause a dissemination of the disease, and not to protect the community."

II. Criminal Liability.

a. Exposing Public to Contagious Disease.—In 1 Hale's Pleas of the Crown, 432, it is said: "A man infected with the plague, having a plague sore running upon him, goes abroad; this is made felony by the statute of 1 Jac. cap. 31, but is now discontinued; but what if such person goes abroad, to the intent to infect another, and another is thereby infected and dies? Whether this be not murder by the common law might well be a question; but if no such intention appear, though *de facto* by his conversation another be infected, it is no felony by the common law, though it be a great misdemeanor, and the reasons are: 1. Because it is hard to discern whether the infection arise from the party, or from the contagion of the air, it is God's arrow; and 2. Nature prompts every man, in what condition soever to preserve himself, which cannot be well without mutual conversation; 3. Contagious diseases, as plague, pestilential fevers, smallpox, etc., are common among mankind, by the visitation of God, and the extension of capital punishments in cases of this nature would multiply severe punishments too far, and give too great latitude and loose to severe punishments."

While not, therefore, punishable as a felon for laying others open to the "visitation of God" in the shape of contagious diseases, one who exposes himself or one under his charge when infected with such a disease, by going into or along a public place or way "to the common nuisance of all liege subjects," is guilty of a common-law misdemeanor. Thus, it was held to be a misdemeanor at common law "unlawfully and injuriously" to carry a child infected with the smallpox along a public highway: *Rex v. Vantandello*, 4 Maule & S. 73, 16 R. R. Cas. 389; *Rex v. Burnett*, 4 Maule & S. 204. And in *Regina v. Henson*, Deara. 24, 18 Eng. L. & Eq. 107, the defendant was convicted of a misdemeanor at common law in having brought a horse infected with the glanders into a public place, to the danger of infecting the queen's subjects. An allegation that the defendant possessed a mare infected with a contagious, infectious and dangerous disease called the glanders, and that he, well knowing the premises, brought the mare into a public place among divers subjects of the queen, to the great danger of infecting them with the disease, sufficiently alleges the knowledge of the defendant that the disease was dangerous and communicable to man.

Unless there is some intentional or negligent exposure of the diseased person, the mere fact that because of their proximity to him others contract the disease does not make him criminally liable. "Such a doctrine would punish as criminals the unfortunate victims of disease, and would be abhorrent to every principle of justice and humanity": *Boom v. City of Utica*, 2 Barb. 104, 109. To the same effect see *Metropolitan Asylum Dist. v. Hill*, L. R. 6 App. Cas. 193, 205.

In England, the public health act of 1875 subjects to a penalty any person who, while suffering from an infectious disorder, willfully exposes himself, without proper precautions against spreading the disorder, in any street or public place, etc., or who, being in charge of any person so suffering, so exposes such person. A physician, who, without unnecessarily exposing a scarlet fever patient, and who, cautioning him against any communication with other persons, sends him to a hospital, is not guilty of violating this act: *Tunbridge Wells Local Board v. Bisshopp*, L. R. 2 C. P. Div. 187.

b. *Communication of Venereal Disease.*—It will be noted that in the cases so far considered as regards the criminal liability of one who exposes himself or one under his charge while infected with a contagious disease, the exposure was in a public street. This leads Stephen, J., in his opinion in *Regina v. Clarence*, 16 Cox C. C. 511, to restrict the language of Lord Hale, already quoted, that it is a "great misdemeanor" to infect another unintentionally by going about with a plague sore, to the case where the act is a public nuisance by reason of being done in a public place, and exposing to contagion the public generally. "The offense referred to by Lord Hale is, therefore, the offense of committing a public nuisance, and

his authority is opposed, rather than favorable, to the notion that to infect another with a contagious disease is in the nature of an offense against the person."

In *Regina v. Bennett*, 4 Fost. & F. 1105, the defendant was charged with an indecent assault upon his niece, thirteen years of age. It appeared that he had given her liquor before she went to bed, and that he had intercourse with her while she slept, communicating to her a venereal disease. Willes, J., in charging the jury, said that it would have been impossible to have established rape in the case, and continued: "But although the girl may have consented to sleep, and, therefore, to have connection with her uncle, yet if she did not consent to the aggravated circumstances—i. e., to a connection with a diseased man—and a fraud was committed on her, the prisoner's act would be an assault by reason of such fraud. An assault is within the rule that fraud vitiates consent, and, therefore, if the prisoner, knowing that he had a foul disease, induced his niece to sleep with him, intending to possess her, and infected her, she being ignorant of his condition, any consent which she may have given would be vitiated, and the prisoner would be guilty of an indecent assault." The prisoner was convicted.

Similarly in *Regina v. Sinclair*, 13 Cox C. C. 28, the defendant was convicted of an assault (inflicting bodily harm) on proof that, knowingly having a venereal disease, he had sexual intercourse with a girl without informing her of the fact, and communicated the disease to her. The case relies upon the authority of *Regina v. Bennett*, 4 Fost. & F. 1105 (*supra*), and proceeds upon the same theory, namely, that the fraud of the defendant in concealing his diseased condition from the woman vitiated any consent to the intercourse the latter may have given.

These two cases, particularly *Regina v. Bennett*, 4 Fost. & F. 1105, have occasioned no little discussion, and are disapproved in the later English cases. The language of Willes, J., in that case, it is said by these later cases, was obiter, since the facts showed that the woman was asleep, and did not therefore consent to the intercourse. But the disapproval of these cases extends to the rule announced. The doctrine that fraud vitiates consent is, it is argued, altogether inapplicable. "*Regina v. Bennett*," says Fitzgerald, J., in *Hegarty v. Shine*, 14 Cox C. C. 124, "is the first instance in which the maxim [fraud vitiates consent] was applied to an agreement for immoral sexual intercourse. . . . I may point out that *Regina v. Bennett* rests not on the vitiation of consent, but on the aggravated results. Thus the judge says that it was the fraud practiced on the girl in concealing the fact of the prisoner's diseased state which vitiated her consent to sexual intercourse; but would the indictment lie if it had not been for the subsequent result? *Regina v. Bennett* is, in truth, a case in which a familiar maxim was strained and misapplied to reach a person who had undoubtedly been guilty of a great moral

offense": See, also, opinions of other judges in *Hegarty v. Shine*, 14 Cox C. C. 124, 145, and note 7 Cent. L. J. 295, and *Regina v. Clarence*, 16 Cox. C. C. 511, 22 Q. B. Div. 23.

In *Regina v. Clarence*, 16 Cox C. C. 511, 22 Q. B. Div. 23, the question was whether a man could be convicted under 24 and 25 Victoria, chapter 100, section 20, of unlawfully and maliciously inflicting grievous bodily harm on his wife, or under section 47 of that act, of occasioning her actual bodily harm, where it appeared that he had intercourse with her while knowingly suffering from a venereal disease, she being ignorant of that fact, and that he had communicated the disease to her. A majority of the court (crown cases reserved, four of the thirteen judges dissenting) held that a conviction could not be sustained under either section of the act. The various judges in their opinions consider the question of criminal liability under these facts, both at common law and under the statute, and discuss at some length the applicability to such cases of the doctrine that fraud vitiates consent. In the opinion of the majority the maxim is inapplicable.

NAQUIN v. TEXAS SAVINGS AND REAL ESTATE INVESTMENT ASSOCIATION.

[95 Tex. 313, 67 S. W. 85.]

VENDOR AND VENDEE—Insurance of Property—Respective Interests in.—If a contract for the sale of real estate stipulates that the vendee shall keep the property insured for the benefit of the vendor, the insurance is not intended as a fund with which to pay the debt, but to furnish indemnity to both parties. It is not the fund of either, but one in which both have a common interest for the accomplishment of a common purpose. (p. 859.)

VENDOR AND VENDEE—Insurance of Property—When cannot be Applied to the Payment of the Balance of the Purchase Price. When property which is the subject of a contract of purchase and sale is insured for the benefit of the vendor as security for the payment of his debt, and is damaged by fire, and the amount of the insurance is paid to the vendor, the vendee has no right to have such amount applied to the satisfaction of the purchase price remaining unpaid, if it is not then due. (p. 859.)

INSURANCE Taken as Security—Right to Use Proceeds for Restoring Property.—Where real property is subject to a contract of sale and is insured for the security of the vendor, he has the right, on the destruction or injury of the property by fire, on the payment of the amount of the insurance to him, to use it in the restoration of the property, and is under no obligation to pay it to the vendee or apply it to the satisfaction of the purchase price remaining unpaid, but not due by the terms of the contract. (p. 860.)

Hutcheson, Campbell & Hutcheson, for the plaintiff in error.

Ewing & Ring, for the defendant in error.

³¹⁶ BROWN, A. J. The court of civil appeals for the first supreme judicial district has certified to this court the following statement and questions:

"In this cause now pending before us on writ of error, the questions hereinafter certified have arisen upon the following state of facts:

"On the twenty-eighth day of July, 1894, the defendant in error executed and delivered to plaintiff in error the following contract of sale of real estate:

"The State of Texas, {
County of Harris. }

"This memorandum of agreement made this twenty-sixth day of July, 1849, between the Texas Savings and Real Estate Investment Association and M. L. Naquin, witnesseth:

"That said Texas Savings and Real Estate Investment Association hereby agrees in consideration of one dollar to it in hand paid and the payment of the further sum of sixteen hundred dollars, with interest as hereinafter provided in monthly installments of twenty dollars per month, including interest, hereafter to convey to said M. L. Naquin, of Houston, Harris county, Texas, all that certain tract or parcel of land on the south side of Buffalo Bayou in the city of Houston, Harris county, Texas, known and described as lot number six (6) in block number five (5) of the Texas Savings and Real Estate Investment Association second addition to the said city of Houston; said lot fronting fifty (50) feet on Jackson street and running back for depth one hundred (100) feet between lines parallel with Drew avenue, together with all improvements situated thereon. Also agreeing that when one-fourth of said sum of sixteen hundred dollars, together with interest thereon at the rate of ten per cent per annum from date hereof, is paid, to execute and deliver to said M. L. Naquin ³¹⁷ a good and sufficient deed retaining vendor's lien for balance of purchase money and interest thereon.

"Said monthly payments are represented by one hundred and twenty (120) promissory notes of even date herewith, each for the sum of twenty dollars, with interest from maturity, the first of which notes is due and payable on the first day of August, 1894, and one on the first day of each and every month thereafter until all shall have become due. It being understood

and agreed that should the said Naquin allow any three of said monthly payments represented by said notes as aforesaid to become due and remain unpaid at the same time, this agreement to convey said property shall become null and void and all sums which shall have been paid by the said Naquin shall be forfeited to and in favor of said association without notice to the said Naquin.

"It is further agreed that the said Naquin shall keep the improvements on said property insured for the benefit of said association in the sum of not less than five hundred dollars. All taxes for the year 1894 are to be paid by said association and all taxes thereafter to be assumed and paid by said Naquin.

"Executed in duplicate.

"Accepted. M. L. Naquin.

(Signed) "TEXAS SAVINGS AND REAL ESTATE INVESTMENT ASSOCIATION.

"By E. L. DENNIS, President."

"Naquin, the plaintiff in error, executed the one hundred and twenty notes prescribed by the contract of sale and entered into possession of the premises. He was a married man and occupied the place as a home.

"There was a dwelling-house on the lot at the date of the contract of sale and this was insured in favor of the association for the sum of eight hundred dollars, the policy also disclosing the interest of Naquin, and the premiums were paid by the association and charged to Naquin.

"Fifty-three of the notes were paid by Naquin, the last one being paid about February, 1898, but no deed was demanded by Naquin and none was given, no did the association exercise its right of rescission on account of Naquin's default. On May 21, 1899, the improvements were practically destroyed by fire. In the early part of August, 1899, Naquin, who was in default in the payment of three or four notes at the date of the fire, and who neither paid nor offered to pay any of the notes thereafter, had an interview with the president of the association and demanded that the association take the insurance money which it collected and give him the lot, stating that he wanted his equities out of it. This the officers of the association refused to do, and thereafter used seven hundred and ten dollars and thirty-eight cents of the insurance money in restoring the house to its condition prior to the fire. When

Naquin heard of the association's purpose to rebuild, he saw the proper officer of the concern, protested against the building of the house on the lot, stated that he did not want to rebuild on it, and insisted that the insurance money be credited on the debt. The association refused all these demands and completed the ³¹⁸ restoration of the improvements some time in October, 1899. It had treated the premises as its own from the date of the interview in which Naquin first demanded that the association take the insurance money and give him his equity in the transaction, but had never in terms exercised its right to declare the contract of sale annulled and rescinded, and at no time in terms notified Naquin of its purpose to do so. When Naquin demanded the credit of the insurance money on the debt and that he have his 'equities,' he did not tender the balance which would have been ultimately due thereon after the crediting of the insurance. Nor did he make tender of such balance appearing to be due after such credit until after the restoration of the improvements had been completed. He then renewed his demand that the eight hundred dollars insurance be credited on his debt and tendered to the president of the association a sum amply sufficient to cover the amount which would have been due if such credit had been made, which tender was refused. Upon the completion of the improvements and after the association had advertised the premises for rent, Naquin, without the knowledge or consent of the association, took possession, whereupon the association, in December, 1899, brought this suit for the recovery of the lot, making Naquin and his wife defendants.

"Naquin answered, renewing his tender of the balance due after the credit of the insurance as demanded, and resisted the right of the association to use the insurance money in improving the premises without his consent. He and his wife also pleaded that the premises were their homestead and insisted that the amount expended by the association could not be made a lien upon the lot, because she had not so agreed in writing as required by law for the fixing of liens upon a homestead for the cost of improvements thereon.

"By the money expended, the premises were restored to their former condition and value. The lot as it stood after the fire and before the restoration was not worth the balance due less the insurance collected. The remains of the burned house were worth about three hundred dollars, if used in rebuilding the house, but were valueless unless so used, and

Naquin showed no disposition to preserve the salvage by such use.

"If Naquin was entitled, under the facts, to have the insurance credited on the debt, the notes then due would have been largely overpaid and he would have been, at the date of his interview with the president of the association, in default as to none of them.

"The trial court rendered judgment against Naquin for eleven hundred and seven dollars and forty cents, the sum of one hundred and three dollars and four cents being included therein as sums expended by the association for taxes and insurance premiums. Decreed that if Naquin should pay such sums into the registry of the court within ninety days from that date, the premises should be his, otherwise they should be sold as under execution, the proceeds of sale to be applied to the payment of the judgment, the excess, if any, to be paid to Naquin. If insufficient to satisfy the judgment execution to issue against Naquin for the balance.

319 "Questions: 1. Under the facts as stated, did Naquin have the right to require that the insurance be credited on the debt? 2. For the preservation of its security, did the association have the right to use the insurance money in restoring the premises to their former condition and enforce the balance due on the debt as a lien on the premises? 3. The insurance money having been actually placed in improvements on the premises, thus restoring them to their former condition and value, will equity enforce the contract of sale on the prayer of Naquin and his tender as made unless he offers to reimburse the association for the cost of restoring the premises? 4. Did the court err in rendering judgment as stated?"

To the four questions propounded, we answer that, in its judgment, the trial court did not err to the prejudice of Naquin.

The insurance was not intended to provide a fund with which to pay the debt, but to furnish indemnity to both the mortgagor and the mortgagee. The object was to secure the mortgagor against being deprived of a home in case of the destruction of the house, for the fund would enable him to rebuild; and it was intended to secure him further against liability for the debt in case the destruction of the house should occur after the debt fell due. In favor of the mortgagee, the purpose was to indemnify his security upon the property; that is, it was to give additional security by providing a fund with which to discharge the debt, if overdue, or to restore the ~~so~~

curity by constructing a new building in place of that destroyed. It was not exclusively the fund of either party, but one in which they had a common interest for the accomplishment of a common purpose: *Gordon v. Ware Sav. Bank*, 115 Mass. 591; *Fergus v. Wilmarth*, 117 Ill. 547, 7 N. E. 509; *Bryant v. Charter Oak Ins. Co.*, 24 Fed. 771; 1 *Jones on Mortgages*, sec. 410; 1 *Biddle on Insurance*, sec. 256.

The debt not being due, the money collected upon the insurance policy could not be applied to its liquidation except by the consent of the creditor and the debtor. The debtor had no more right to demand the application of the money to the satisfaction of those installments which had not fallen due without the consent of the payee of the obligation than the payee had to apply it to the satisfaction of the unmatured indebtedness against the wishes of the mortgagor. The rights of the parties were reciprocal under the contract. In this situation, the purpose of the parties in creating the insurance out of which this fund arose was attained by a restoration of the house, thereby placing them in the same situation they were in before the fire. In a sense, the investment association held the money in trust for the payor, but with an interest of its own to be protected, and it could not be required to deliver over the fund to Naquin, for that would be to surrender its security for the unmatured debt. Duty did not permit it to serve its own interests only, nor require it to give up its rights to exclusively benefit the debtor, but required that it use the fund to carry out the purposes for which it was provided.

³²⁰ In the case of *Gordon v. Ware Sav. Bank*, 115 Mass. 591, the court expresses the rule of law which governs in such cases in the following language: "The insurance was for indemnity to the mortgagor as well as to the mortgagee. To the mortgagee, it was for protection of the security, not for payment of the debt. It was collateral to the debt. Money received from the insurance took the place of the property destroyed, and was still collateral until applied in payment by mutual consent, or by some exercise by the mortgagee of the right to demand payment of the debt, and upon default of payment, to convert the securities." In that case, there was a second mortgage upon the property not included in the indemnity of the insurance. The savings bank and *Gordon* agreed to the investment of the fund in another house, but the second mortgagee insisted that the destruction of the property and the collection of the insurance was, in law, a satis-

faction of the debt to the extent of the sum collected. While the case is not exactly in point with that now under consideration, we think it supports our conclusion in this case. The junior mortgagee had a right to have the money rightly applied for the protection of his interests, which could be done by discharging the first debt or by rebuilding the house. The bank was under obligation to the junior mortgagee to keep the money and apply it to the debt or to see that it was used to restore the security. That case establishes the character of the fund, from which springs the duty of the appellee to appellant and the right to protect itself as well as Naquin.

In *Fergus v. Wilmarth*, 117 Ill. 547, 7 N. E. 508, the insurance was placed upon the house, and, by the insured, the policy was assigned to Fergus as trustee, to hold for the indemnity of a debt secured by mortgage upon the property. The house having been destroyed by fire, the trustee collected the fund and placed it in the bank to await a proper application of it under the trust. The creditor demanded the payment of the money upon his debt, which was not due. The debtor insisted upon building another house upon the ground. The trustee refused to turn the fund over to the mortgagor, or to pay it to the mortgagee upon the debt, but agreed to pay it to the former whenever he should complete the building so that sufficient insurance could be had upon it to replace the indemnity to the mortgage that was afforded by that policy. The bank failed, and a part of the money was lost. It was sought to hold the trustee liable. The supreme court of Illinois held that the trustee acted properly in the discharge of his duty and was not liable for the loss by failure of the bank. The principle decided in that case embraces the very heart and core of the question, Did the appellee properly apply the money by protecting the rights of both parties? We have answered that question in the preceding part of this opinion, but will restate the proposition briefly. Under the circumstances of the case, it was the duty of the appellee to use the fund for the best interests of both parties, which were best served by rebuilding the house, whereby the security was preserved intact for the indemnity of both.

If Insured Property is destroyed after the making of a contract of sale, but before the payment of the purchase money and the execution of the conveyance, the proceeds of the insurance belong to the vendor as between him and the company; but he acts as trustee for the vendee, who, upon payment of the purchase price, is entitled to

the insurance money in equity, although he intended to tear the buildings down: *Skinner & Sons etc. Co. v. Houghton*, 92 Md. 68, 84 Am. St. Rep. 485, 48 Atl. 85.

In *White v. Gilman*, 138 Cal. 375, 71 Pac. 436, it appeared that the plaintiff had purchased a vacant lot for the sum of two hundred and fifteen dollars, to be paid in monthly installments of eight dollars per month. He went into possession and erected a dwelling-house. Afterward the vendor, subject to this contract, conveyed to one Gilman, who took out a policy of insurance on the house, and, on its subsequent destruction by fire, was paid the amount of the insurance. After this the purchaser demanded a conveyance of the lot without offering to pay the remainder of the purchase money, claiming that he was relieved from the duty of making such payment by the fact that the sum received from insurance exceeded the part of the purchase price remaining unpaid. The court held that each party held an insurable interest in the house; that neither had any interest in an insurance effected and paid for by the other; and hence that the plaintiff was not entitled to recover any part of the insurance money, or to have it credited on the purchase price remaining unpaid.

WESTERN UNION TELEGRAPH COMPANY v. COBB.

[95 Tex. 333, 67 S. W. 87.]

TELEGRAPH CORPORATIONS—Delivery of Message to Clerk of Hotel.—The relation of hotel-keeper and lodger and boarder does not create any authority in the former or his clerk to receive telegrams addressed to the latter, and a delivery to either does not satisfy the obligation of the corporation to deliver the message to the addressee, nor relieve it from a claim for damages due to its failure to make a proper delivery. (pp. 863, 864.)

Wilkins & Vinson and George H. Fearons, for the appellant.

James A. Graham and J. M. Chambers, for the appellee.

333 WILLIAMS, A. J. The court of civil appeals for the second district certifies the following question:

"This appeal, now pending before us, is from a verdict and judgment in favor of appellee against the appellant recovered in the county court of Montague county as damages for the failure on the part of appellant to promptly deliver a message sent by appellee to his brother, Percy Cobb, at Bowie, Texas, informing him of the serious illness of appellee in the Indian Territory, and of the surrounding circumstances of distress which his brother could and would have relieved, as found by the jury, if the telegram had been promptly delivered. Instead of delivering the message to Percy Cobb, it was promptly

delivered to the clerk of the Brown Hotel, where he roomed and boarded. The evidence, however, failed to show that it was the custom of its clerk to receive telegrams for the hotel guests, and the evidence affirmatively showed that Percy Cobb had not in fact given said hotel clerk any such authority, unless it was conferred by his taking lodging and board at the ³³⁴ hotel. Unless the delivery to the clerk was a sufficient delivery, the company was undoubtedly guilty of negligence and liable in damages for the injury sustained, but if the delivery to the hotel clerk was a sufficient compliance with its contract, appellee was not entitled to recover.

"Error is assigned to the court's refusal to give the following instruction at the request of appellant: 'If you find and believe from the evidence that the defendant's messenger boy, upon the receipt of the message in question in this case, delivered the same to the clerk of the Brown Hotel where Percy Cobb, the addressee of said message, roomed and boarded, then you are instructed that such delivery was a full and complete discharge of the defendant's duty in reference to the delivery of said message, and you will find for the defendant.'

"Unless there was error in refusing this charge, the judgment must be affirmed, and we deem it advisable, in response to request of counsel for appellant, to certify the material question thus raised—that is, whether a hotel clerk has implied authority from the guests of the hotel to receive telegrams for them, and whether the court erred in refusing to so charge in the absence of evidence showing the custom of the Brown Hotel, or hotels generally, in this respect. In this connection, we refer to the case of *Western Union Tel. Co. v. Trissall*, 98 Ind. 566."

The question presented is whether or not the mere relation of hotel-keeper and lodger and boarder creates, in law, an authority in the former or his clerk to receive telegrams addressed to the latter. It must be answered in the negative, since there is no evidence stated from which it might be inferred as a fact that Cobb had constituted the clerk of the hotel his agent or servant for such purposes, there is nothing to be considered but the fact that he boarded and lodged at the hotel. If such an authority arose from that fact alone, it could only be because the performance of such services by the keeper of the hotel was among the duties imposed on him by law toward those so boarding with him. Should it be assumed that the full relation of innkeeper and guest existed (which does

not appear), and that all of the duties arising from it rested on the keeper of this hotel, we know of no authority that would include among them that of receiving and assuming the responsibility of safely delivering telegrams. We can see no reason why such a duty would exist, if not voluntarily assumed, any more than that of receiving other notices or of transacting other business for the boarder.

A Telegram may Properly be Delivered, it has been held, at the hotel where the addressee resides, when he is not found at his place of business because of his absence from town; and the failure of the hotel clerk, with whom the message is left, to deliver it to the addressee, will not render the company liable: See the note to *Western Union Tel. Co. v. Houghton*, 27 Am. St. Rep. 925.

FORT WORTH AND DENVER CITY RAILWAY COMPANY v. BEAUCHAMP.

[95 Tex. 496, 68 S. W. 502.]

NUISANCE in the Transportation of Dangerous Explosives.—What is not.—The mere fact that a railway corporation has in its cars for transportation explosives of a highly dangerous character does not make it guilty of creating a nuisance, either public or private, though danger to persons or property along its line is necessarily incident to such transportation. (p. 867.)

NEGLIGENCE in Delaying Transportation of Dangerous Explosives.—If a railway car loaded with giant or blasting powder is unnecessarily and unreasonably delayed at a place, so as to subject property to danger for a longer time than would have attended a transportation made with reasonable dispatch, such keeping of the car at that place is a nuisance. A like result follows if ordinary care is not exercised in keeping or caring for the car, and its absence gives rise to a degree of danger which would have been avoided by the exercise of such care. (p. 868.)

RAILWAY CORPORATIONS—Negligence Respecting High Explosives.—If a car known to be loaded with blasting and giant powder is left standing an unnecessary and unreasonable length of time on a switch adjacent to a city and within quarter of a mile of many residences with no guard or watch, and in a locality frequented by tramps, who are in the habit of building fires and entering empty cars, the trial court may properly conclude that there was negligence on the part of the railway corporation having the custody and control of the car. (p. 869.)

NEGLIGENCE—Damages—When Proximate Caused by.—If a railway corporation negligently suffers a car known by it to be loaded with giant and blasting powder to remain an unnecessary and unreasonable time upon a switch near many residences, where an explosion resulting from a fire started in an empty car caused damage to the plaintiff's property, such negligence must be deemed to be the proximate cause of the damages. (p. 869.)

Stanley, Spoonts & Thompson and Robert Harrison, for the appellant.

Speer & Speer and James A. Graham, for the appellees.

⁴⁹⁷ WILLIAMS, A. J. This case comes before us upon questions certified by the court of civil appeals for the second district. The action was begun by appellee to recover of appellant for damages done to appellee's residence by an explosion of dynamite or powder in a car belonging to appellant. The facts found by the trial judge, and his conclusions therefrom, are as follows:

"1. I find that on the fifth day of April, A. D. 1901, the plaintiff resided in Montague county, Texas, and was the owner of a tract of land, with the residence house thereon, situated in the suburbs of the city of Bowie, in said county.

"2. That on and prior to the fifth day of April, the defendant was a ⁴⁹⁸ railway corporation, owning and operating a line of its road through said city of Bowie.

"3. That on the third day of April, 1901, the Chicago, Rock Island and Texas Railway Company, which company also owned and operated a line of its road through said city of Bowie, and was a connecting carrier with defendant, brought into the vicinity of said city a car containing twenty-eight thousand two hundred pounds of blasting powder and giant powder, and delivered to defendant said car of powder on said day, taking its receipt therefor, and left the said car upon a transfer switch, in charge and under the control of the defendant.

"4. That said car of powder was contained in a single wooden boxcar, closed up, with no covering or sheeting of iron or other metallic material, but was otherwise of comparatively recent construction, and was in good condition and not differing from those in ordinary use by railway companies generally; that the manner of storing of said powder within said car was not shown.

"5. That from said date of the receipt of said car until the date of the explosion as hereinafter found, it was permitted by defendant to stand upon its transfer switch, connected with two empty boxcars to the north or west, and a car of hay immediately to the south or east, and yet another car, with contents not shown, to the east or south; that the car immediately to the north or west of said car of powder and connected therewith was an empty boxcar, in which was some hay from kaffir

corn, scattered about the floor, the door of which car was standing open.

"6. That said transfer upon which said cars stood was of length sufficient to hold thirteen cars, and was situated at the intersection of the said Chicago, Rock Island and Texas road with the defendant, which said intersection was upon the line of the incorporation of said city, but the switch on which the care was standing was outside of the corporation; that said cars stood about the center of said switch and within a radius of one-fourth mile of some forty residence houses, and within a radius of three-fourths of a mile of the greater portion of the residence and business houses of said city, said city having a population of about twenty-six hundred inhabitants; that a public road or highway ran within a few feet, and the main line of defendant within about twenty feet, and that of the Chicago, Rock Island and Texas Railway within about two hundred feet, of where the said car of powder was permitted to stand; and further, that there were scheduled to pass said point, upon said two roads, sixteen trains daily, besides extras.

"7. I find that defendant placed no guard or watch about said car of powder; that its contents was known to the agent who receipted for said car, and that there were placarded upon the walls of said car the following, viz.: 'High Explosives. Handle with Care'; and, further, I find that the locality where said car was permitted to stand was one frequented by tramps, who were in the habit of building fires and entering into the empty cars left standing thereabouts; I find that on as many ⁴⁰⁰ as two occasions, while said car was upon said switch, an employé of defendant inspected said cars, the last time being about 9 o'clock A. M. on the morning of the explosion, as hereinafter found, going within two hundred feet for that purpose.

"8. I find that defendant permitted said car of explosives to stand, situated as hereinbefore stated, upon said switch, from the date of its receipt till about 9:47 A. M. of the fifth day of April, at which time it exploded; that there were two scheduled freight trains daily upon the line of defendant, and that trains passed in that direction said car was billed to go after its receipt and prior to its explosion, and that other cars placed upon said switch on the day preceding said explosion were by defendant picked up and carried away in the direction in which said car of explosives was billed.

"9. That on the morning of the 5th of April, about thirty minutes before the final explosion, a fire was discovered to have

originated in the empty boxcar immediately to the north or west of said car of explosives; that at said time the doors upon both sides of said cars were open; that the fire was communicated from said car to the wooden car containing said explosives, violently exploding the same, and injuring and damaging the property of plaintiff as hereinafter found.

"10. I find that the place where said car was left standing, and where said explosion occurred was distant from the property of plaintiff about eight hundred yards.

"11. I further find that by reason of said explosives, plaintiff's property described in his petition was injured and damaged in the sum of nine hundred and ninety-five dollars; that it will cost the said sum of nine hundred and ninety-five dollars to repair the said injuries occasioned by said explosion, and that plaintiff's said property is worth less by said amount by reason of said explosion and said injuries, and that no portion of said amount has ever been paid to plaintiff.

"12. I find, also, as a matter of fact, that the receiving and storing of such quantity of explosives in the manner, for the time, and in the locality as shown by the defendant, constituted a public and private nuisance.

"13. I also find as a fact that defendant was guilty of negligence in receiving, storing, and handling said car of explosives as it did, and in permitting said explosion, and that said negligence was the immediate and proximate cause of said explosion and injuries, and but for which negligence said explosion and injuries would not have occurred."

The court of civil appeals propounds the following questions: 1. Whether or not the facts found by the trial judge warranted the legal inference of nuisance; 2. Whether or not those facts afford any evidence of negligence; 3. Whether or not, if the acts of defendant constitute negligence, the damage to appellee was the proximate result thereof.

The answer to the first question, we think, will be found by a decision of the second, for it is not contended, and cannot be held, that the mere ⁵⁰⁰ fact that a railroad company has in its cars, for transportation, explosives of this character makes it guilty of creating a nuisance, either public or private, even though danger to persons or property along its line be necessarily incident to such transportation. Such articles are property useful for some purposes, and common carriers are under legal obligation to receive and properly carry them: *Walker v. Chicago etc. Ry. Co.*, 71 Iowa, 658, 33 N. W. 224.

In this, the case of a common carrier differs from those of owners of mills, magazines, or other places where such explosives are voluntarily manufactured or stored in such way as to unreasonably endanger the persons or property of the public or of neighboring property owners. Such places are generally held to be nuisances, the mere existence and maintenance of which render their owners liable for damages resulting from explosions, without regard to the degree of care exercised in keeping them: *Weir's Appeal*, 74 Pa. St. 230; *Cheatham v. Shearon*, 1 Swan, 213, 55 Am. Dec. 734; *Meyers v. Malcolm*, 6 Hill, 292, 41 Am. Dec. 744; *Heeg v. Licht*, 80 N. Y. 579, 36 Am. Rep. 654. But a railroad company must carry freight of this character over its road, and such dangers as necessarily result to others from the proper and reasonable performance of this duty must be borne by them as an unavoidable incident of the proper transaction of legitimate business. But a nuisance may result from the negligent exercise of a right, or performance of a duty, with respect to one's own property or property in his charge: 1 Wood on Nuisances, sec. 4, and notes.

A nuisance to others may thus arise from the careless discharge by a common carrier of its duty in the transportation of such dangerous articles as are here in question. The right to carry them does not include the right to subject persons along the route to dangers from explosions for a longer time or in a greater degree than is reasonably necessary to the proper performance of the carrier's duty. This is an obvious deduction from plainest principles. If, therefore, the car was unnecessarily and unreasonably delayed at the place where it exploded, so as to subject plaintiff's property to such danger for a longer time than would have attended a transportation made with reasonable dispatch, such keeping of the car at that place was a nuisance. The case thus supposed would not differ essentially from those of other keepers of dangerous explosives. Or if ordinary care was not exercised by the appellee in keeping and caring for the car, and the absence thereof gave rise to a degree of danger such as would have been avoided by the exercise of it, such negligence would make the presence of the car so negligently kept a nuisance. Ordinary care is the measure of appellee's duty; but, of course, the degree of diligence and the nature of the precautions to be used depends upon the nature and circumstances of the situation and the danger to be avoided. The finding of the trial court that there was such negligence will, if supported by evidence, sustain its own con-

clusion that the car, under the circumstances stated, constituted a nuisance. We are of the opinion that there was evidence from ⁵⁰¹ which the court could properly conclude that, considering the very dangerous contents of the car, there was negligence both in leaving it so long at that place, and in not properly caring for it while there. No reason for the delay is shown, and the circumstances stated by the judge might have been held by him as sufficient to call for a showing on the part of the defendant of any circumstances which made the delay necessary or reasonable, and to justify the conclusion, in the absence of such a showing that there were none. This, and the further question as to the precautions which ordinary prudence required in keeping the car, are questions of fact which this court cannot resolve. We merely hold that there was sufficient evidence tending to sustain both conclusions of the trial judge, and this answers the first and second questions as far as we can answer them.

To the third, we answer that if there was negligence such as we have indicated, the evidence justifies the conclusion that it was the proximate cause of the damage to plaintiff's house.

Explosives.—The liability for keeping explosives is considered in the monographic note to *Kinney v. Koopman*, 67 Am. St. Rep. 134-140. The storage of gunpowder for use in manufacturing does not constitute a nuisance per se: *Kleebauer v. Western Fuse etc. Co.*, 138 Cal. 497, 94 Am. St. Rep. 62, 71 Pac. 617. But see *Cameron v. Kenyon-Connell Com. Co.*, 22 Mont. 312, 74 Am. St. Rep. 602, 56 Pac. 358. Storing and keeping gunpowder and dynamite near dwellings in a thickly settled portion of a city, near a public street, is held not to be a nuisance per se; but to constitute such keeping a nuisance and impose liability for an accidental explosion, there must be negligence: *Kinney v. Koopman*, 116 Ala. 310, 67 Am. St. Rep. 119, 22 South. 593. This case is approved in the California decision last cited.

SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY v. WADE.

[95 Tex. 598, 68 S. W. 977.]

INSURANCE.—A condition against keeping, using, or allowing gasoline on the premises, contained in a policy of insurance, is not broken by the bringing of a gallon of gasoline on the premises on a single occasion, though their destruction by fire resulted therefrom. (p. 872.)

INSURANCE.—A Condition Against Keeping, Using, or Allowing Gasoline on the Premises is not Violated unless it is brought there for the purpose of being stored or kept. The purpose of the word "used" is to provide against the danger which would arise from the habitual, constant, or continued exposure of the property through the presence or use of the article. The one word forbids the permanent or habitual keeping of the dangerous thing, and the other a like use of it without the actual depositing or storing of it on the premises. (p. 873.)

INSURANCE.—A Condition Against Allowing Gasoline on the Insured Premises Should be Construed to mean allowing it to be kept or used, and does not forbid the bringing of the gasoline on the premises on a single occasion. (p. 874.)

Alexander & Thompson and S. J. Hogsett, for the appellant.

Smith, Templeton & Tolbert, for the appellee.

599 **WILLIAMS, A. J.** Certified question from the court of civil appeals for the fifth district. The certificate is as follows:

"The appellant issued to the appellee an ordinary standard fire insurance policy covering a house and household furniture. Among other provisions, the policy contained the following: 'Permission is hereby given for the using of a gasoline stove; the reservoir to be filled by daylight only, and when the stove is not in use. Warranted by the assured that no artificial light will be permitted in the room when the reservoir is being filled, and no gasoline, except that contained in the reservoir, shall be kept within the building, and not more than five gallons in a tight, entirely closed, metallic can free from leak, on the premises adjacent thereto.

" 'This entire policy, unless otherwise provided by agreement indorsed hereon and added hereto, shall be void if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above-described premises, benzine, gasoline, etc.'

600 "The ground urged by appellant to avoid liability on the policy is the use of gasoline as shown by the testimony of ap-

pellee, which is as follows: 'About noon of the twenty-sixth day of March, 1901, as I left the house, my wife requested me to send up a gallon of gasoline for use on the premises. I declined to do so. She subsequently sent to the grocer and bought a gallon, a part of which was used by her that afternoon, so she told me that evening when I went home. I was not aware that the gasoline had been brought on the place until about 7 o'clock that night, when I was home for the night, when she told me she had gasoline on the premises, and that she had not used it all, and desired to know of me what she should do with the portion unused. I told her to throw it out. I was reading at the time, and paid no further attention to it; but I supposed she had thrown it out. About 10 o'clock at night, having occasion to go into my back yard, I passed through the house, with a view of going out the back door, through the kitchen. It being dark, I struck a match in the kitchen, to see how to get out of the back door. The match burned low, and seeing what I supposed to be a little tub sitting on the floor, containing what I supposed was dirty water, I threw the unburned portion of the match into this tub. As I did so, the flame shot up out of the tub. I attempted to open the door and throw the tub out, holding the tub with one hand and attempting to open the door with the other. The tub had become hot, and I dropped my handhold on the tub, and, in falling, it tilted, and the burning gasoline ran out on the floor, and, as a result, the property was destroyed.' It was also shown that no gasoline stove was used on the premises.

"Question: 1. Do the facts above stated authorize a recovery by appellee, or was the use of gasoline and the origin of the fire in the manner stated such a violation of the terms of the policy as caused a forfeiture thereof and prevented a recovery thereon? 2. Is the temporary having of a small quantity of gasoline on insured premises, to be used for household purposes, other than for fuel, a violation of such prohibitory clause?"

The question upon which the decision of both of those put by the court depends is, Do the facts stated show a breach of the warranty that no gasoline shall be "kept, used, or allowed" on the premises? The fact that the fire was caused by the gasoline, or by the negligence of the insured, if there was such negligence, is not, by the policy as stated, made a ground for avoiding it; and it is properly conceded by appellee that the permission to use a gasoline stove does not affect the case. The question, therefore, is, as stated, whether or not the gasoline, in

the sense in which those words are used in the contract, was "kept, used, or allowed" on the premises. We find it unnecessary to determine the extent to which appellee is responsible for the acts of his wife to which he did not consent. For the purposes of this case, alone, it will be assumed that all that was done is properly chargeable to appellee.

That the gasoline was not "kept" on the premises is clear. "It is not enough, according to this phraseology, that hazardous articles are ⁶⁰¹ upon the premises. They must be there for the purpose of being stored or kept": *Hynds v. Schnectady etc. Ins. Co.*, 11 N. Y. 554. That this is substantially true, all of the authorities agree: *Mears v. Humboldt Ins. Co.*, 92 Pa. St. 15, 37 Am. Rep. 647; *Maryland Fire Ins. Co. v. Whiteford*, 31 Md. 219, 100 Am. Rep. 45; *Farmers' etc. Ins. Co. v. Simmons*, 30 Pa. St. 299; *First Cong. Church v. Holyoke etc. Ins. Co.*, 158 Mass. 479, 33 N. E. 572.

As the word "kept" means that the prohibited article must not only be upon the premises, but must be there for keeping or storing, and not merely upon a temporary occasion for a different purpose, it follows that there must be some degree of permanency in its continuance there. The word implies all this. The word "used" is employed in immediate connection with the word "kept," in order, we think, to extend the provision so as to exclude the idea that the article must be stored or deposited on the premises. But the purpose in the use of each word is to provide against the same danger, viz., that which would arise from the habitual, constant, or continued exposure of the property through the presence or use of the article. One word forbids the permanent or habitual keeping of the dangerous thing, and the other a like use of it without the actual depositing or storing of it on the premises.

In *Mears v. Humboldt Ins. Co.*, 92 Pa. St. 15, 37 Am. Rep. 47, Chief Justice Paxson said: "We are not disposed to give the word 'use' in this policy the narrow construction claimed for it. It must have a reasonable interpretation, such as was probably contemplated by the parties at the time the contract was entered into. Nearly every policy of insurance issued at the present time contains this condition, or a similar one. What is intended to be prohibited is the habitual use of such articles, not their exceptional use upon some emergency. The strict rule claimed by the defendants would prevent the assured from painting his house or cleaning his furniture, as it would be

difficult to do either without using some of the prohibited articles."

The same interpretation of the word is approved by the same court in *Farmers' etc. Ins. Co. v. Simmons*, 30 Pa. St. 299, in which the language of Lord Tenterton in *Dobson v. Sotheby*, 1 Moody & M. 90, is quoted as follows: "I think the condition must be understood as forbidding only the habitual use of fire, or the ordinary deposit of hazardous goods, not their occasional introduction, as in this case, for a temporary purpose connected with the occupation of the premises."

The same principle is recognized in *Fischer v. London etc. Ins. Co.*, 83 Fed. 807; and we find no dissent from it in any of the cases relied on by the appellant. Nearly all of those decisions are thoroughly consistent with it, the prohibited article having been habitually used or kept on the premises, and the discussions being upon other points.

The judgment in the case of *Heron v. Phoenix etc. Co.*, 180 Pa. St. 257, 57 Am. St. Rep. 638, 36 Atl. 740, seems to conflict with the rule previously laid down in the supreme court of that state. The immediate question as to ⁶⁰² what constituted a using was not, however, discussed, it being assumed that the forbidden articles had been used.

In *German Fire Ins. Co. v. Board of Commissioners*, 54 Kan. 732, 45 Am. St. Rep. 306, 39 Pac. 697, it was merely held that the constant use of gasoline on the premises for several days was a violation of the condition of the policy. There was no discussion of the question as to what constituted a using of the article, the question discussed being whether or not the owner of the premises was responsible for the act of the persons who brought the article upon them.

We think the rule as above quoted is the true one, and therefore conclude that, in the sense of the policy, the gasoline was not used. It remains to consider whether or not the facts show that the gasoline was "allowed" on the premises. In *Fischer v. London etc. Ins. Co.*, 83 Fed. 807, this word was held to mean the same as if expressed "allowed to be kept or used."

The following from Judge Taft's opinion is regarded by us as entirely sound: "The court construed the word 'allowed' to mean 'allowed to be kept or used.' The evidence tended to show that gasoline was carried through the store from a shed in the back yard, not connected with the main building, where the stock of goods was insured. It was conceded that such carrying of gasoline through the store, without leaving it there per-

manently, did not come within the adjudicated meaning of the terms 'kept and used'; but it was contended that the word 'allowed' embraced more than 'kept or used,' and was sufficiently broad to include the carrying of gasoline through the store for immediate delivery to customers, even though gasoline was not allowed to be stored on the premises, or to remain there longer than the time required to carry it from the back door to the customer, and to deliver it to him. The court construed the word 'allowed' as if inserted for the purpose of making it clear that the condition would be broken whether the keeping and using was done by the insured himself, or was allowed or permitted by him to be done by some one else. The argument made on this construction is that under it the word 'allowed' is merely redundant, and adds nothing to the meaning of the other two words, because it has often been adjudicated that they are broad enough to cover, not only the act of the insured, but also the act of any person whom the insured may permit or allow to keep or use gasoline upon the premises, and in some cases even the act of a tenant in keeping gasoline against the express command of the insured. The mere fact that the words 'kept or used' might, by construction, be made wide enough to include 'allowed,' does not require of us, when the word 'allowed' is expressly made a part of the policy, to give it any different meaning from what it would have when it was implied from the use of other words. The habit of using apparently redundant expressions in statutes and contracts and deeds, for the purpose of excluding any possibility of misconstruction, is very frequent. It justifies us in giving the word 'allowed' its ordinary meaning, instead of attributing to it a strained and vague significance, which will defeat the policy. The duty of the court, where the meaning is ambiguous, is to construe the words used against the insurer, who framed them, so as to validate the policy, rather than destroy it."

To the reasons given it may be added that it is unreasonable to suppose that the parties intended a forfeiture for the mere allowance of acts or conditions, which would not operate a forfeiture if done or produced by the insured himself. As the gasoline was not "kept or used," it necessarily follows that it was not allowed.

The facts stated do not show a violation of the warranty set out in the certificate, nor prevent a recovery because of such warranty.

The second question is answered in the negative.

A *Fire Insurance Policy* providing that it shall become void if gasoline is kept, used, or allowed on the premises, has been held to be avoided by temporarily storing a small quantity of gasoline to be used in a gasoline stove for cooking purposes: *Boyer v. Grand Rapids Fire Ins. Co.*, 124 Mich. 455, 83 Am. St. Rep. 338, 83 N. W. 124. But see *Mears v. Humboldt Ins. Co.*, 92 Pa. St. 15, 37 Am. Rep. 647; *Wheeler v. Traders' Ins. Co.*, 62 N. H. 450, 13 Am. St. Rep. 582; *Phoenix Ins. Co. v. Walters*, 24 Ind. App. 87, 79 Am. St. Rep. 257, 56 N. E. 257.

RAMSEY v. TOD.

[95 Tex. 614, 69 S. W. 133.]

CORPORATIONS Attempted to be Formed for Two or More Purposes.—A statute purporting to authorize the formation of corporations for certain specific purposes, and "for any other purposes intended for mutual profit or benefit not herein otherwise specially provided for," does not sanction the formation of a corporation for two or more purposes, if the statute also declares that the charter must state the purpose for which the corporation is formed. (p. 880.)

STATUTE—Construction of by Public Officers.—The fact that a statute had been construed by successive secretaries of state as authorizing the formation of corporations for two or more purposes, and had been amended after such construction without change in this respect, is not of controlling effect, and does not require the courts to adopt such construction. (p. 881.)

Application for mandamus to compel the Secretary of State to file the charter of a corporation.

Hill, Dabney & Carlton and Gregory & Batts, for the relators.

Attorney General C. K. Bell, for the respondent.

621 GAINES, C. J. This is a petition for a writ of mandamus to compel the Secretary of State to file a charter under articles 642, 643, and 644 of the Revised Statutes. The cause has been submitted for final determination upon demurrers to the petition.

It is alleged in the petition, in substance, that the relators had prepared a charter in compliance with articles 643 and 644; that they had presented the same to the respondent with the request that he receive and record it in accordance with article 645. A copy of the alleged charter is made a part of the petition, and it appears therefrom that it designates

two purposes of the proposed corporation: 1. "The purchase and sale of goods, wares, and merchandise and agricultural and farm products": and 2. "The accumulation and loan of money in carrying out said purpose." The sole ground upon which the demurrers are urged are that the proposed charter specifies two of the distinct purposes for which corporations may be formed, and that the statute permits an incorporation for one of such purposes only.

In considering the question so presented, a brief history of the statutes in question may be useful.

At the adjourned session of the twelfth legislature, in 1871, a bill was passed by both Houses and approved by the governor, which was intended to provide, by a general law, for the creation of private corporations for certain specified purposes. This bill, it seems, was a copy of the statute of the state of Kansas upon the same subject, and had no enacting clause. Acting upon the theory, as we presume, that the law was invalid for want of the enacting clause, the thirteenth legislature, for the purpose of giving validity to the act, passed a law amending the first section thereof by prefixing thereto such clause; but did not expressly re-enact the subsequent sections. Again, the fourteenth legislature, in 1874, re-enacted the entire act with some slight changes—one especially in relation to the amendments of charters. Section 4, which declared that corporations could be formed for certain purposes, and section 5, which designated the purposes, and section 6, which prescribed the requisites of the articles of incorporation, which were to constitute the charter, were re-enacted without change. The act of 1874 was incorporated in the Revised Statutes of 1879, without material amendment, so far as the question before us is concerned. Sections 4 and 5 of the act appear in the revision as articles 565 and 566, and section 6 as a part of article 567. Article 566 has been frequently amended, and with its amendments appears in the Revised Statutes of 1895 as article 642. Articles 565 and 567 have never been amended and are now articles 641 and 643 of the Revised Statutes now in force. The amendments to article 566 of the Revised Statutes of 1879 have been mainly by way of adding specifications of additional purposes for which corporations may be formed, so that the original specifications, twenty-seven in number, have been swelled to fifty-four in the Revised Statutes of 1895.

Since the original sections 4 and 6 have never been changed, and since section 4 has been amended only as to the sub-

divisions which specify the objects for which corporations are permitted to be created, we think that in order to determine whether a corporation may be formed for more than one of the designated purposes, we should go back to the original act. Our reason for this conclusion is, that if the intent of the original law was to permit an incorporation for one of the specified purposes only, and a subsequent legislature had desired to change the law in so important particular, and to permit an incorporation for two of the purposes, they would have expressed their intention in clear language, and not have left it to be implied by questionable inferences.

⁶²³ The following are the sections of the original law which bear upon the question:

"Sec. 4. Private corporations may be created by the voluntary association of three or more persons, for the purposes and in the manner mentioned in the following sections of this article.

"Sec. 5. The purposes for which the corporations mentioned in the last section may be formed, are: 1. The support of public worship; 2. The support of any benevolent, charitable, educational or missionary undertaking; 3. The support of any literary or scientific undertaking, the maintenance of a library, or the promotion of painting, music, or other fine arts; 4. The encouragement of agriculture and horticulture; 5. The maintenance of public parks, and of facilities for skating and other innocent sports; 6. The maintenance of a public or private cemetery; 7. The purchase, location and subdivision of lands, and the sale and conveyance of the same, in lots and subdivisions, or otherwise; 8. The construction and maintenance of any species of road, except a railroad, and of bridges in connection therewith; 9. The construction and maintenance of a bridge; 10. The construction and maintenance of a telegraph line; 11. The establishment and maintenance of a ferry; 12. The establishment and maintenance of a line of stages; 13. The building and navigation of steamboats, and carriage of persons and property thereon; 14. The supply of water to the public; 15. The manufacture and supply of gas, or the supply of light, or heat, to the public by any other means; 16. The transaction of any manufacturing, mining, mechanical, or chemical business; 17. The transaction of a printing and publishing business; 18. The establishment and maintenance of a hotel; 19. The erection of buildings, and the accumulation and loan of funds for the purchase of real property; 20. The improvement

of the breed of domestic animals by importation, sale or otherwise; 21. The transportation of goods, wares and merchandise, or any valuable thing; 22. The promotion of immigration; 23. The construction and maintenance of sewers; 24. The construction and maintenance of a street railway; 25. The erection and maintenance of market houses and market places; 26. The construction and maintenance of canals for the purpose of irrigation, or manufacturing purposes; ⁶²⁴ 27. For any other purpose intended for mutual profit or benefit not otherwise specially provided for, and not inconsistent with the constitution and laws of this state.

"Sec. 6. A charter may be prepared setting forth: 1. The name of the corporation; 2. The purpose for which it is formed; 3. The place or places where its business is to be transacted; 4. The term for which it is to exist; 5. The number of its directors or trustees, and the names and residences of those who are appointed for the first year; and 6. The amount of its capital stock, if any, and the number of shares into which it is divided."

Considering these provisions together, we are of the opinion that it was the intention of the legislature to authorize a corporation to be formed for any one or more of the purposes as specified in any one of the subdivisions, and not for two or more purposes as designated in two or more subdivisions. Section 4 throws no light upon the question. As to this matter, language could hardly have been employed which would have been more indefinite. The words "private corporations may be created . . . for the purposes . . . mentioned in the following sections," may mean literally that a corporation may be formed for one of the purposes only, or for any one or more of the purposes, or for all of the purposes mentioned in the section. So the language in section 5, "the purposes for which corporations . . . may be formed are" is equally indeterminate. But where we come to consider the requirements as to the contents of the charter as prescribed in section 6, the legislative intent becomes more apparent. One of these is that the charter must state "the purpose" for which the corporation "is formed." For the reason that if it had been intended that a corporation might be created for two or more of the purposes specified in the preceding section, it would have been appropriate to have said "the purpose or purposes for which it is formed." The use of the word "purpose" in the singular number tends strongly to show that it was the intention of the legis-

lature to authorize the creation of a corporation for only one purpose, or for two or more of the purposes mentioned in one subdivision. It may be true that the use of the singular number may not be conclusive of the question, and that if there were other provisions in the act which, either by express declaration or clear implication, indicate that it was intended to authorize an incorporation for two or more of the designated purposes, whether in the same subdivision or not, we should so hold. But no provisions in the act which show satisfactorily such intention have been pointed out, nor have we found any. On the contrary, the structure of section 5 tends to show that it was only one purpose that was to be mentioned in the charter. If such was not the intention, why did the legislature specify each purpose in a separate subdivision of the section, and number them from 1 to 27 successively? It is at least suggestive that ⁶²⁵ two purposes when not embraced in the same subdivision were not to be conjoined in a charter, but that they were to be severed and one alone adopted.

Further in this connection it is to be noted that we are not dealing with a hastily prepared legislative enactment. Unlike many others, the statute under construction is comprehensive in its scope, elaborate in its details, and bears evidence upon its face that it was thoroughly considered and carefully prepared by a person or persons learned in the law. In such a statute the designation of the purposes for which corporations were authorized to be created, in numbered subdivisions, together with the provision that the charter should set forth "the purpose for which it was formed," ought, in the absence of provisions indicating a different intent, to be deemed to show that the legislature had in mind the creation of a corporation for one of the purpose or purposes specified in one subdivision only.

But there are also provisions in section 5 which support the construction which we give to the act. Subdivision 8 specifies one of the purposes as follows: "The construction and maintenance of any species of road, except a railroad, and of bridges in connection therewith." Subdivision 9 reads: "The construction and maintenance of a bridge." The question suggests itself, if it was intended to authorize a corporation for two or more of the purposes named in two or more of the subdivisions, why, in a carefully prepared act like this, provide in subdivision 8 for the construction and maintenance of bridges in connection with roads, when bridges were provided for sep-

arately in the next subdivision? Again, why provide in subdivision 13 for "the carriage of . . . property" in connection with "the building and navigation of steamboats," when subdivision 21 specifies "the transportation of goods, wares, and merchandise, or any valuable thing," as one of the purposes for which a corporation may be formed?

So, also, under the amended law, as it appears in article 648 of the Revised Statutes, of 1895, subdivision 17 provides for an incorporation for the purpose of "the erection and repair of any building or improvement, and for the accumulation and loan of money for said purposes," etc., and subdivision 27 authorizes a corporation for "the accumulation and loan of money." Again we ask, if the purpose specified in two distinct subdivisions may be combined, why specify the "accumulation and loan of money" in subdivision 17, when that purpose is separately provided for in subdivision 27?

But it is argued that, for the reason that some of the subdivisions of section 5 provide for more than one purpose, it is to be inferred that it was intended that two or more of the purposes named in different subdivisions may be combined. For the reason that the structure of the section suggests that it was framed upon the theory that a corporation could be created under one subdivision only, the reasonable deduction from the fact that some of the subdivisions specify more than one purpose ⁶²⁶ is that it was the intention to permit a combination of two or more purposes when named in the same subdivision, but in that case only.

But it is insisted that there are other clauses in the statute which show that a corporation could be formed for two purposes, provided for in separate subdivisions. The act of 1874 made in addition to the original act of 1871 as attempted to be passed, by providing for the amendment of charters, and in that connection this provision is found: "No changes or amendments shall be of any force or effect which are not germane to the original objects or charter of incorporation, and calculated to carry out and effect the same." This provision was carried into the Revised Statutes of 1879, the only change being the substitution of the word "purposes" for the word "objects." It is now article 649 of the Revised Statutes of 1895. So, also, by section 11 of the act of 1874, now article 651 of the Revised Statutes now in force, corporations, among other things, are empowered "to hold, purchase, sell, mortgage, or otherwise convey such real and personal estate as the purposes

of the corporation shall require," etc. The contention is that the word "purposes" shows that it was contemplated that corporations might be created for more than one purpose. When we consider that some of the subdivisions provided for an incorporation for more than one purpose, it is apparent that the use of the plural "purposes" is entirely consistent with our construction of the law, and the argument loses its force.

It is alleged in the petition, in effect, and it is, of course, admitted by the demurrer, that since the passage of the law, successive secretaries of state have construed it in accordance with the construction of the relators. But we do not think that the construction of the statute is of such doubtful character that the action of the secretaries of state should be given controlling effect. Nor do we think the fact that the law has been amended by the legislature since such construction by the executive officers of the state, without change as to the matter under consideration affects the question. It is not such a matter as was likely to be called to the attention of the legislature in amending the law in other particulars.

Our conclusion is that the statute does not authorize an incorporation for two distinct purposes, each of which is mentioned in a separate subdivision of article 642 of the Revised Statutes, and that, therefore, the writ of mandamus applied for in this case must be denied. What is the status of a charter which combines two purposes not authorized to be conjoined, and which has been accepted, filed, and recorded by the Secretary of State, is a question not before us.

The writ of mandamus is denied.

Motion denied.

Statutory Construction.—Besides judicial construction of statutes, there exists what is called practical construction, having special application to statutes for the regulation of the different departments of the government, and it consists in the interpretation put upon them in the actual administration of them by such departments. Such construction, while not of such high authority as judicial construction, is of great persuasive force: *Bloxham v. Consumers' Electric Co.*, 36 Fla. 519, 51 Am. St. Rep. 44, 18 South. 444. See, too, *Burridge v. Detroit*, 117 Mich. 557, 72 Am. St. Rep. 582, 76 N. W. 84. The reenactment of a statute as carrying with it the construction placed upon the former statute by the courts, is considered in *Dixon v. Plums*, 98 Cal. 384, 35 Am. St. Rep. 180, 33 Pac. 268; *Cargill v. Kountze*, 86 Tex. 386, 40 Am. St. Rep. 853, 22 S. W. 1015, 25 S. W. 13.

CASES
IN THE
SUPREME COURT
OF
VERMONT.

SMITH v. SMITH.

[74 Vt. 20, 51 Atl. 1060.]

DIVORCE—Alimony—Jurisdiction to Order Payment of.—As against a nonresident not served with process in the state, and who does not appear in the action, the court cannot decree payment of alimony. (pp. 882, 883.)

JURISDICTION to Order Payment of Alimony Out of Moneys Belonging to a Nonresident.—The fact that a resident of a state has in his hands moneys due to a nonresident defendant in a divorce suit does not give the court jurisdiction to order such moneys to be paid to the plaintiff for alimony. Nor is it material that an injunction issued in the case prohibiting the payment or transfer of such money. (p. 884.)

Suit for divorce and alimony. An application for alimony having been denied, the plaintiff appealed.

M. M. Wilson, for the petitioner.

E. W. Smith, pro se.

21 **START, J.** The court below held that it did not have jurisdiction to decree the payment of money to the libellant as alimony. This holding was correct. The process was not served upon the respondent in this state, and he did not appear in the cause by himself or attorney. The only notice of the pendency of the libel was by publication, under Vermont Statutes, 2682. This did not give the court jurisdiction of the person of the respondent, or of his estate that was not brought under the control of the court by the process. A decree for the payment of money as alimony is a decree in personam, and is void without personal service upon the respondent, or with-

out his appearance. In *Rigney v. Rigney*, 127 N. Y. 408, ²² 24 Am. St. Rep. 462, 28 N. E. 405, it is held that although a suit for a divorce is in the nature of a proceeding in rem, or quasi in rem, in so far as it affects the marital status of the parties, as to alimony and costs, it is a proceeding in personam, and that an award of alimony and costs against a non-resident defendant, who was not served with process within the jurisdiction, and did not appear in the action, does not bind him. In 1 *Encyclopedia of Pleading and Practice*, 413, numerous cases are cited in support of the rule that, although a divorce ex parte may be obtained on constructive service, no alimony can be decreed unless the defendant appears in person or by attorney, or has been duly served with process within the jurisdiction of the court.

In common-law actions it is held that a money judgment against a nonresident, without service of the process upon him in this state, or appearance, is inoperative except for the purpose of subjecting the property attached on the original writ to execution: *Price v. Hickok*, 39 Vt. 292. A decree for the payment of money as alimony stands on no different ground, but is governed by the principles that control in an ordinary judgment for the recovery of money: *Prosser v. Warner*, 47 Vt. 667, 19 Am. Rep. 132. Judge Cooley says that in divorce cases, no more than in any other, can the court make a decree for the payment of money by a defendant not served with process, and not appearing in the case, which should be binding upon him personally. It follows in such cases that the wife, when complainant, cannot obtain a valid decree for alimony, nor a valid judgment for costs: *Cooley's Constitutional Limitations*, 6th ed., 499.

It appears that E. W. Smith, a resident of this state, as executor of an estate situate in the state of New Hampshire, under an appointment of the probate court for the state of New Hampshire, has in his hands money which has been decreed to the respondent as his distributive share of the estate; and ²³ the libellant's counsel contends that the court has jurisdiction to decree the payment of this money. This contention is not sound. The court had no more power to decree the payment of this money than it had to decree a payment of money found to be in the hands of the respondent. The executor was not a party to the action; and, if he had been, the court would have had no authority to order a payment of money by him that would bind or protect him. There is no provision by law

by which the executor could have been made a party to the action, or the money in his hands brought within the control of the court. The statute relating to divorce and alimony does not authorize the bringing of money due and owing to a respondent in divorce proceedings within the control of the court by attachment, trustee process, or otherwise. It only provides for an injunction, the effect of which is to subject the respondent who is within the jurisdiction of the court, and has notice, to punishment if he disobeys it, and to provide for a lien upon his real estate and stock in private corporations: *Vt. Stats.*, 2688, 2689.

The injunction order that was issued prohibited the payment of, or transfer of, the money in the hands of the executor; but this did not have the effect to seize and bring the money within the control of the court, and the court could make no decree concerning it. There was no money brought within the control of the court. The process was not served on the respondent, and he did not appear. Therefore, the court did not have jurisdiction to decree the payment of any money as alimony: *McKinney v. Collins*, 88 N. Y. 216; *Bunnell v. Bunnell*, 25 Fed. 214; *Lydiard v. Chute*, 45 Minn. 277, 47 N. W. 967; *Pennoyer v. Neff*, 95 U. S. 714; *De La Montanya v. De La Montanya*, 112 Cal. 101, 53 Am. St. Rep. 165, 44 Pac. 345.

Judgment affirmed.

In a Suit for a Divorce, the court has no jurisdiction to award alimony as against a defendant, if he was not in the state when the suit was commenced, nor afterward, nor did he appear in the action: *De La Montanya v. De La Montanya*, 112 Cal. 101, 53 Am. St. Rep. 165, 44 Pac. 345; *Rigney v. Rigney*, 127 N. Y. 408, 24 Am. St. Rep. 462, 28 N. E. 405.

FINDLAY v. UNION MUTUAL FIRE INSURANCE CO.

[74 Vt. 211, 52 Atl. 429.]

INSURANCE—Commencement of Suit—Conditions Against.—A condition that the policy shall be void if the property is alienated without the consent of the insurer, and that the commencement of foreclosure proceedings shall be deemed an alienation, is not void as against public policy. (p. 885.)

INSURANCE.—A Suit in Foreclosure is Commenced when a petition is served on the insurer, within the meaning of a condition in a policy making it void on the commencement of such suit. (p. 886.)

INSURANCE—Waiver of Condition—What is.—If a policy has become void by reason of the commencement of a suit in foreclosure, the statement of the secretary of the insurer two weeks afterward that the company will not rely on this condition is not a waiver of the right to claim the forfeiture, nor does it estop the insured from relying thereon. (p. 886.)

Assumpsit on a fire insurance policy. Verdict and judgment for the defendant.

Edward H. Deavitt, for the plaintiff.

Dillingham, Huse & Howland, for the defendant.

²¹³ **MUNSON, J.** The suit is upon a policy of insurance, which covered property on which there was a mortgage. The contract provided that an alienation of the property without the consent of the company should avoid the policy, and that the commencement of foreclosure proceedings should be deemed an alienation. A petition to foreclose the mortgage, dated May 10, 1899, and made returnable to the September term of that year, was served upon the plaintiff May 12, 1899. The property burned August 17, 1899, without notice of the foreclosure having been given to the company.

The plaintiff contends that the provision regarding foreclosure proceedings should be held void as against public policy, for the reason that it affords the company an opportunity to evade payment after all the substantial requirements of the contract have been complied with. But this claim fails at the outset, if the provision complained of is itself a material requirement; and we think it must be so regarded. The moral risk is universally recognized as an important consideration in determining the business of a company, and it is clear that this ²¹⁴ risk is increased when the default of the insured has resulted in proceedings to foreclose his equity. It is well under-

stood that the temptation to realize upon the policy when contemplating a probable loss of the property through inability to redeem, has an appreciable effect upon the statistics of losses: *McIntyre v. Norwich Fire Ins. Co.*, 102 Mass. 230, 3 Am. Rep. 458; *Springfield Steam Laundry Co. v. Traders' Ins. Co.*, 151 Mo. 90, 74 Am. St. Rep. 521, 52 S. W. 238.

The plaintiff also claims that foreclosure proceedings are not commenced, within the meaning of this provision, until the suit is entered in court. The purpose of the provision to be construed is always regarded in determining what shall be considered the commencement of a suit. We think the service of the petition upon the insured must be regarded as the commencement under this provision. It is then that the insured has the knowledge that produces the increase of risk. From that time on he understands that he can avoid the consequences of his default only by the making of some payment or arrangement, and the moment when he will become convinced of his inability to do this is entirely uncertain. The protection which the provision is designed to secure would not be obtained if the entry of the case were to be treated as the beginning of the suit.

The consent required was to be given by the indorsement of the secretary upon the policy. The plaintiff offered to show that two weeks after the fire the secretary told him that the company would not rely upon this clause. The plaintiff insists that this statement constituted a waiver of the right to claim a forfeiture, and estopped the defendant from making that claim. This position is untenable. The policy was void at the time, and the statement could not revive it. The plaintiff was not thereby induced to omit anything to his ²¹⁵ detriment. It was no longer in his power to do anything to establish a right of recovery.

Judgment affirmed.

Insurance.—An action to foreclose a mortgage is commenced, with-
in a policy of insurance stipulated to be void on the commencement
of foreclosure proceedings, when the papers are served on the de-
fendant: *Norris v. Hartford Fire Ins. Co.*, 55 S. C. 450, 74 Am. St.
Rep. 765, 33 S. E. 566. See, also, *Springfield Steam Laundry Co. v.*
Traders' Ins. Co., 151 Mo. 90, 74 Am. St. Rep. 521, 52 S. W. 238;
Schroeder v. Imperial Ins. Co., 132 Cal. 18, 84 Am. St. Rep. 17, 63
Pac. 1074; *Horton v. Home Fire Ins. Co.*, 122 N. C. 498, 65 Am. St.
Rep. 717, 29 S. E. 944; *Hanover Fire Ins. Co. v. Brown*, 77 Md. 64,
39 Am. St. Rep. 387, 25 Atl. 689, 27 Atl. 314.

KILPATRICK v. GRAND TRUNK RAILWAY COMPANY.

[74 Vt. 288, 52 Atl. 531.]

NEGLIGENCE in Maintaining a Railway Car Contrary to the Statute.—To maintain a ladder at the side of a railway car, instead of at the end or inside, as required by statute, is negligence in law. (p. 890.)

JURY TRIAL—Waiver of Right to have Question Submitted. Where the defendant asks the court to rule, as a matter of law, that a side ladder maintained on one of its cars in defiance of the law was not the proximate cause of an injury, and does not ask, and evidently does not desire, to have the question submitted to the jury, it cannot afterward claim that the question was one of fact which should have been so submitted. (pp. 890, 891.)

NEGLIGENCE—Proximate Cause.—A court does not err in refusing to hold as a matter of law that a side ladder on a railway car was not the proximate cause of the plaintiff's injury, when such ladder was maintained in defiance of a statute, and the plaintiff, while in the employ of the defendant, was knocked from such ladder by a post near enough to strike him. The accident was due as much to the position of the ladder as to the fact that the defendant's employé was thereon. (p. 891.)

MASTER AND SERVANT—Assumption of Risk, Rule of, When Inapplicable.—When a statute forbids the maintaining of a ladder outside of a car and creates a liability in favor of employées injured thereby, the ordinary doctrine of the assumption of risks does not apply as against him. (p. 893.)

CONSTITUTIONAL LAW.—A Statute in Effect Prohibiting an Employe from Assuming the Risk of a hazardous appliance forbidden by the statute is constitutional, because it is for the protection of the poor and helpless, and is in the interest of the public welfare. (p. 894.)

NEGLIGENCE, Contributory, Where an Employe has not Assumed the Risk.—Though by a statute an employé cannot be regarded as having assumed the risk of an appliance forbidden thereby, yet he may be guilty of such contributory negligence in its use as precludes his recovery for injuries received therefrom. (p. 896.)

NEGLIGENCE, Contributory, When a Question for the Jury. Whether the plaintiff was guilty of contributory negligence in using a side ladder on a car in a space where he might be knocked therefrom by a post near the track, the position of which he knew, is a question for the jury, if it appears that he was placed in a perilous position, and did not think of it at the time. (p. 897.)

NEGLIGENCE, Contributory, What is not.—The law requires of every person the prudence of a prudent man, but a prudent man may be guilty of inattention or failure to think of a probable danger to which he is exposed. Circumstances may excuse whenever the jury may reasonably say that a man placed as he was might be guilty of forgetfulness or inattention without losing the right to be called a prudent man. (p. 897.)

NEGLIGENCE.—The Choosing of a Dangerous Method of Performing Work when other and safer methods are open to him does not expose the plaintiff to a charge of contributory negligence, unless it appears that he knew, or that a man of prudence would have

known, that other and safer methods were so open, and that the method he was choosing was dangerous. (p. 899.)

JURY TRIAL—Argument of Counsel.—If counsel pursues a line of argument, which, being objected to, and by the court declared improper, is withdrawn, no ground for exception exists in favor of the objecting litigant. (p. 900.)

JURY TRIAL—Argument of Counsel Referring to Plaintiff's Supposed Duty.—Where plaintiff was suing to be compensated for injury from the use of a ladder on the side of a car, such use being prohibited by statute, and the defendant claims that he was guilty of contributory negligence, his counsel has the right to argue to the jury that he was doing what the defendant reasonably expected of him. (p. 900.)

THE GRANTING OF A NEW TRIAL Wipes Out the Previous Adjudication, and the case must proceed de novo, and, on the second trial, the court or jury may award damages in excess of those allowed on the first. (p. 901.)

E. A. Cook and George B. Young, for the plaintiff.

C. A. Hight, L. L. Hight and R. W. Chamberlain, for the defendant.

292 STAFFORD, J. The plaintiff is seeking to recover for injuries sustained by him, as an employé of the defendant, in consequence of the latter's running a car of its own, equipped with a side ladder instead of a ladder upon the end or inside, in contravention of the statute, and having a post dangerously near its track, whereby the plaintiff, using the ladder to mount the car while in motion, was knocked off by the post, and his foot run over by the wheels.

STATEMENT OF FACTS AND HISTORY OF THE CASE.

The Grand Trunk Railway runs through the village of Island Pond, where it has a large yard, fourteen or fifteen tracks wide. The tracks extend east and west. On the south side are freight-sheds—a long line of buildings. On the north side is a hotel. Connecting the sides is an overhead bridge, built by the railroad company, some twenty feet above the tracks, and supported by eight or ten standards about twenty feet apart, each standard consisting of two posts strengthened by a brace and framed at the bottom into a timber resting upon the ground. The passenger station is near the middle of the yard, dividing it into what are called the east end and the west end. The bridge is twenty-five or thirty feet west of the station. All but two of the tracks are on the north side of the station. Those two are on the south side, and are, first from the station, the main line, and second, the freight-shed track.

A platform extends around the station and under the bridge. ²⁰⁸ The freight-shed track is fifty or sixty rods long, and at each end joins the main line, having probably two-thirds of its length west of the bridge; and it runs so near one of the standards that the north rail is only forty-one inches from it; so that, when a freight-car is on the track opposite the standard, the distance between the car and the post is only twenty inches.

The accident occurred on the 14th of October, 1898, and the foregoing description is to be understood as of that date. The location of the standards had not been changed since the bridge was built, in 1889, but the location of the freight-shed track had been changed, bringing it thus near the post instead of, as before, at some considerable distance from it. This change had been made about a year before the accident. No other standard or post in the yard stood so near the track by six inches, and most of them were still farther away.

Kilpatrick had worked for the company in this yard nearly all the time for eighteen years. From the May until the September before his accident in October, he had been yardmaster. Now, he was acting as switchman; and it was his duty to assist in shunting cars, making up trains, and letting them in and out of the yard under the direction of the foreman.

The defendant introduced no testimony, and the only witnesses, aside from the physician, were the engineer of the train upon which the plaintiff was riding when the accident occurred and the plaintiff himself. The engineer did not see what happened, so that the case rested substantially upon the plaintiff's own story. There had been a previous trial resulting in a verdict and judgment for the plaintiff, which this court reversed, on the ground that the plaintiff was guilty of contributory negligence as matter of law: *Kilpatrick v. Grand Trunk Ry. Co.*, 72 Vt. 263, 82 Am. St. Rep. 939, 47 Atl. 827. Upon the second trial, the evidence was so far varied that the question was submitted to the jury.

²⁰⁴ The plaintiff's story was, that about 1 o'clock in the morning he started from a point near the west end of the yard, where he had been at work, and came to the passenger station on his way to do other work at the east end. As he came upon the platform, he saw approaching from the east, on the freight-shed track, a train of four boxcars and one empty coal-car, pushed by a backing engine attached to the east end. He knew that there were cars already standing on this same track far-

ther west, beyond the bridge, and considering it his duty to be there when the train should come up to them, and thinking there was not time for him to walk or run ahead in the dark, and in order to be where he might the better signal to the engineer with the lantern he was carrying, and where he might put on the brake if necessary to prevent a too violent collision, which might break the drawbars, or even throw the standing cars foul upon the main line, where they would be in the way of trains soon to be let in, he made up his mind to mount the first car. This was a Grand Trunk boxcar, and was equipped with a side ladder at the west end, on the north side, the side toward him, and had no ladder on the end. So, having his left arm through the bail of the lantern and both hands free, he caught hold of a round of the ladder with his right hand, and stepped with his left foot upon the truck box under the car, the box that covers the end of the axle. His foot slipped from the box to the ground, and, running along a few steps beside the car, he tried again in the same way, and succeeded, drawing himself up so far on the ladder that his feet were on the bottom round and his head at the top of the car, when he struck against the post of the standard, and was knocked off; and the wheels passed over his foot, inflicting the injury for which he claimed to recover. As to the speed of the train, he had said on the first trial that he could not tell accurately, but upon being pressed for an opinion, had estimated ²⁹⁵ it at eight or nine miles an hour. Upon this trial he reduced his estimate to three or four miles, the rate at which the engineer, also, testified the train was running.

THE STATUTES RELIED UPON.

Vermont Statutes, 3886 and 3887, declare that no railroad corporation shall run a car of its own with a ladder or steps to the top of the same on the side, but that the same shall be on the end or inside of the car; and that it shall forfeit fifty dollars for each day's neglect to comply with this requirement, and be liable for damages and injuries to passengers and employés resulting from such neglect. This car was one of the defendant's own, and was being run in violation of the statute. The trial court correctly held that its action in that respect was negligence in law. Such was the holding of this court when this case was here the first time: *Kilpatrick v. Grand Trunk Ry. Co.*, 72 Vt. 263, 82 Am. St. Rep. 939, 47 Atl. 827.

THE QUESTIONS RAISED BELOW.

At the close of the plaintiff's testimony the defendant moved for a verdict, on two grounds: 1. That the plaintiff was guilty of contributory negligence; 2. That he had assumed the risk. The court said it would hold, pro forma, that he did not assume the risk; that the defendant was guilty of negligence as matter of law; that it thought the only question, aside from damages, was that of contributory negligence—which it thought should be submitted to the jury. To the ruling that the defendant was negligent as matter of law, and the ruling that the plaintiff did not assume the risk, the defendant excepted, and requested the court to hold, as matter of law, that the side ladder was not the proximate cause of the injury. It did not ask to have it left to the jury as a question of fact, and evidently did not desire that; for, although it excepted to the refusal of the court to hold that the side ladder was not the ²⁹⁶ proximate cause, it did not except to its omission to submit the question to the jury, nor to the charge itself, wherein it was assumed that the injury resulted from the presence of the side ladder. In view of the attitude taken, the court had a right to understand that the defendant stood upon its point of law alone. So we think it is not open to it now to argue that the question was one of fact and ought to have been submitted to the jury.

PROXIMATE CAUSE.

In refusing to hold as matter of law that the side ladder was not the proximate cause, there was no error. That certainly could not be ruled as matter of law. Leaving out of view the question of contributory negligence, there were three essential factors in the accident: the post, the ladder, and the man. It was necessary that the post should be near enough to strike the man when on the ladder; it was necessary that the man should be on the ladder to be struck; it was necessary that the ladder should be on the side instead of the end to bring the man near enough the post to be struck. If either one had been omitted, the accident would not have occurred. If the post was too near, by anyone's fault, it was the fault of the defendant; but leave that question out, and say the post was not near enough to be dangerous except to one on a side ladder; then we have only two factors left: 1. A ladder on the side instead of the end; 2. A man on the ladder. Can one be said to be any more proximate to the injury than the other? Are they not mutual, con-

temporaneous? As said before in this case (*Kilpatrick v. Grand Trunk Ry. Co.*, 72 Vt. 266, 82 Am. St. Rep. 939, 47 Atl. 828), "in the use of the words proximate cause, negligence occurring at the time of the injury is meant." Did not the negligence of the company in having a side ladder occur at the time of the injury as much as the presence of the man upon the ladder? Well, then, if both causes were equally ²⁹⁷ proximate, and one cause existed through the negligence of the defendant and the other existed without the fault of the plaintiff, and while and because he was in the performance of his duty toward the defendant, is not the defendant liable? And if the plaintiff was not guilty of contributory negligence, but was rightfully and prudently where he was, what question was there for the jury, of proximate or remote cause? Even if the question be treated as saved by the exception, we think the court was right in assuming that the side ladder was the cause of the injury, and that the defendant was liable, unless the plaintiff was guilty of contributory negligence, or had assumed the risk.

Pertinent instruction may be found in two cases from the federal supreme court. The Michigan Central Railroad Company was bound, by a municipal ordinance of Chicago, to fence its track, but omitted to do so; and the plaintiff, a child of nine years, bright and well grown, but deaf and dumb, came with his companions in the course of play, upon the track, there being no fence to prevent him, and was run over by a passing train. The circuit court directed a verdict for the defendant, on the ground that there was no evidence of legal negligence on its part. The supreme court held otherwise. It was there argued, in support of the judgment below, that the want of a fence was not the cause of the injury. The court said: "In the sense of an efficient cause, *causa causans*, this is no doubt strictly true; but that is not the sense in which the law uses the term in this connection. The question is, Was it *causa sine qua non*—a cause which, if it had not existed, the injury would not have taken place, an occasional cause? And that is a question of fact, unless the causal connection is evidently not proximate": *Hayes v. Michigan Cent. R. R. Co.*, 111 U. S. 228, 4 Sup. Ct. Rep. 369.

²⁹⁸ In *Union Pacific Ry. Co. v. McDonald*, 152 U. S. 262, 282, 283, 14 Sup. Ct. Rep. 619, where a child was burned by running into a hot slack pile left unfenced, in disregard of the statute, near the mouth of the company's coal mine, it appeared that the plaintiff was frightened by miners, who came up out

of the pit calling: "Let's grease him! Let's burn him!" and ran away, making for the village where his mother was, but slipped and fell into the pile. The circuit court held the child not guilty of contributory negligence as matter of law, and told the jury that the only question was one of damages, the defendant being negligent in law in failing to have a fence; and the supreme court affirmed the judgment, citing and relying upon the Hayes case.

ASSUMPTION OF RISK.

Did the court err in its pro forma ruling that the plaintiff did not assume the risk? The doctrine of assumption of risk may be regarded as only one phase of the broader doctrine expressed by the maxim, "*Volenti non fit injuria*." One is not to be allowed to recover for an injury which he has voluntarily brought upon himself, and he has brought it upon himself voluntarily if it resulted from a course of action which he took with full knowledge and appreciation of the risk. Moreover, one who enters upon a regular employment is presumed to know and appreciate the risks ordinarily incident thereto, and he assumes them. And when, in the course of his employment, a special and obvious risk is presented to him, one not ordinarily incident to the business, he may, as a rule, refuse to accept it, and if he choose to encounter it he assumes that also: *Carbine v. Bennington etc. R. R. Co.*, 61 Vt. 348, 17 Atl. 491; *Dumas v. Stone*, 65 Vt. 442, 25 Atl. 1097. The latter rule is subject to some exceptions, but they are not in point here, and we do not stop to notice them. But sometimes the legislature, in tenderness for ²⁹⁹ a class liable to abuse or oppression, railroad or factory hands, for example, forbids the use of a certain dangerous appliance, and gives an action to employes who may be injured as the result of using it. Such is this case. Now, it must be apparent to everyone that the legislature understood perfectly well that the employes who might be injured in using the appliance would be using it knowingly and voluntarily. In the case of a side ladder, for instance, they could not have expected that employes would not know they were using a side ladder; still they give an action for the injury.

So we think the ordinary doctrine of assumption of risk does not apply to a case where the negligence of the employer consists in the disregard of a statutory duty imposed upon him for the protection of his employes; certainly not when an action is expressly given for the breach. And this is exactly the dif-

ference between cases of negligence arising from the disregard of a statutory obligation, like the present, and cases of negligence arising from the failure of the employer to fulfill his common-law duty of providing safe appliances—that in the latter case the common-law duty is to be applied in connection with the common-law rule of the assumption of risk; while in the former, the statutory rule is accompanied by the bestowal of a right of action for the breach of it in favor of those who must necessarily be deprived of any action by the application of the common-law rule of the assumption of risk; and consequently the common-law rule is inconsistent with the statute and falls to the ground: *Badderley v. Earl Granville*, 19 Q. B. Div. 423; 17 Eng. Rul. Cas. 212, with notes at page 237.

On the other hand, the doctrine of assumption of risk may be regarded as purely a matter of contract, express or implied, between master and servant; and, when so regarded, the servant's inability to recover is put on the ground that he was ~~was~~ hired to do that very thing, and paid for taking that very risk. If that theory should be adopted in this case, then the first question would be whether in view of the statute, the plaintiff could assume this risk as a part of his contract.

The statute is a criminal one to the extent that it imposes a penalty of fifty dollars for each day's disobedience; and it also gives, as a still more efficient means of securing its observance, a private action in favor of the person injured. How plain it is that the act is an exercise of the police power of the state for the protection of life and limb among a large class of its people! And how easy it would be to thwart the whole purpose of the legislature by holding, as we are asked to do, that the class thus sought to be protected not only might formally contract away their protection, and relieve the road of its public duty thus imposed, but that the very fact of their using the ladder, seeing and knowing it was on the side of the car, constituted in law such a contract. We cannot adopt so bold a conception of judicial duty.

If the doctrine of assumption of risk is to be regarded as contractual, then we hold that the statutory protection cannot be bought and sold, but that the policy of the law forbids it in the interest of public welfare. This very question was thus decided in *Narramore v. Cleveland etc. Ry. Co.*, 96 Fed. 298, 37 C. C. A. 499, where the judgment is laid down by Taft, J., with a breadth of view and vigor of reasoning that leaves little need or excuse for treating the subject further. There, too,

the authorities on both sides are cited, criticised and distinguished.

If it be objected that the statute, when thus read, deprives the laborer of his right to make his own contracts, the answer is to be found in the principle that the state has a right to protect its poor and helpless, even to that extent, if need be: *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 22 Sup. Ct. Rep. 1. Such is ³⁰¹ the basis of the decisions that uphold the Utah labor law, restricting the hours of mining work to eight per day (*Short v. Bullion etc. Min Co.*, 20 Utah, 20, 57 Pac. 720; *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. Rep. 383), statutes that forbid the employment of children in certain callings, the store-order acts, and the long standing statutes against usury, in defense of one of the last named of which this court held, some twenty years ago, that even a release under seal given by the borrower at the time of the loan did not bar his right to recover the unlawful rate, declaring that "the statute was intended for the protection of the weak against the strong; and public policy requires that it should not be evaded nor its force abated": *Rowell, J.*, in *Herrick v. Dean*, 54 Vt. 568.

Everybody knows that there are large classes who get their living from day to day in such service as that in which the plaintiff was engaged, who must work where they are working, and keep their job at all hazards, if they would not bring themselves and their families to want. To say to such men, "If you do not like the conditions you may quit," is often only a heartless mockery. The legislature understood this; and the act we are considering was an attempt to better the condition of that very class by compelling the employer to yield something of profit in the interest of humanity, and to save the lives and limbs of his workmen by adopting safer instruments of labor. It seems to us a court should be very slow to construe the beneficial purpose out of such a law, or make it of no effect. On broad lines of public good and social progress, it is plain that such legislation must be largely looked to if government is to remain firm and secure in the respect and affection of the people.

³⁰² CONTRIBUTORY NEGLIGENCE.

Yet it does not follow that an employé who is injured, by reason of the neglect of his employer to comply with the statute, can recover under all circumstances. By the language of the statute, the right to recover is limited to injuries "resulting

from such neglect"; and, as this court has once decided, in this very case, that means resulting from such neglect alone; and the plaintiff must, as in other actions of this character, show that his own negligence did not contribute to the injury. But the doctrine of contributory negligence is entirely separate and distinct in theory from the doctrine of assumption of risk, although, as a practical matter, the fact that the employé knew and appreciated the risk he was running may, in the circumstances, justify or even require a finding that he was guilty of contributory negligence; or the negligence may consist entirely in the manner in which the risk is met.

To speak concretely, take this very case—the use of a side ladder. They had been used by employés for years, and doubtless by such use the risk had been assumed. Now, by reason of the statute, the risk is not, and cannot be, assumed. Yet the use of it under the given circumstances may be negligence, and may even be so gross as to be negligence as matter of law.

The defendant here claimed that the plaintiff was guilty of contributory negligence as matter of law, and based the claim mainly upon the ground that the plaintiff knew the location of the post and the track, their nearness to each other, and the consequent danger to one riding by the post on a side ladder. The plaintiff admitted that he knew the location of the post and the rail in a general way, but denied that he knew the distance between the two, and testified that before the accident he did not know of any reason why one could not ride safely by the post on a side ladder; that he had never tried it nor ~~so~~ seen it tried, although he had ridden safely past other posts in the same yard. At the first trial he had testified as follows, referring to the post against which he struck: "Q. You knew the location of it; you had seen it there every day for years? A. Yes, sir. Q. But you forgot at that moment? You didn't think about it at that moment? A. I didn't think about it at that moment. Q. Ever think about that question of getting injured as you were riding along through on those cars anywhere—about hitting those posts along there anywhere? A. No, sir. Q. Never thought of it? A. No, sir. Q. You knew the danger if you did get hit? A. Yes, sir. Q. You knew, with respect to this one, that you were liable to get hit, if you had thought of it? A. Yes, if I had thought of it."

Upon this testimony we are asked to say as matter of law that the plaintiff was guilty of contributory negligence. We

think it was a question for the jury. Taking the plaintiff's testimony in the light most favorable to him, as we are bound to do, it means that, even if he had taken thought, he would not have known that he would be hit in the position in which he then was, but only that he might be, that he was "liable" to be and that such thought, if it had occurred to him, would not have been the recollection of some danger which he had thought of before, for he says he had never thought of it, but would have been his opinion concerning the danger if it had occurred to him to form an opinion at that time. The fact that he did not do this at that time is not of itself negligence in law. It is a fact to be considered by the jury, with all the other facts. The law required of him the prudence of a prudent man. The prudent man is not the man who never forgets ³⁰⁴ anything, who is never guilty of any inattention, who never fails to think of any possible danger to which he is exposed. That is the perfect, the infallible man. Circumstances may excuse ignorance, forgetfulness, inattention, whenever the jury may reasonably say that a man so placed might be so ignorant, or forgetful, or inattentive, without losing his right to be called a prudent man in the circumstances. And here the circumstances must be attended to. The plaintiff was attempting to mount the car to perform his duty. In his first attempt his foot slips from the box, and he finds himself in a position of danger. In the moment's struggle, his mind intent upon its object, he does not think of the post at all. Considering his situation at the instant, can it be said as matter of law that his failure to think of the post and of his liability to be struck by it, was negligence? There may have been ample time for him to have reached a place of safety if his foot had not slipped. In his second attempt, we cannot expect of him quite the same calmness and deliberation as in his first. It is the miscarriage of the first attempt that has placed him in an unexpected and dangerous position, where he must decide and act quickly. We are much aided in this inquiry by a case remarkably in point: Kane v. Northern Central Ry. Co., 128 U. S. 91, 9 Am. St. Rep. 16. There the plaintiff, a brakeman, in letting himself down from the end of a car to pass over a lumber-car to the next one, where he belonged, fell between the cars, and was injured by reason of one of the steps being gone from the end of the car he was getting down from. He knew the step was gone, and had called the conductor's attention to it, and the conductor had promised to have it set out at a station soon

to be reached. But it was a dark, stormy, bitter cold night in the winter, and he was in a hurry to get to his post, and forgot the step was missing until it was too late. If he had not forgotten, he could have avoided the accident. If he had thought ³⁰⁵ a moment sooner, he could still have saved himself by drawing himself back up. The circuit court ordered a verdict for the defendant, on the ground of contributory negligence; but the supreme court of the United States reversed the judgment, and held that it ought to have been left to the jury "to determine whether the plaintiff, in forgetting or not recalling, at the precise moment," that the step was missing. "was in the exercise of the degree of care and caution which was incumbent upon a man of ordinary prudence in the same calling, and under the circumstances in which he was placed"; saying that, if he was, he was not defeated of his right to recovery by contributory negligence: Harlan, J., at page 96, 128 U. S. and page 18, 9 Sup. Ct. Rep. The case is approved in *Union Pac. Ry. Co. v. McDonald*, 152 U. S. 262, 281, 282, 14 Sup. Ct. Rep. 619.

In view of all the surroundings here, the duty of the plaintiff as the defendant's servant, the need, if need there was, to mount the car to set the brake or give the signals or be at the place of collision, the speed of the train, the darkness, the mischance of the plaintiff in his first attempt to get on, his knowledge of the post and track, his experience or want of experience in passing there, his position upon the ladder, the exigency, and his failure to think at that time of his liability to be struck—in view of all this, we think it was fairly within the province of the jury to determine whether the conduct of the plaintiff deserved to be called negligent. The facts are not, in our opinion, sufficiently decisive to make the question one of law.

The court submitted to the jury the question whether the plaintiff had been guilty of contributory negligence; and to its charge as given upon this subject no exception was taken. The defendant presented, however, eleven requests, none of ³⁰⁶ which was granted, and excepted to the refusal in respect to each. Each request, therefore, must be considered.

REQUESTS TO CHARGE.

The first to charge that the plaintiff could not recover, without specifying any ground, and is sufficiently covered by the foregoing reasoning, as is also the second, which requests the

same charge on the ground that the plaintiff was guilty of contributory negligence.

The third and fourth insist that the plaintiff, by the very fact of knowingly and voluntarily using a side ladder, necessarily assumed all the risks and perils incident thereto. This question has been already disposed of.

The fifth reads as follows: "That if the plaintiff voluntarily and without necessity, chose a dangerous method of performing his work, when other safer methods were open to him, then he assumed the risks and perils arising from the method which he chose, and if injured because of such choice, and because of the performance of his work by the dangerous method, he is not entitled to recover."

This request was properly refused, because it omits the essential element of knowledge on the part of the plaintiff that other safer methods were open to him, and that the method he was choosing was dangerous. It is not enough that he voluntarily chose a way which the jury could see was dangerous, instead of one which the jury could see would have been safer, if it did not so appear to him, nor would necessarily have so appeared to a man of prudence under those circumstances.

The sixth was: "That if the plaintiff knew, or in the exercise of due care ought to have known, of the danger of getting upon the car and riding, or attempting to get on and ride, as he was attempting to do, by the supports of the overpass, ³⁰⁷ and from inattention, indifference, absentmindedness, or forgetfulness, failed to avoid such danger, and was injured, he was guilty of negligence, and cannot recover." This was properly refused because it cannot be said that inattention or forgetfulness at the critical moment was necessarily, and, as matter of law, negligence. The question would still remain whether he was acting as a prudent man in the circumstances. And, besides that, the court did charge upon the subject of contributory negligence and in a manner not excepted to. In so charging it laid down the general rule that the plaintiff was bound to show that he was acting as a careful and prudent man would act under the same circumstances. This is the true rule; and it was not the right of the defendant to dictate the language of the instruction, or to select certain possible phases of the evidence and formulate them into a rule of law, to take the place of the general and long approved form which the court adopted.

For the same reason, the court properly refused the seventh request, which was, that if the plaintiff knew of his danger, but temporarily forgot it, he could not recover.

In the eighth, ninth and tenth requests, the defendant singled out the question of the speed of the train, and insisted that the plaintiff could not recover if he thought the train was going faster than he could naturally walk or run, or about eight or nine miles an hour, or if it was in fact moving at such a speed. These requests were properly refused, for the question of negligence could not be made to turn entirely upon one isolated fact, but was to be determined upon a view of all the facts.

The eleventh request was to charge that the side ladder, as matter of law, was not the proximate cause of the accident—a subject already discussed and disposed of.

306 THE ARGUMENT TO THE JURY.

One of counsel for plaintiff, in arguing to the jury, stated that had the plaintiff failed in his duty at the time of the accident, or failed to do what he attempted at the time, it would not have been long before he would have had notice from the defendant. To this argument, the defendant objected and excepted; and then the advocate inquired of the court if he had not the right to argue and ask the jury what they would do to a man who failed to do his duty; and, upon being told that such argument was not legitimate, said that he withdrew all that had been said upon the subject. The defendant asks special consideration of this exception.

Although an exception was allowed to what had been said, the ruling seems to have been in favor of the excepting party; and in the absence of any indication of bad faith, and in view of the instant submission and complete retraction, we should hardly be justified in considering the exception at all.

Moreover, it was a question for the jury to consider, whether the plaintiff, in attempting to mount the car, was performing a duty to the defendant—doing what the defendant would reasonably expect him to do, and what he would naturally and rightly understand was expected of him. It was to this point that the argument was addressed. It was merely claiming, not by way of fact, but by way of inference and probability, that the plaintiff was acting in the line of his duty, and so clearly so, that, if he had failed to do as he did, he might reasonably

have expected to be dismissed. We are not prepared to say that so far as the argument had proceeded it was not legitimate.

THE SECOND TRIAL WAS DE NOVO.

The verdict on the first trial was \$1,750. Upon the second it was \$3,000. The defendant excepted to judgment ³⁰⁰ being rendered for the larger sum, claiming that the damages had been determined by the first verdict, and that the judgment could only be for that sum.

When the new trial was granted, the whole adjudication of the first was wiped out, and the case proceeded de novo. Such has always been the practice here: *State v. Bradley*, 67 Vt. 465, 472, 473, 32 Atl. 238.

Judgment affirmed.

Nonperformance of a Duty Commanded by Statute, resulting in injury to another, is negligence as a conclusion of law: Chicago etc. R. R. Co. v. Mochell, 193 Ill. 208, 86 Am. St. Rep. 318, 61 N. E. 1028. It is the duty of an employer to use the very means prescribed by statute for the safety of employes; he is not at liberty to adopt others, though in his opinion more efficacious. The risks that arise from his disregard of such duty cannot be put upon an employe: *Davis Coal Co. v. Pollard*, 158 Ind. 607, 93 Am. St. Rep. 319, 62 N. E. 492; *Odin Coal Co. v. Denman*, 185 Ill. 413, 76 Am. St. Rep. 45, 57 N. E. 192. As to whether the doctrines of contributory negligence and assumption of risk apply in case a positive statutory duty is disregarded, see the monographic note, *Wellston Coal Co. v. Smith*, 87 Am. St. Rep. 584-595; *Kilpatrick v. Grand Trunk Ry. Co.*, 72 Vt. 263, 82 Am. St. Rep. 939, 47 Atl. 827; *Reidel v. Philadelphia etc. R. R. Co.*, 87 Md. 153, 67 Am. St. Rep. 328, 39 Atl. 507.

LIVINGSTON v. PAGE.

[74 Vt. 356, 52 Atl. 965.]

ELECTIONS—Contracts Against Public Policy.—A contract to pay for the support or influence of a newspaper in securing a nomination for public office is against public policy, and therefore void. (p. 905.)

H. H. Powers and Barber & Darling, for the plaintiff.

R. H. Hurlburt and Young & Young, for the defendant.

³⁵⁷ **MUNSON, J.** At the close of the plaintiff's evidence, the defendant moved that a verdict be directed in his favor, on the ground that the contract claimed by the plaintiff was void,

as against public policy. The court held the contract void for ~~as~~ the reason assigned, and directed a verdict accordingly. The case is here upon the plaintiff's exception to this holding.

The plaintiff called the defendant as a witness. The evidence consisted of certain correspondence had by the parties; and the testimony of the parties as to the circumstances in which the letters were written, the meaning that was attached to the language used, the matters inclosed for publication by one party and the services rendered by the other, and subsequent transactions bearing upon their understanding of the relations they had sustained.

The defendant claimed that no contract with the plaintiff was in fact consummated, and that the only contract ever contemplated was one for the publication of extracts from other papers at a legitimate charge for the space actually taken. The plaintiff did not claim to recover on this ground, but claimed to recover a reasonable compensation for the support and influence of his paper and his services as its editor.

The plaintiff was a Democrat, publishing a Democratic paper of independent proclivities. The defendant was a Republican, seeking a nomination to Congress from a Republican convention. It appeared from the plaintiff's testimony that he considered defendant's proposal an application for the use and influence of his paper, in the nature of a retainer; that he accepted it with the understanding that his paper and his services as editor would be at the command of the defendant during the campaign, to be settled for at its close; that he was to do all he could to influence the choice of delegates and secure the defendant's nomination; that original matter was within the scope of his contract; and that his editorials were written in that view; that he supported defendant because of this contract and the money he was to get out of it; that he expected to receive a larger compensation if defendant was nominated than he otherwise would; that he tried to conceal his relations ~~as~~ with the defendant from the public, and understood that the defendant was trying to do the same; that he took this course because it would make his efforts in influencing voters in defendant's behalf more successful.

The case of *Nichols v. Mudgett*, 32 Vt. 546, decided by this court in 1860, is one of the few cases bearing upon this subject. The plaintiff in that case was a candidate for the office of town representative and a creditor of the defendant.

The defendant's party affiliations were such as would naturally lead him to vote for the opposing candidate. Conversations were had which resulted in a mutual understanding that the defendant should use his influence in favor of the plaintiff's election, and that, if the plaintiff was successful, the defendant's indebtedness should be treated as paid. Induced by this agreement, the defendant supported the plaintiff's candidacy until his election was declared. There was no agreement that defendant should vote for the plaintiff unless it was implied in the above understanding. He voted for the plaintiff, however, and did so because of the understanding. The suit was for the recovery of the indebtedness referred to, and the defendant claimed that it had been satisfied. The court considered that there was a sale of the defendant's influence and vote, held the agreement void, and gave judgment for the plaintiff.

The agreement in that case involved both the defendant's vote and his influence upon the votes of others, but the court's discussion of the subject does not leave much doubt as to what its conclusion would have been if the undertaking had been confined to the latter service. Certainly no distinction could properly be made between the two. But that contract had reference to the votes to be cast at an election; and the plaintiff contends that, inasmuch as caucuses and conventions are not creations of the law, contracts for services in influencing the ³⁶⁰ choice of delegates and the action of a convention cannot be considered against public policy.

In *Liness v. Hesing*, 44 Ill. 113, 92 Am. Dec. 153, the contract was for services of this character. It is suggested that there may have been a law in that state regulating primaries, but there is no intimation of one in the opinion, and we have found none in the examination we have been able to make. There, the plaintiff sent the defendant twenty dollars, with a request that he use his influence to get plaintiff nominated for a certain office, and a direction to call upon him for twenty more if he got the nomination. The defendant kept the twenty dollars, and aided the plaintiff's opponent. The suit was to recover this money, but the defendant had judgment. The decision was announced by Justice Lawrence, who characterized the transaction as "an attempt to influence, by moneyed considerations, the action of the defendant in a matter where every person should be governed solely by a regard for the public welfare."

In *Strasburger v. Burk*, 13 Am. Law Reg., N. S., 607, decided by the city court of Baltimore, the defendant was the keeper of a lager beer saloon, and agreed to give his political influence and furnish beer and cigars to secure a caucus nomination for the plaintiff's father. The gratuitous furnishing of food or liquor to secure votes at an election was prohibited by the code, but the only statutory recognition of primary elections was a provision for the preservation of order. The court considered that in applying the principles of public policy no distinction could be made between voluntary meetings of this character and elections ordained by law. Mr. McCrary adopts the conclusions of this opinion in his work on Elections, and applies the doctrine to the sale of influence, as well as the sale of votes. Mr. Redfield, in commenting upon the same opinion in 13 American Law Register, New Series, page 610, says ³⁰¹ that the invalidity of contracts designed to control the freedom of elections results from the principles of the common law, and that those relating to caucuses cannot be made an exception on the ground that such meetings are not recognized by the statute.

We cannot doubt the correctness of this conclusion. The rule would largely fail of its purpose if not so applied. When the voters are unevenly divided into two parties, the nomination of the stronger organization is usually equivalent to an election. And when party action is less decisive, the subsequent efforts of the voters are ordinarily confined to a selection from the candidates regularly presented. The individual voter of a large electorate can seldom give an effective expression to a choice that is not in line with the action of some party convention. To secure a free and exact expression of the sovereign will, there must be a proper selection of candidates, as well as an honest election. If the choice of delegates and the action of the nominating convention are improperly determined, the election ballots will fail to express the real judgment of the voters.

It is not claimed in argument, and no ground occurs to us upon which it could be claimed, that this contract was any the less obnoxious to the law because the purchased influence was to be exerted through the columns of the plaintiff's paper. A newspaper is understood to present the views of some one connected with its management or views deemed consistent with some settled policy, and has a patronage and influence which are due to that understanding. As long as the editorial column is relied upon as a public teacher and adviser, there can be no

more dangerous deception than that resulting from the secret purchase of its favor.

We hold that the contract testified to and relied upon by the plaintiff is contrary to public policy, and therefore void.

Judgment affirmed.

Note.—Since the delivery of the above opinion, we have seen *Fitch v. De Young*, 66 Cal. 339, 5 Pac. 364, where it was held, upon views similar to those expressed in concluding the opinion, that an article charging a publisher with selling the support and advocacy of his paper for money, is libelous.—L. M.

WHAT CONTRACTS WITH NEWSPAPERS ARE AGAINST PUBLIC POLICY AND THEREFORE VOID.

- I. In General.
- II. Contracts for Sale of Support and Influence of Newspaper.
- III. Contracts of Indemnity for Libel.
- IV. Contracts Affecting Competition for or Procurement of Public Printing.
- V. Contracts in Restraint of Trade.
 - a. Sale of Newspaper and Goodwill of Business.
 - b. Contracts with News Agencies.
- VI. Contracts for Advertisements in Sunday Papers.

I. In General.

In view of the enormous progress of newspaper publication in recent years, and of the extent of the influence over public matters exercised by the newspaper press, it is remarkable to what a small extent considerations of public policy have been invoked or applied in determining the validity of contracts to which the owners or proprietors of newspapers are parties. The rules of public policy applicable to other contracts are applicable to contracts of the kind mentioned, and are applied no more and no less stringently where the contract is with the owner or publisher of a newspaper than where no such consideration is present.

II. Contracts for Sale of Support and Influence of Newspaper.

In the principal case (*Livingston v. Page*, 74 Vt. 356, ante, p. 901, 52 Atl. 965) the contract sued upon was one in which the plaintiff, the publisher of a Democratic newspaper, sold the support of his paper to the defendant, a candidate for nomination to Congress by a Republican convention. The court very properly held that such a contract was contrary to sound public policy and void. But the holding is not dependent upon the fact that the policy of a newspaper is involved. The nature of the cases relied upon and the tone of the opinion show that the contract was held void because it was a contract under which, for a pecuniary compensation, one agreed to influence voters in a matter of public interest—the choice of delegates to a nominating convention. The circumstance that the support and

influence sold was that of "a public educator," as counsel for the defendant characterized it, was referred to only to show that that made it none "the less obnoxious." "It is not claimed in argument, and no ground occurs to us upon which it could be claimed, that this contract was less obnoxious to the law because the purchased influence was to be exerted through the columns of the plaintiff's paper." It is true that the court proceeds to say that patronage and influence given to a paper by the public are dependent upon the understanding that it presents the views of its management consistent with some settled policy, and that "as long as the editorial column is relied upon as a public teacher and adviser, there can be no more dangerous deception than that resulting from the secret purchase of its favor." But this language is evidently intended merely to show the extent of the influence wielded by the plaintiff, and which he attempted to sell, rather than as a basis upon which to predicate any rule of public policy which applies solely to newspapers and their owners, or to them any more stringently than to other persons.

In *Gode v. Robinson Consol. M. Co.* (N. Y. Daily Reg.), Nov. 15, 1882, it was held that a contract by which the editor of a newspaper agrees to insert an advertisement, and also a notice of the subject matter of it in the editorial department of his paper, is legal. While the original report of the case is not accessible to us, the distinction between it and the principal case is obvious, and bears out the statement already made that contracts affecting newspapers are void as against public policy only when they would be void even did they not affect a newspaper. In the New York case the sale (if there was such) of the editorial policy of the paper was with reference to a matter in which the public had no direct interest, and the fact that the support of a newspaper had been bartered did not in itself make the contract of barter illegal. In the principal case (*Livingston v. Page*, 74 Vt. 356, ante, p. 901, 52 Atl. 965), the contract was void, not because it was a contract for the sale of the editorial policy of a newspaper, but because it was a sale of personal influence in a matter with reference to which public interest demanded the free judgment of voters.

In a note to the principal case, Munson, J., who wrote the opinion, refers to *Fitch v. De Young*, 66 Cal. 339, 5 Pac. 364, where he says it was held "upon views similar to those expressed in concluding the opinion, that an article charging a publisher with selling the support and advocacy of his paper for money, is libelous." In the case referred to the libel complained of was that the plaintiff, the proprietor of a newspaper, had been charged by the defendant, the proprietor of another paper, with being a party to a secret conclave in which he (the plaintiff) sold the support and advocacy of the former newspaper to certain corporations for a large sum of money. Myrick, J., in delivering the opinion of the court as to whether such a charge is libelous, comments at some length on the relations between an editor and the public, on the duty of the former to give, and on the

right of the latter to expect, sincere expression to convictions in line with the general course of the paper's editorial policy. "A newspaper, as to its editorials, is, in the main, read because its readers are in accord with its general sentiments, and desire to be able to place confidence in its general course. They have a right to presume that if a radical change occur, the change will be from conviction, and that fair dealing will suggest that due notice thereof be given, to the end that they may, if they choose, cease to remain such. If readers of newspapers are at all honest in their own sentiments, proprietors of newspapers owe them the duty of being sincere," and the court concludes: "We cannot say that it would not expose the proprietors of a newspaper to hatred, contempt, ridicule, or obloquy of its readers, or would not injure them in their occupation, to accuse them of acts having a tendency to lessen the confidence of its readers, or to lessen the number of its patrons. On the contrary, we think it would have that effect." Similarly, it was held in *Hart v. Townsend*, 67 How. Pr. 88, that to write of a newspaper called "Truth" that "The newspaper 'Truth' is alleged to have been started for purposes of plunder," is defamatory and libelous, and the publisher may recover therefor.

These cases simply hold that to charge the publisher of a newspaper with insincerity or the sale of his influence is libelous, and are undoubtedly correct. The proprietor of a newspaper is under a moral duty to make his paper express his own convictions and reflect an honest and consistent editorial policy. To charge him with failure to do this, and with having sold his influence for money, plainly exposed him to "hatred, contempt, ridicule and obloquy," and injures him in his occupation. But it does not follow that he is under a legal duty to be absolutely sincere in his editorial policy, or that in a matter which does not affect the public interest directly he may not sell his influence. And unless the contract in its ends and aims is violative of some rule of public policy, it will not be void simply because it involves the sale of the support of a newspaper or hampers the free expression of his honest opinion by the editor.

Jones v. Williams, 139 Mo. 1, 61 Am. St. Rep. 436, 39 S. W. 486, 40 S. W. 353, although it involves considerations of public policy in respect to a contract with the owner of a newspaper, presents really a question of corporation law, but will be here noted. In that case it is held that a contract by which a stockholder controlling almost all of the shares of a corporation publishing a newspaper, contracts with a third person for the sale of a number of shares to the latter, and that he will secure his election as director and president and his appointment as editor and manager for five years, was not void as against public policy where all the stockholders acquiesced therein. The only objection on the ground of public policy was that the contract coupled with a sale of corporate stock an agreement by the selling stockholder to secure the vendee a position as officer and employé of the corpora-

tion, and would thus possibly require action by the stockholder inconsistent with the duty he owed the company and other stockholders. The court held, however, that the unanimous assent to the contract of the other stockholders obviated this objection.

III. Contracts of Indemnity for Libel.

While, as we have seen, the mere fact that a contract affects a newspaper does not make or emphasize any rule of public policy, and a contract with a newspaper will be void as against public policy only when the same result would follow were no newspaper involved, the converse is equally true. A contract which would ordinarily be held violative of sound public policy will not be upheld simply because one of the parties thereto is the owner of a newspaper. A contract to indemnify a publisher of a newspaper for the consequences of a libel is void. The rule resting on considerations of public policy, and to the effect that there can be no contribution or indemnity as between wrongdoers, is well established. And where therefore, one party induces a newspaper proprietor to publish a libel, a contract of indemnity between them, whether made prior to or after the beginning of an action for libel, is contrary to public policy and void. "The law will not interfere in aid of either. It will not inquire which of the two are most in the wrong, with a view of adjusting the equities between them, but regarding both as having been understandingly engaged in a violation of the law, it will leave them as it finds them to adjust their differences between themselves as best they may": *Atkins v. Johnson*, 43 Vt. 78, 5 Am. Rep. 260. To the same effect see *Arnold v. Clifford*, 2 Sum. 238, Fed. Cas. No. 555; *Shackell v. Romier*, 2 Bing. N. C. 634, 29 Eng. Com. L. 438. On the same principle, the proprietor of a newspaper cannot recover of his editor the damages he has suffered as a result of an action against him for a libel inserted in his paper by his editor without the proprietor's knowledge or consent: *Colburn v. Patmore*, 1 Crompt. M. & R. 73.

"The liberty of the press" does not change this rule. "The liberty of the press does not include the right to publish libels. Much less does it include the right to be indemnified against the just legal consequences of such publications": *Story, J., in Arnold v. Clifford*, 2 Sum. 238, Fed. Cas. No. 555. To the same effect see *Atkins v. Johnson*, 43 Vt. 78, 5 Am. Rep. 260.

IV. Contracts Affecting Competition for or Procurement of Public Printing.

Where a statute requires certain public officers to designate each year the newspapers in each county in which the laws of the state are to be published, the selection to be carried out on such a basis that the papers selected shall be those having the largest circulation, the number of the newspapers to be equal to the number of representatives in the legislature from each county and to be divided

equally among the papers of the two leading political parties, the policy of the law requires the selection of the papers by the officers named and "having reference also to such of them as have the largest circulation." Accordingly, if the proprietors of two of the newspapers in a county, belonging to the two leading political parties, agree not to compete for such business, but to divide the net proceeds of any such printing as may be given to either paper, the contract violates the policy of the statute and is void. "The contract in question . . . on its face assumes control of the disposition of the selection to publish the laws. . . . This contract was substituted in the place of the statute, and, so far as the statute is to be considered and interpreted, the statute no longer had any effect. . . . No grosser form of a contract in contravention of the provisions and policy of the statute could be demonstrated": *Brooks v. Cooper*, 50 N. J. Eq. 761, 35 Am. St. Rep. 793, 26 Atl. 978. And where the manager of a newspaper gives a commission to one who brings him public advertising, under circumstances such as to give the manager notice that the public officers were making private profit out of such advertising, where the price paid was excessive to the extent of the commissions, the state can recover from the principals of the manager the amount of such commissions: *Commonwealth v. Press Co.*, 156 Pa. St. 516, 26 Atl. 1035.

Where, however, the price to be paid for the printing is fixed by law, and the selection of the paper in which it is to be printed is to be selected by an officer who has the power to designate any paper of general circulation, a contract by which a vendee under an executory contract of sale agreed to procure such printing for his vendor is not void as against public policy, where no improper means were contemplated or employed: *Brady v. Yost*, 6 Idaho, 273, 55 Pac. 542.

V. Contracts in Restraint of Trade.

a. *Sale of Newspaper and Goodwill of Business.*—Whether a contract by a newspaper man, who disposes of his business, that he will not engage in the publication of a paper within a certain time or in a certain territory is valid or not depends upon the same considerations as determine the validity of contracts in restraint of trade generally. An editor or proprietor of a newspaper has an asset in the goodwill of his business and the patronage which his personal or literary qualities have given to his paper. "Where an editor, by reason of his style, his power, his pathos, his humor, his learning, or any gift or attainment, attracts subscribers solely by such personal qualities, he imparts a peculiar value to the goodwill and property of a newspaper which goes with him, to its injury when he leaves it and lends the talent and accomplishments that have given it patronage and popularity to a rival journal in the same vicinity. . . . But it is not like other property which ordinarily passes by delivery or assignment to the purchaser. Neither an editor, a lawyer or a physician can transfer to another his style, his

learning, or his manners. Either, however, can add to the chances of success and profit of another who embarks in the same business in the same field by withdrawing as a competitor. So that the one sells and the other buys something valuable, and the policy of the law limits the right to enter into such contracts of sale only to the extent that they are held to injure the public by restraining trade": *Cowan v. Fairbrother*, 118 N. C. 406, 54 Am. St. Rep. 733, 24 S. E. 212.

No arbitrary limits as to what is a "reasonable restraint of trade" can be laid down. The reasonableness of the restraint depends upon the extent of the business and the extent of territory in which as a consequence competition by the vendor would affect the interests of the vendee. The restraint permissible is as great as the protection necessary, and may embrace in the case of a newspaper an entire state: *Cowan v. Fairbrother*, 118 N. C. 406, 54 Am. St. Rep. 733, 24 S. E. 212. Nor in order that a contract by a newspaper man to abstain from carrying on the publication of a paper within a certain area be valid is it necessary that the printing plant of the paper be sold. It is enough if the agreement to refrain from competition is an incident of the sale of goodwill of the business and this "goodwill" may be sold by a mere agreement to discontinue publication: *Mapes v. Metcalf*, 10 N. Dak. 601, 88 N. W. 713.

An agreement to abstain from publishing a paper when reasonable and otherwise valid is not rendered void by a constitutional provision which guarantees the freedom of the press. "In its broadest sense, freedom of the press includes not only exemption from censorship, but security against laws enacted by the legislative department of the government, or measures resorted to by either of the other branches for the purpose of stifling just criticism or muzzling public opinion [citing authorities]. . . . It has never been held anywhere that these provisions could be made engines of oppression by construing them as restrictions upon the right to sell anything of value that is the creature of one's brain, provided society would not be made to suffer by the transaction": *Cowan v. Fairbrother*, 118 N. C. 406, 54 Am. St. Rep. 733, 24 S. E. 212.

b. *Contracts with News Agencies.*—In the note to *Harding v. American Glucose Co.*, 74 Am. St. Rep. 235-273, on what constitute unlawful trusts, the legality of the Associated Press and other combinations relating to the publication of news is considered at pages 262-264. These associations are agencies for the collection of the news of the day and furnishing it to such newspapers, etc., as may be members of the association. In the now famous case of *Inter-Ocean Pub. Co. v. Associated Press*, 184 Ill. 438, 75 Am. St. Rep. 184, 56 N. E. 822 (reversing 83 Ill. App. 377), it was held that the Associated Press, having power in its charter to establish, etc., telephone and telegraph lines, although organized and managed solely for the purpose of gathering news for sale and publication, was engaged in a business to which a public interest attaches, and that a provision in the by-laws of such an association that any member receiving news

from it may be suspended for procuring news from any other source was held unreasonable and void, and an injunction was issued to restrain the imposition of the penalty. The grounds of the decision are that the by-law of the corporation and its contract with its "members" tended to create a monopoly, and to restrict competition; and that such a by-law was beyond its power to make, and was unreasonable and void.

In other states, however, the rule has been otherwise declared. Such a contract and by-law have been held reasonable and valid, and the doctrine that the business of gathering news is one affected with a public interest or *publici juris* is denied. This latter question is discussed at great length and with much learning by Sherwood, J., in *State ex rel. Star Pub. Co. v. Associated Press*, 159 Mo. 410, 81 Am. St. Rep. 368, 60 S. W. 91, in which the court refused to compel the Associated Press to enter into a contract to furnish a certain newspaper with news service on the same terms as it was supplied to other papers. (See, also, *Iron Age Pub. Co. v. Western Union Tel. Co.*, 83 Ala. 498, 3 Am. St. Rep. 758, 3 South. 449, in which the court refuses to compel specific performance by the Associated Press of its contract for furnishing exclusive news service to the complainant, on the ground (*inter alia*) that it would compel the court to superintend the continuous performance of services requiring special skill, judgment and discretion.)

In *Matthews v. Associated Press*, 136 N. Y. 333, 32 Am. St. Rep. 741, 32 N. E. 981, affirming 15 N. Y. Supp. 887, 61 Hun, 199, the court refused to restrain the defendant from imposing the penalty of suspension in accordance with its by-laws and contracts where the plaintiff had, in violation of such by-law, received news from other sources. The by-law was held valid and enforceable. It was not, said the court, an unreasonable restraint upon trade, nor did it affect the liberty of the press. Certainly, a third person has no right to restrain the suspension of one of its members by the association for receiving news from sources other than the association: *Dunlap's Cable News Co. v. Stone*, 60 Hun, 583, 15 N. Y. Supp. 2. And in an English case, *Exchange Tel. Co., Ltd., v. Central News, Ltd.* (1897), 2 Ch. 48, the news agency itself secured an injunction against one of its members communicating news received from it to third parties in violation of his contract, and also restrained such third party from inducing the member to break his contract by supplying such information.

See, as to discrimination by a telegraph company in the rates charged various newspapers for news service, *Western Union Tel. Co. v. Call Pub. Co.*, 44 Neb. 326, 48 Am. St. Rep. 729, 62 N. W. 506.

VI. Contracts for Advertisements in Sunday Papers.

In *Sheffield v. Balmer*, 52 Mo. 474, the defendant contracted for an advertisement in the Sunday edition of plaintiff's paper, and then sought to escape liability on the ground that it was in violation of

the law against labor. It appeared that all the work on the paper was done on week days, although the paper was sold on Sunday. The court held that since the contract could be legally performed without any work being done on Sunday, the contract would be sustained.

In *Smith v. Wilcox*, 24 N. Y. 353, 82 Am. Dec. 302, on very similar facts and statutes, the opposite conclusion is reached, the court holding that the contract must have assumed that the service would be performed in the usual way, and that the paper would therefore be sold on Sunday. See, also, *Smith v. Wilcox*, 19 Barb. 581, 25 Barb. 341. The view of the New York cases seems a reasonable one, but the rule in that state was changed by a statute passed April 25, 1871 (2 N. Y. Laws 1871, c. 702) to the effect that "all contracts or agreements of any nature made with the publishers or proprietors of any paper dated, published or issued on the first day of the week shall be as valid, legal and binding, as contracts made with newspapers dated and published on any other day of the week."

COOK v. HOWLAND.

[74 Vt. 393, 52 Atl. 973.]

CORPORATIONS, Foreign, Right of to do Business Within the State.—A foreign corporation may be permitted to do business in this state, or may be entirely excluded therefrom. If such permit is granted, it may be under such conditions and regulations as the state chooses to impose, provided matters of a federal nature are not affected thereby. (pp. 913, 914.)

CONSTITUTIONAL LAW—Nonresident Agents—Right to Exclude from Doing Business for Foreign Corporations.—A state may deny to a foreign corporation the right to do business therein except by licensed resident agents, and may hence refuse to issue a license except to a resident. (p. 914.)

Hamilton S. Peck, for the petitioner.

Dillingham, Huse & Howland, for the respondents.

393 **WATSON, J.** Vermont Statutes provide: "Sec. 4181. A foreign insurance company shall not transact insurance business in this state, unless it first obtains license of the insurance commissioners, authorizing the company so to do. Before receiving such license, the company shall file with the Secretary of State a certified copy of its charter and by-laws, and a statement, under oath, of its president and secretary, showing its financial condition and standing, in accordance with blanks furnished by him. Sec. 4182. If the commissioners are satisfied with such copies and statements and that the company has

complied with the provisions of this title, they shall grant a license authorizing it to do insurance business by lawfully constituted and licensed resident agents only. . . . Sec. 4193. No person shall act as agent of a foreign insurance company, until he has filed with the Secretary of State a certificate from the company or its general agent, authorizing him to act as such agent, and obtains a license from the commissioners. Upon filing the certificate, the commissioners shall issue a license to such person to act as an insurance agent in this state; provided, the company for which such person acts is authorized to do insurance business in this state."

The United States Life Insurance Company is an insurance corporation of the state of New York, and the petitioner is one of its duly authorized agents to transact such business in that state. The company has complied with the provisions of section 4181, and it has been licensed by the insurance commissioners ³⁹⁶ to carry on its business in this state by lawfully constituted and licensed resident agents only, subject to the laws of the state, from the first day of April, 1902, to the first day of April, 1903; and it has been and now is transacting business under said license. The company constituted the petitioner, a resident and citizen of the state of New York, one of its agents, and requested the commissioners to issue a license to him authorizing him under the laws of this state, as agent for the company, and in its name and behalf here to transact business of life insurance, so far as he may be authorized by the company; and the petitioner in his own behalf made a like request of the commissioners. The commissioners refused, and still refuse, thus to license the petitioner, for the reason that he is not a resident of this state.

The petitioner alleges and contends that so much of section 4182 as provides that a license issued to a foreign insurance corporation shall limit it in doing business to "lawfully constituted and licensed resident agents," is void, in that it invades the rights and privileges guaranteed in section 2 of article 4 of the federal constitution, and in section 1 of the fourteenth amendment, by which the citizens of each state are entitled to all privileges and immunities of citizens of the several states.

A corporation has legal existence only in the state of its creation. It may be permitted to do business in another sovereignty or it may be entirely excluded therefrom. The question whether such permission shall be given rests wholly with the state which the corporation seeks to enter for that

purpose; and if permission is granted it may be under such conditions and regulations as the state shall impose, providing matters of a federal nature are not affected thereby, without invading the rights and privileges guaranteed by the provisions of the constitution above referred to; for it is settled beyond ³⁹⁷ question that a corporation is not a citizen within the meaning thereof: *Paul v. Virginia*, 8 Wall. 168; *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. Rep. 207; *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 20 Sup. Ct. Rep. 518.

But it is urged by the petitioner that the United States Life Insurance Company has received its license to do business in this jurisdiction; that the petitioner is seeking relief in his personal capacity alone; and that a refusal to grant him a license as requested because he is not a resident of this state, when the law provides for issuing such license to a resident, is an abridgment of his rights and privileges as a citizen of one of the states within the inhibition of the constitution.

As has already been seen, the condition whereby the corporation is licensed to conduct business by resident agents only, is valid and binding on the company in its corporate entity. It cannot be less so as to the agents of the company: *People v. Formosa*, 131 N. Y. 478, 27 Am. St. Rep. 612, 30 N. E. 492.

To license an agent who is a resident of another state to conduct the business of a foreign insurance corporation in this state would be to give him a right to manage the business of his agency in a way prohibited to his principal—a position incompatible with the governing principles of the law of agency.

Such a license to a nonresident agent would render ineffective the condition in the license to the company requiring it to do its business by resident agents.

In *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. Rep. 207, before cited, the plaintiff in error was adjudged guilty in the state court of the misdemeanor of procuring for a resident of the state of California insurance from a foreign company which had not complied with the laws of that state. It was contended that the Penal Code of the state in this behalf was an infringement upon the interstate commerce clause of the federal constitution, and in violation of ³⁹⁸ the fourteenth amendment within the meaning of the clause prohibiting states from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States. The court, speaking through Mr. Justice White, said: "She

[the state] has the power, if she allows any such companies to enter her confines, to determine the conditions on which the entry shall be made. And, as a necessary consequence of her possession of these powers, she has the right to enforce any conditions imposed by her laws as preliminary to the transaction of business within her confines by a foreign corporation, whether the business is to be carried on through officers or through ordinary agents of the company; and she has also the further right to prohibit a citizen from contracting within her jurisdiction with any foreign company which has not acquired the privilege of engaging in business therein, either in its own behalf or through an agent empowered to that end. The power to exclude embraces the power to regulate, to enact and enforce all legislation in regard to things done within the territory of the state which may be directly or incidentally requisite in order to render the enforcement of the conceded power efficacious to the fullest extent, subject always, of course, to the paramount authority of the constitution of the United States." And in *Noble v. Mitchell*, 164 U. S. 367, 17 Sup. Ct. Rep. 110, a case on writ of error to the supreme court of Alabama, the action was to recover of the plaintiffs in error, a firm of insurance agents in that state, the amount of a loss under a policy of insurance procured by them from a foreign insurance corporation not licensed to do business within the state. By the laws of that state any person acting as agent for a foreign insurance company which has not received a license permitting it to transact such business therein, is liable personally to any holder of a policy so procured for any loss covered by it. The court, again speaking ²⁰⁰ through Mr. Justice White, after referring to the case of *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. Rep. 207, as showing the power of a state to determine and enforce the conditions on which such a company may be permitted to come within its territory to transact the business of insurance, said: "It inevitably results from this ruling that the state of Alabama, in virtue of the power possessed by it of excluding foreign fire insurance corporations from its jurisdiction, could lawfully punish or regulate, by the imposition of civil liability, or otherwise, the doing of acts within the territory of the state calculated to neutralize and make ineffective the statute which prescribes conditions upon which alone the right existed in a foreign insurance corporation to do business within the state."

Since a state has the right thus to punish or regulate the

doing of acts contrary to the force of the conditions imposed, it must follow, logically, that it may refuse to license all such agents to transact business in the state for such corporation, as are not within the purview of the conditions, without depriving them of any rights under the constitutional provisions named.

Petition dismissed with costs.

Foreign Corporations do business in a state, not by right, but by comity: *Harding v. American Glucose Co.*, 182 Ill. 551, 74 Am. St. Rep. 189, 55 N. E. 577; *State v. Schlitz Brewing Co.*, 104 Tenn. 715, 78 Am. St. Rep. 941, 59 S. W. 1033. They can do business in a state only upon the conditions imposed by its laws: *State v. North American Land etc. Co.*, 106 La. 621, 87 Am. St. Rep. 309, 31 South. 172; *Anglo-American Prov. Co. v. Davis Prov. Co.*, 169 N. Y. 506, 88 Am. St. Rep. 608, 62 N. E. 587. A state may exclude them, and is not prohibited from discriminating in the privileges it may grant them: *Scottish etc. Ins. Co. v. Herriott*, 109 Iowa, 606, 77 Am. St. Rep. 548, 80 N. W. 665; *Cravens v. New York Life Ins. Co.*, 148 Mo. 583, 71 Am. St. Rep. 628, 50 S. W. 519. And it may, at pleasure, revoke a privilege: *State v. Standard Oil Co.*, 61 Neb. 28, 87 Am. St. Rep. 449, 84 N. W. 413.

ESTABROOK v. UNION CASUALTY AND SURETY COMPANY.

[74 Vt. 473, 52 Atl. 1048.]

INSURANCE, Life, Change to a More Hazardous Occupation. What is.—One who, being insured against accident as proprietor of a gristmill, goes to his father's farm to assist temporarily during the latter's disability in overseeing the work of haying, changes his employment, and, if injured, must be deemed to have received his injury while in an occupation other than that in which he was insured. (p. 918.)

Dennett & Slack, for the plaintiff.

Edward H. Deavitt, for the defendant.

⁴⁷⁴ **MUNSON, J.** The plaintiff was insured as "Proprietor of a gristmill—supervision only," an occupation classed as preferred. The policy provided that in case of an injury received in any occupation or exposure classed as more hazardous than preferred, the insured should recover only such amount as the premium paid would have purchased at the rates fixed for such increased hazard. Among the occupations classed as more hazardous was that of "farmer and farm laborer."

On the eighth day of July, the plaintiff went to his father's farm in Danville, to assist temporarily, during the absence or disability of his father, in overseeing the work of haying, then being carried on by hired help. On the following day a shower came up, and the plaintiff jumped onto a horse-rake, and started hastily to drive it under cover, and was injured in so doing. The case finds that the work being performed by plaintiff at the immediate time of his injury was work ordinarily performed by a farmer and farm laborer.

It is doubtless true that individual acts outside the stated occupation do not constitute a change of employment within the meaning of the provision above recited. Such a provision may well be construed to permit the occasional doing of the various acts of recreation, exercise, accommodation and duty ⁴⁷⁵ which are recognized as proper incidents in the lives of men of all occupations. The merchant spends a day in hunting; the agriculturist acts as superintendent of police at a fair; the teacher looks after the workmen who are building his barn; the manufacturer, visiting a relative, assists in loading hay; the farmer goes to the rescue of a shipwrecked crew; the supervising farmer repairs a bridge upon his own land; and these things are held not to constitute a change of occupation: *Union Mutual etc. Assn. v. Frohard*, 134 Ill. 228, 23 Am. St. Rep. 664, 25 N. E. 642; *Travelers' Preferred etc. Assn. v. Kelsey*, 46 Ill. App. 371; *Stone v. United States Casualty Co.*, 34 N. J. L. 371; *North American etc. Ins. Co. v. Burroughs*, 69 Pa. St. 43, 8 Am. Rep. 212; *Tucker v. Mutual Benefit etc. Ins. Co.*, 50 Hun, 50, 4 N. Y. Supp. 505; *National Acc. etc. Soc. v. Taylor*, 42 Ill. App. 97.

But we think the work in which the plaintiff was engaged at the time of his injury cannot be treated as incidental and occasional within the meaning of these decisions. His was not the case of a visiting relative who rides the horse-rake or throws on a load of hay by way of amusement, exercise or accommodation. He went to take his father's place because of his father's disability, and presumably would have continued in that place until the haying, was done, if he had remained uninjured and his father's disability had continued so long. The work undertaken was not the doing of a single act nor the rendering of occasional assistance. It was the continuous performance of the series of acts which constitute the occupation of the haying season. In thus taking his father's place, he assumed for the time being his father's occupation, and brought

himself within the clause under consideration. It cannot reasonably be said that the company assumed the hazard of this work at the premium charged for the lesser risk.

We reach this conclusion without considering the meaning of the term "exposure," or giving any effect to it.

⁴⁷⁶ Pro forma judgment reversed, and judgment that defendant recover its costs after tender.

Change of Occupation as avoiding an accident insurance policy is considered in *Union Mut. Acc. Assn. v. Frohard*, 134 Ill. 228, 23 Am. St. Rep. 664, 25 N. E. 642; *Holiday v. American Mut. Acc. Assn.*, 103 Iowa, 178, 64 Am. St. Rep. 170, 72 N. W. 448. A condition against any more hazardous occupation does not apply to individual acts, but only to employments: *Berliner v. Travelers' Ins. Co.*, 121 Cal. 458, 66 Am. St. Rep. 49, 53 Pac. 918. If a person, while engaged as a clerk in a city, takes out accident insurance as such, and has his home on a farm, the fact that his employers sell their business, and he ceases to draw his salary, does not thereby necessarily make him a farmer, so as to limit his recovery under a policy making farming more hazardous than clerking, if he has the farm work done by employes: *Johnson v. London etc. Acc. Co.*, 115 Mich. 86, 69 Am. St. Rep. 549, 72 N. W. 1115.

CASES
IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA.

CONNELLY v. WESTERN UNION TELEGRAPH CO.

[100 Va. 51, 40 S. E. 618.]

TELEGRAPH CORPORATIONS.—Damages for Mental Suffering cannot be Recovered in an action against a telegraph corporation for its delay in delivering, or its failure to deliver, a message independent of any injury to person or estate, though the corporation is advised of the character of the message. (pp. 921, 932.)

TELEGRAPH CORPORATIONS.—Damages for Mental Anguish, Whether Recoverable Under Code Provision Giving a Right of Action for the Violation of a Statute.—Though one statute makes it the duty of a telegraph corporation to deliver and transmit messages, and provides a penalty for not delivering them as soon as practicable, and another declares that any person injured by the violation of a statute may recover the damages he may sustain therefrom, mental anguish cannot be recovered as damages for the failure to deliver a message where there has been no injury to the person or estate of the plaintiff. (p. 928.)

TELEGRAPH CORPORATIONS.—Mental Anguish—Statute, When does not Create a Right of Action for.—A statute providing that telegraph corporations shall be liable for special damages occasioned in receiving, transmitting, or delivering dispatches, and that grief and mental anguish occasioned thereby may be considered by the jury in determining the quantum of damages, does not confer any right to recover for mental suffering or anguish where the right does not otherwise exist. The whole statute is substantially declaratory of the pre-existing law. (p. 928.)

Hugh A. White and H. S. Rucker, for the plaintiff in error.

George A. Fearons, Stiles & Holladay and Scott & Staples, for the defendant in error.

⁵³ **CARDWELL, J.** The plaintiff in error brought this action of trespass on the case against the defendant in error, in

the corporation court for the city of Buena Vista, claiming damages to the amount of one thousand eight hundred dollars for mental suffering occasioned him by the nondelivery of a telegraphic message announcing the death of his father. The declaration contains two counts. The first alleges a statutory cause of action, and the second alleges solely the violation of a common-law duty, and a common-law remedy. There was a demurrer to the declaration, which was sustained, and the action dismissed. To this judgment a writ of error was awarded by one of the judges of this court.

The material facts alleged in the declaration are that on June 11, 1900, at Richmond, Virginia, a message was delivered to the defendant in error, a telegraph company, engaged in the ⁵³ business of sending and delivering telegraphic messages for hire, directed to the plaintiff in error, at Buena Vista, signed "Little Sisters," announcing the death of the father of plaintiff in error. This message was to be transmitted to Buena Vista, Virginia, to be delivered to plaintiff in error, a resident of that place. It was received by the telegraph company at Richmond, transmitted to Buena Vista, and there received by the agent of the company at 9:03 A. M. of that day. The message was not delivered as promptly as practicable to the sendee, it is alleged, and not delivered at all until some days thereafter, when he, hearing that a message for him had been received, called at the office of the company and got it. It is further alleged that by reason of the failure on the part of the telegraph company to deliver promptly the message, plaintiff in error was greatly troubled and damaged, in that he was deprived of being present at his father's funeral, and thereby suffered great grief and mental anguish.

It will be observed that while defendant in error is engaged in the business of sending messages "for hire," it does not appear that any tolls were paid or tendered to the company for receiving, transmitting, or delivering the message. It is set out in full in the declaration, and is marked "D. H. Charity," and was presumably a charity message. In the view, however, that we take of the case, this is immaterial. The question to be determined, for the first time by this court, is, whether or not damages for mental suffering can be recovered in actions of this kind, independent of any injury to person or estate, where the telegraph company is advised of the character of the message, and fails to deliver it as soon as practicable.

Damages such as are recoverable at law must not only be the proximate result of the act complained of, but must also be capable of definite ascertainment, or, to use the language of law-writers and the decided cases, must be certain, definite, and not speculative in their character. Under this rule, damages⁵⁴ for mental suffering alone, as an independent cause of action, were never allowed at common law. An illustration is in the case of an action of a father for the seduction of his daughter. There no action would lie against the seducer, no matter how aggravated, nor how great the mental anguish, unless it was alleged and could be proven that the father, by reason of the wrongful act of the defendant, had sustained the loss of the services of his child, and thus some special damage shown. When this was shown, in aggravation of the damages, as a punishment for the wrongdoing, damages for mental suffering were allowed: *Lee v. Hodges*, 13 Gratt. 726.

This is also true of an action for slander and libel. No matter how great the mental suffering, from an insult or a charge of being guilty of degrading acts not amounting to a crime, such as being a black-leg, cheat, etc., no action would lie, unless special damage, apart from the mental suffering, was shown.

In actions for assault and battery, false imprisonment, and kindred wrongs, damages for mental suffering are allowed as a punishment, and then only because some actual damage, apart from the mental suffering, must necessarily be inferred from the act itself.

In the case of a physical injury, damages for pain suffered, bodily and mentally, are allowed, for the reason that such mental suffering is necessarily a part of the physical injury, and inseparable therefrom: *Kennon v. Gilmer*, 131 U. S. 22, 9 Sup. Ct. Rep. 696; *Norfolk etc. Ry. Co. v. Marpole*, 97 Va. 600, 34 S. E. 462, and authorities cited.

The rule of the common law, that damages for mental suffering are not allowable, save as incidental to a physical injury, and except in that class known as vindictive actions, came under review in the case of *Allsop v. Allsop*, 5 Hurl. & N. 534. That was an action arising from an illness caused by slanderous words, and the court was unanimously of the opinion that the demurrer to the declaration should be sustained. *Bramwell, B.*, in his opinion, said: "The question seems to me one of⁵⁵ some difficulty, because a wrong to the female plaintiff who becomes ill, and therefore there is damage alleged to be flowing from the wrong; and I think it did in fact so flow. But I am

struck by what has been said as to the novelty of this declaration—that no such special damage ever was heard of as a ground of action. If it were so, I am at a loss to see why mental suffering should not be likewise. It is often averted to in aggravation of damages as well as pain of body. But if so, all slanderous words would be actionable. Therefore, unless there is distinction between the suffering of mind and the suffering of body, this special damage does not afford any ground of action.”

The question came up again in *Lynch v. Knight*, decided by the House of Lords in 1861, 9 H. L. Cas. 592, where the same view of the law was taken. Lord Brougham said; “I think that *Allsop v. Allsop*, 5 Hurl. & N. 534, was well decided, and that mere mental suffering or sickness, supposed to be caused by the speaking of words not actionable in themselves, would not be special damage to support an action.”

In a concurring opinion by Lord Wensleydale this language is used: “Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone; though where a material damage occurs, and is connected with it, it is impossible a jury, in estimating it, should altogether overlook the feelings of the party interested.”

It is conceded in nearly all of the decided cases in this country and by the text-writers that the general rule which has come down to us from England is that mental anguish and suffering resulting from mere negligence, unaccompanied with injuries to the person, cannot be made the basis of an action for damages.

To examine all of the American authorities dealing with this question would protract this opinion to too great a length, and we shall not attempt to do more than to review a few of the ⁵⁰ leading cases which are departures from the common-law rule, as well as some adhering to it.

In 1861, the supreme court of Texas, in *So Belle v. Western Union Tel. Co.*, 55 Tex. 308, 40 Am. Rep. 805, made the first departure from the common-law rule, and held that the addressee of a telegraph message might recover from the company as compensatory damages, for mental suffering caused by its failure to deliver promptly a message which announced the death of his mother, by reason of which default he failed to attend her funeral. The cases cited by the court in support of its ruling were *Hays v. Houston etc. R. R. Co.*, 46 Tex. 279; *Houston etc. R. R. Co. v. Randall*, 50 Tex. 261; and *Phillips*

v. Hoyle, 4 Gray, 568. The first of these cases was an action for assault and battery. The second was a case in which a serious and permanent personal injury had been sustained, and the third was a case where the wrongful act charged was the seduction of the plaintiff's daughter. In all of them, as a matter of course, and in accordance with generally admitted rules, damages for mental suffering were allowed. The main reliance, however, of the Texas court was placed on the following passage from the text of Shearman and Redfield on Negligence, fourth edition, section 756: "In case of delay or total failure of delivery of messages relating to matters not connected with business, such as personal or domestic matters, we do not think that the company in fault ought to escape with mere nominal damages on account of the want of strict commercial value in such message. Delay in the announcement of a death, an arrival, the straying and recovery of a child, and the like, may often be productive of an injury to the feelings which cannot be estimated in money, but for which a jury should be at liberty to award fair damages."

In *Gulf etc. Ry. Co. v. Levy*, 59 Tex. 563, 46 Am. Rep. 278, the court went counter to the view taken in the *So Relle* case, and held that if the plaintiff is not entitled to recover even nominal damages, as for breach of contract, and has sustained no injury to his person, reputation or property, he can have no recovery for mental distress ⁵⁷ alone. And another case, *Gulf etc. Ry. Co. v. Levy*, 59 Tex. 542, 46 Am. Rep. 269, appears to hold that if nominal damages are proved, then a recovery may be had for mental suffering, but only in cases where there was such gross negligence or wilfulness as to justify exemplary damages. But both of these cases have been overruled in later decisions of the same court, particularly in the case of *Stuart v. Western Union Tel. Co.*, 66 Tex. 580, 59 Am. Rep. 623, 18 S. W. 351; so that the *So Relle* case has been reinstated as the law of Texas, and has been followed in a number of decisions of the same court, and by the courts of a few of the other states, notably *Chapman v. Western Union Tel. Co.*, 90 Ky. 265, 13 S. W. 880; *Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 18 Am. St. Rep. 148, 7 South. 419; *Reese v. Western Union Tel. Co.*, 123 Ind. 294, 24 N. E. 163; *Young v. Western Union Tel. Co.*, 107 N. C. 370, 22 Am. St. Rep. 883, 11 S. E. 1044; *Thompson v. Western Union Tel. Co.*, 107 N. C. 449, 12 S. E. 427; *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695, 6 Am. St. Rep. 864, 8 S. W. 574.

The decisions in the Texas supreme court have not been themselves harmonious and have been criticised, in some instances, severely by law-writers and in the decided cases. In fact, the earlier decisions have not escaped the criticism of the same court in later decisions.

In *Rowell v. Western Union Tel. Co.*, 75 Tex. 26, 12 S. W. 534, the plaintiff and his wife had received information of the dangerous illness of her mother. Subsequently, a dispatch was sent containing the information of the mother's improved condition. This dispatch the company failed to deliver. Suit was brought, but recovery denied, the court saying: "The demurrer was properly sustained. The damage here complained of was the mere continued anxiety caused by the failure to promptly deliver the message. Some kind of unpleasant emotion in the mind of the injured party is probably the result of a breach of contract in most cases. But the cases are rare in which such emotion can be held an element of the damages resulting for the breach. For injury to feelings in such cases, the courts cannot give redress. Any other rule would result in intolerable litigation."

⁵⁸ We fail to appreciate the distinction the court seeks to draw in that case, and it has been suggested in later decisions of the courts of other states, that it was evidently resorted to for the purpose of staying the tide of "intolerable litigation" flowing from the decisions following the *So Relle* case.

The case of *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695, 6 Am. St. Rep. 864, 8 S. W. 574, was well considered, and argued to a conclusion upon general principles of law, but the plaintiff's right of action was upheld, as a statutory, and not a common-law, right.

Chapman v. Western Union Tel. Co., 90 Ky. 265, 13 S. W. 880, cites only a Texas case, and *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695, 6 Am. St. Rep. 864, 8 S. W. 574, as authority for the conclusion reached. The case of *Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 18 Am. St. Rep. 148, 7 South. 419, only to a limited degree sustains the doctrine contended for by plaintiff in error. There were other features in the case than mere mental suffering as a basis of the action, and it may be said that the observations of the court as to the right of recovery of damages for mental suffering alone was dictum only, and for its conclusion the court relied mainly on its own decisions and a Texas case.

In *Young v. Western Union Tel. Co.*, 107 N. C. 370, 22 Am. St. Rep. 883, 11 S. E. 1044, the message was: "Come in haste; your wife is at the point of death," and the company failed to deliver the same for eight days. The court conceded that the great weight of authority was against a recovery in that case, but, relying mainly upon the Texas cases and those following them, took the broad ground that the action was in reality in the nature of tort for the negligence, and that, as is usually the case in such actions, the plaintiff was entitled to recover, in addition to nominal damages, compensation for the actual damages done him, and that mental anguish is actual damage. The case of *Reese v. Western Union Tel. Co.*, 123 Ind. 294, 24 N. E. 163, is greatly relied on by plaintiff in error here, and in the cases we have just reviewed, and it is in accord with the view they contend for, but *Reese v. Western Union Tel. Co.*, has, by a decision of the same court rendered May 28, 1901—*Western Union Tel. Co. v. Ferguson*, 157 Ind. 64, 60 N. E. 674—been, in express terms, overruled. In the last case the message was: "Grandma is dead. Will be buried Thursday two o'ck, come." Says the opinion by Baker, J.: "By the failure to deliver, appellee received neither pecuniary nor bodily injury, but suffered mental anguish consequent upon his being deprived of the opportunity of attending his grandmother's funeral. . . . Though courts should and do extend the application of the rules of the common law to the new conditions of advancing civilization, they may not rightly create a new principle unknown to the common law, nor abrogate a known one. If new conditions cannot be properly met by the application of existing laws, the supplying of the needful law is the province of the legislature, not the judicial department."

Nearly all of the authorities holding a contrary view are reviewed by the learned judge, and a great number are cited in support of the conclusion that the demurrer to the declaration was properly sustained. An examination of the citations discloses that a very great majority of the decisions of the courts of the different states of the Union are in accord with the ruling in the case.

Every federal court before which the question has arisen has taken the view that damages for mental suffering alone cannot be recovered: *Chase v. Western Union Tel. Co.* (Ark.), 44 Fed. 554; *Crawson v. Western Union Tel. Co.* (Ga.), 47 Fed. 544; *Tyler v. Western Union Tel. Co.* (Va.), 54 Fed. 634;

Kester v. Western Union Tel. Co. (Ohio), 55 Fed. 603; Gahan v. Western Union Tel. Co. (Minn.), 59 Fed. 433; Western Union Tel. Co. v. Wood (1893), 57 Fed. 471; Chicago etc. R. R. Co. v. Caulfield, 63 Fed. 396, 11 C. C. A. 552—though it is conceded in one case that if there had been such gross negligence on the part of the agents of the company as to indicate a wanton or malicious purpose in failing to transmit or deliver the message, the plaintiff's mental suffering might have been considered: *Crawson v. Western Union Tel. Co.*, 47 Fed. 544.

⁶⁰ As was said by Cauty, J., in a concurring opinion in *Francis v. Western Union Tel. Co.*, 58 Minn. 252, 49 Am. St. Rep. 507, 59 N. W. 1078: "The difficulty in such cases is the character of the damages claimed. The injuries in such cases are too hard to determine with any reasonable certainty—are more often assumed than real—and the suit too liable to be wholly speculative. If everyone was allowed damages for injuries to his feelings caused by someone else, the chief business of mankind might be fighting each other in the courts. Damages for mental suffering open into a field without boundaries, and there is no principle by which the court can limit the amount of damages. Mere logic will not dispose of a question of this character. The court must keep one eye on the theoretical, and the other on the practical. At the same time I am strongly of the opinion that there should be some practical remedy in this class of cases, and, if the legislature would provide for the recovery to, say two or three hundred dollars, there would not be the same incentive to bring speculative suits, or to employ experts to draw on their own imagination for the purpose of proving the condition of plaintiff's imagination; there would not be so much elaborate preparation to impose on the jury. But if the court should allow such damages at all, on no principle could it thus arbitrarily limit the amount of recovery and escape the evils mentioned."

In the recent case of *Davis v. Western Union Tel. Co.*, 46 W. Va. 48, 32 S. E. 1026, the rule of law as stated in 1 American and English Encyclopedia of Law, 862, is cited with approval, viz.: "A rule that is more consistent with recognized legal principles, and that is supported by better authority, is that mental suffering alone, and unaccompanied by other injury, cannot sustain an action for damages, or be considered as an element of damages. Anxiety of mind and mental torture are too refined and too vague in their nature to be the subject of

pecuniary compensation in damages, except where, as in case of personal injury, they are so inseparably connected with the physical pain that they cannot ⁶¹ be distinguished from it, and are, therefore, considered part of it."

We come now to the consideration of the legislation in this state upon this subject, and upon which plaintiff in error relies as a basis for the first count in his declaration, in which the damages claimed are the same as in the second count—i. e., damages for mental anguish or suffering, standing alone.

Section 1291 of the code relates to "the receipt and transmission of dispatches," and section 1292 to "their delivery." The first declares that it shall be the duty of the telegraph company to receive dispatches "and upon the payment of the usual charges therefor, to transmit the same," under a penalty of one hundred dollars, to the sender; and the second provides that upon the arrival of the dispatch at the point of its destination it shall be delivered as promptly as practicable, under a penalty of one hundred dollars to the addressee. These statutes are similar to those of Indiana regulating the business of telegraph companies, considered by the supreme court of that state in *Western Union Tel. Co. v. Ferguson*, 157 Ind. 64, 60 N. E. 674.

Section 2900 of the code, under the title: "Damages from violation of a statute," provides: "Any person injured by the violation of any statute may recover from the offender such damages as he may sustain by reason of the violation, although a penalty or forfeiture for such violation be thereby imposed, unless the same be expressly mentioned to be in lieu of such damages." And the act of March 2, 1900, Acts 1899-1900, page 724, provides: "That all telegraph companies shall be liable for special damages occasioned in receiving, copying, transmitting, or delivering dispatches, or for the disclosure of the contents of any private dispatch to any person other than to him to whom it was addressed, or his agent, the amount of these damages to be determined by the jury upon the facts in each case. Grief and mental anguish occasioned to the plaintiff by the aforesaid negligent failures may be considered by the jury in the determination of the quantum of damages.

⁶² "Special damages recoverable under this act shall not be barred by regulations of the company concerning the repeating of messages, or by any special understanding to relieve the company from the consequences of its own negligence."

Section 2900 of the code takes the place of sections 2 and 3, chapter 65, of the code of 1873, and it is claimed by plaintiff in error that under the construction of that statute by this court in *Western Union Tel. Co. v. Reynolds*, 77 Va. 173, 46 Am. Rep. 715, he may recover in this action any damages a jury may assess, where a violation of a statute has been shown. The "violation of the statute" in *Reynolds'* case was a patent and admitted feature. Damages were sustained by the plaintiff—legal damages, and to a definite and admitted extent. Lacy, J., in the opinion says: "And it is admitted, and is equally clear from the evidence in this case, that the actual loss to Reynolds Brothers was the amount found by the jury of thirteen hundred and forty-seven dollars and ten cents, nothing being added by the jury as punitive or vindictive damages."

The only point decided in that case was that a telegraph company is liable for the actual, ascertained money loss on a business transaction, resulting directly from its negligence in failing to transmit a dispatch upon which the usual charges of the company had been paid, whether the dispatch was understood by the company or not. There is nothing whatever in the opinion to sustain the view that under the statute damages may be recovered for mental suffering as an independent cause of action. That question was not involved in the case, and was not adverted to.

Section 2900 came under review in *Tyler v. Western Union Tel. Co.*, 54 Fed. 634, where it is well said by Paul, J.: "It is very evident that the purpose of section 2900 was merely to preserve to any injured person the right to maintain his action for the injury he may have sustained by reason of the wrongdoing of another, and to prevent the wrongdoer from setting up the defense that he had paid the penalty of his wrongdoing under a penal statute." ⁶³ It cannot be supposed that, in enacting section 2900, the legislature had the remotest idea of creating any new ground for bringing an action for damages. It was only intended to keep the subject just where it was under the common law before the enactment of section 1292, prescribing the duties of telegraph and telephone companies, and fixing a penalty for their failure to perform said duties."

Nor is there anything in the act of March 2, 1900, that can be construed as creating any new ground for bringing an action for damages. That statute provides, first, that telegraph companies shall be liable for special damages occasioned by the

negligent failure of their operators in delivering dispatches. It then provides that, in the determination of the quantum of damages, the jury may consider "grief and mental anguish" occasioned to the plaintiff by the negligent failure.

It is special damages occasioned by the negligent failure of the defendant in delivering a dispatch that the statute confers the right upon the plaintiff to recover, and when he has alleged and proven that he is entitled to recover such damages, the jury may then, in fixing the quantum of damages, consider his mental anguish occasioned by the defendant's negligent failure to deliver the dispatch. "Quantum," according to Webster, means "quantity," "amount"; and "amount," "the sum total of two or more particular sums or quantities"; "the aggregate; the whole quantity; a totality."

To recover under the act in question, two things are necessary to be shown: 1. Negligent failure on the part of the operator of the defendant company in delivering the message; and 2. Special damages resulting to the plaintiff therefrom. Neither of these grounds of action are alleged in this case. The first sentence of the act is plainly declaratory of the common law, and the whole act taken together is substantially declaratory of the pre-existing law. The rule governing in the construction of such statutes laid down in *Arthur v. Bokenham*, 64 11 Mod. 150, seems to have been universally followed, viz.: "The general rule in the exposition of all acts of parliament is this, that in all doubtful matters, and where the expression is in general terms, they are to receive such construction as may be agreeable to the rules of the common law in cases of that nature; for statutes are not presumed to make any alteration in the common law further or otherwise than the act does expressly declare; therefore, in general matters, the law presumes the act did not intend to make any alterations, for if the parliament had that design, they would have expressed it in the act."

If the purpose and intention of the legislature had been by the statute of March 2, 1900, to make a new cause or ground of action, viz., for the recovery of damages for mental anguish alone, it is inconceivable that other and more apt phraseology should not have been employed.

In a proper case, under the statute, the plaintiff may recover any "special damages" alleged and proven to have been occasioned by the negligent failure of the operators or servants of a telegraph company in receiving, copying, transmitting, or de-

livering a dispatch, whether such negligent failure occasioned him grief and mental anguish or not, but the converse of the proposition cannot be true, because the jury are not authorized to consider the grief and mental anguish of the plaintiff except in determining the quantum of damages—i. e., the amount of special damages alleged and proved, together with such additional sum as may be added thereto for the grief and mental anguish occasioned the plaintiff by the negligent failure of the defendant's operators or servants.

Any other construction of the statute would result, as did the departure from the common law in like cases, in a fruitful source of litigation, and open into a field without boundaries, for the recovery of speculative, sentimental and other like damages.

We quote with our unqualified approval the following from ^{as} the opinion in *Western Union Tel. Co. v. Ferguson*, 157 Ind. 64, 60 N. E. 674: "There is no open or practicable means by which the damages occasioned by a negligent act that causes only mental anguish can be assessed. On account of mere difficulties, courts do not and should not falter at finding remedies; but it is not a question of difficulties purely when it is proposed to violate the natural principles of justice and fair play. The parties to a lawsuit should have an even chance. The damage for which plaintiff seeks compensation should be shown by evidence that the defendant may test, impeach, refute. When the plaintiff asks to recover damages for physical injuries, open or hidden, the court may require him, as a condition of prosecuting his case, to submit his person to examination by medical experts, who may be called as witnesses by the defendant. . . . The determination of the nature and extent of the physical hurt is not dependent upon the eloquence of the plaintiff as a witness, but upon the eloquence of the facts established, by the evidence on both sides, which may not have included the verbal testimony of the plaintiff at all. Now, the mental anguish for which damages are allowable is incident to and dependent upon the nature and extent of the physical injury. And although there can be no absolute standard for measuring mental anguish in terms of money, nor for measuring physical injuries, yet it is apparent that the differences between the physical injuries in two cases, established by evidence open to both sides, furnish a means of testing in some degree the existence and extent of the mental anguish of the respective plaintiffs outside of their mere assertions. The dif-

ference between the mental anguish caused by the presence of a scar on a man's body, and that produced by the same kind of a scar upon a woman's face, would hardly be decided in favor of the man, although he alone of the two possessed the vocabulary necessary for a vivid description of the alleged tortures of mind. Even in the case of libel, malicious prosecution, and the like, in which punitive damages ⁶⁶ may be added to compensatory, the mental anguish of which cognizance is taken is measurable by the enormity of the willful offense, the nature and extent of which are established by the evidence open to both sides. But the mental anguish doctrine awards damages for a state of mind that is not at all dependent upon or measurable by a cause of action existing outside the mental contemplation of the plaintiff, and provable by evidence open to both parties. If psychometry could determine the difference in the plaintiff's consciousness before and after the defendant's negligent act, it would take something still more occult to measure how much of the total disturbance was attributable to the death of the relative, and how much to being prevented from attending the funeral. Manifestly, the defendant is not to pay for the mental anguish caused by the death of the relative. The alleged actionable wrong is in depriving the plaintiff of the opportunity of attending the funeral. But would the plaintiff have accepted the opportunity if seasonably offered? If the defendant is to be mulcted for mere delay, even though the plaintiff would not have gone to the funeral in any event, the damages would be wholly punitive. There would be no loss to compensate. And so in this case (and probably the same thing has been true in all), the plaintiff was asked the following questions: 'Q. Suppose the telegram had been delivered to you on the evening of July 13, 1898, could you have reached her funeral by 2 o'clock on the 14th? A. I could. Q. I will ask you whether or not you would have done so? A. I would, sir; I would.' The plaintiff says he would have gone. But would he? The jury found so, as a fact, wholly from the plaintiff's present opinion on a past condition of things that never existed, but is now summoned before the mind by conjecture. Thus, the mental anguish doctrine not only departs from principle in regard to measuring compensatory damages, but also warps the rules of evidence, which forbid a witness to testify what he would or would not have done in a stated contingency."

⁶⁷ A striking illustration of the extent to which the doctrine condemned in the opinion just quoted from would lead is afforded by the case at bar. Here the plaintiff in error seeks to recover damages for alleged mental anguish occasioned him by the failure on the part of the defendant company's operator to deliver promptly a dispatch sent him by the company from Richmond, as a charity message, announcing the death of his father, and without alleging that the failure to deliver the message was a "negligent failure," and without alleging that he was able and would have attended the funeral of his father had the message been promptly delivered to him.

"It is contrary to public policy (corruptive of public morals) for the courts to tie the hands of a defendant, and give the freest hand in collecting compensatory damages to the plaintiff, who is most moving in depicting an alleged physical condition, and readiest to declare what he would have done under circumstances that never occurred.

"Denial of equal justice, wrongful discrimination between persons in similar circumstances, is at least as vicious in judge-made as in statutory law: *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064. . . . To be a law of equal justice and no discrimination, the mental anguish doctrine should assert, as a broad general principle, that damages are recoverable, for mental distress alone, from every person whose negligent act causes that condition": *Western Union Tel. Co. v. Ferguson*, 157 Ind. 64, 60 N. E. 674.

Upon reason and a great weight of authority, such damages are not recoverable at common law, as an independent cause of action, and until our legislature deems it wise to authorize such a recovery, the courts cannot sustain it. Our statutes thus far impose a penalty for the dereliction on the part of a telegraph company in the transmission and delivery of dispatches intrusted to it, and authorize the recovery of special damages occasioned the injured party thereby, to which may be added such damages as the jury may assess for his grief and mental suffering, but they go no further.

⁶⁸ It is claimed, however, for plaintiff in error, that this court has sanctioned his right of recovery in this case by its decision in *Norfolk etc. Ry. Co. v. Neely*, 91 Va. 546, 22 S. E. 367. That case was not one of mere mental anguish. Neely, the plaintiff, suffered other wrongs, inconveniences and damage, to which, according to the doctrine of well-recognized

authorities, damages for his injured and insulted feelings might well be added.

We are of opinion that the judgment of the corporation court of Buena Vista, sustaining the demurrer to plaintiff in error's declaration, is right, and it is affirmed.

Mental Suffering as an element of damages for negligence in the transmission and delivery of telegraphic messages is considered in the monographic notes to *Western Union Tel. Co. v. Luck*, 66 Am. St. Rep. 873-875; *Western Union Tel. Co. v. Cooper*, 10 Am. St. Rep. 788-790. Perhaps the weight of authority is adverse to the right of recovery for mental suffering in such cases: See *Western Union Tel. Co. v. Giffin*, 93 Tex. 530, 77 Am. St. Rep. 896, 56 S. W. 744; *Morton v. Western Union Tel. Co.*, 53 Ohio St. 431, 53 Am. St. Rep. 648, 41 N. E. 689; *Connell v. Western Union Tel. Co.*, 116 Mo. 34, 38 Am. St. Rep. 575, 22 S. W. 345; *Summerfield v. Western Union Tel. Co.*, 87 Wis. 1, 41 Am. St. Rep. 17, 57 N. W. 973. But see *Gray v. Telegraph Co.*, 108 Tenn. 39, 91 Am. St. Rep. 706, 64 S. W. 1063; *Western Union Tel. Co. v. Van Cleave*, 107 Ky. 464, 92 Am. St. Rep. 366, 54 S. W. 827; *Butler v. Western Union Tel. Co.*, 62 S. C. 222, 89 Am. St. Rep. 893, 40 S. E. 162; *Mentzer v. Western Union Tel. Co.*, 93 Iowa, 752, 57 Am. St. Rep. 294, 62 N. W. 1; *Western Union Tel. Co. v. Carter*, 85 Tex. 580, 22 S. W. 961, 34 Am. St. Rep. 826, and cases cited in the cross-reference note thereto.

NATIONAL VALLEY BANK v. HANCOCK.

[100 Va. 101, 40 S. E. 611.]

CREDITOR'S RIGHT to Subject Improvements Made by the Debtor on the Lands of Another must be sustained. (p. 936.)

FRAUDULENT TRANSFERS—Who may Attack.—An Indorsee or Assignee of a Debt may maintain a creditor's bill to avoid a fraudulent transfer and obtain other equitable relief which the assignor could have maintained but for the assignment. (p. 937.)

PARENT AND CHILD.—A Father, if of Sufficient Ability, is bound to maintain his infant children. (p. 937.)

INFANT—Right to Maintain Out of Trust Fund.—A trustee cannot apply any part of the infant's estate to its maintenance without an order of court, unless the property has been given to the infant with a direction for its maintenance. (p. 938.)

TRUST FUNDS—Creditors of Trustees, When may Object to Restoration of.—If one to whom trust property has been devised for the support and maintenance of his wife and children used the income for such support, though himself able to support them out of his own means, he will not, as against his creditors, be subsequently allowed to expend upon the property a sum equal to that which he has so used, not for the protection of the trust from loss, but to augment it by the capitalizing of the rents derived from it. (p. 942.)

Creditors' bill. Decree for the defendant and the complainants appealed.

Harrison & Long, for the appellant.

Caskie & Coleman and Wilson & Manson, for the appellees.

¹⁰² KEITH, P. It appears from the bill that the National Valley Bank of Staunton, on the 20th of December, 1894, discounted for the Traders' Bank of Lynchburg its note for \$5,000, which, after being curtailed from time to time, was renewed on the 19th of December, 1896, for \$3,150, at sixty days. Along with this note certain collaterals were delivered, from which there was realized the sum of \$1,150.25. Those uncollected were returned to the Traders' Bank, and in place of them the Bank of Staunton received six notes as security for its debt. The collaterals thus received were three notes of Rucker, Clark & Co., dated August 23, 1894, payable thirty-nine months after date to James Hancock, and indorsed by James Hancock and the Traders' Bank of Lynchburg, each for the sum of \$225.20; two notes of P. V. Rucker, dated October 1, 1894, payable three years, and forty-two months, respectively, after date, to Rucker, Clark & Co., and indorsed by Rucker, Clark & Co., James Hancock, and the Traders' Bank of Lynchburg, each for \$250; and one note of W. E. Clark, dated October 1, 1894, payable thirty-nine months after date to Rucker, Clark & Co., and indorsed by Rucker, ¹⁰³ Clark & Co., James Hancock, and the Traders' Bank of Lynchburg, for \$250.

The bill charges that after exhausting every means to collect the collaterals in the possession of the Bank of Staunton, there was a balance due by the Traders' Bank of Lynchburg of \$1,999.75 of principal, and \$267.55 of interest, as of February 24, 1899, which will be wholly lost unless it can realize on the notes indorsed by James Hancock.

It is charged that James Hancock holds title as trustee under the fifth clause of the will of his father, the late A. G. Hancock, to a valuable house and lot situated on Main street, in the city of Lynchburg, called the Traders' Bank building, now occupied by the National Bank of Lynchburg. The trust declared by the will of A. G. Hancock is as follows:

"Item 5. I give and devise to my said son, James Hancock, as trustee for his wife and children, including those now born and all that may be born to him by his present, or any future

wife he may take, my storehouse and lot on Main street, Lynchburg, on the west side, between Ninth and Tenth streets, now occupied by M. E. Doyle, which I value at \$14,000, to be held in trust, not subject to his debt or liabilities, for the support and maintenance of his present and any future wife he may take and all his children, the said trust to continue during the life of the said James Hancock, and if at his death he shall leave a wife surviving him, until her death. Upon his death, if no wife survive him, or if one do survive him, upon her death, the said property shall pass in fee simple absolute to all the children of the said James Hancock in equal shares. The descendants of any who now have died leaving descendants then surviving to take the share of their deceased ancestor."

This will bears date April 17, 1888, and was recorded in the clerk's office of the corporation court of Lynchburg on June 6, 1888. Those interested in the foregoing clause are Alice Hancock, wife of James Hancock, and certain infant children.

The bill states that the building at present on the lot was "erected during the year 1895 by the said James Hancock, and paid for by him with his individual funds, at which time Hancock was indebted as aforesaid on the notes held by your orator herewith filed, and your orator is advised that the said Hancock, being thus indebted, could not lawfully divert his own estate to the improvement of the trust estate as aforesaid and leave his indebtedness to your orator unpaid and unprovided for; that the money expended by Hancock out of his individual estate in improving the trust estate, being voluntary and without consideration, was in fraud of the rights of your orator, and that the estate can, in favor of your orator, be charged with the value of said improvements."

James Hancock, in his answer, denies that the present indebtedness of the Traders' Bank to the complainant, or that any part thereof, existed in 1895, and claims that only one of the respondent's notes ever came into the complainant's hands as collateral for the original debt. The answer denies the allegation that James Hancock expended money out of his individual estate in improving the trust property held under the will of his father, or that it was made in fraud of complainant's rights. His account of the transaction is that when the property was devised by his father it was valued at \$14,000, with a storehouse which was rented out up to January 1, 1895; that during this period respondent had a good income from his own property and business, which was that of a leaf tobacco

dealer; that he was able to maintain, and did maintain, his wife and children from his own means, and, as the storehouse was old, and getting into bad condition, he determined to tear it down and erect a bank building on the trust property; that respondent owed the trust fund the sum of \$602.30, with interest from November 5, 1888, and rents received from the trust property from ¹⁰⁵ 1888 to 1895, amounting to the sum of \$5,765; that he erected the building under a contract with the Traders' Bank to rent it at an annual sum of \$1,750; that it cost \$9,100, and that since January 1, 1895, and prior to the institution of this suit, he had collected from the rents of said property the sum of \$6,391.66, had paid the city taxes amounting to \$408.90, and state taxes amounting to \$109.08, so that the balance due respondent from the trust fund had been paid back to him in full.

Upon the issues thus made, and the proof in support of them, the judge of the circuit court, "being of opinion that the allegation of the bill that the moneys expended by the defendant, James Hancock, trustee, in improving the trust property was of his individual estate, and voluntary and without consideration, is not sustained; but to the contrary, the evidence shows that the moneys belonging to the children, and the rents received from the trust property by said trustee constituted a valuable consideration for the expenditures made," dismissed the bill.

The case is before us upon an appeal from this decree.

There can be no doubt of the right of a creditor in a proper case to subject improvements made by his debtor on the property of another. This subject was recently considered by this court in *New South Bldg. etc. Assn. v. Reed*, 96 Va. 345, 70 Am. St. Rep. 858, 31 S. E. 514, where the court, speaking through Judge Harrison, said: "D. V. Reed, having created the debts due to the appellants, could not thereafter lawfully divert his estate to the payment of purchase money due from his wife on her separate real estate, or to the cost of improving said real estate, leaving his own debts unpaid, and without the means of payment. It is well settled that improvements put upon the wife's separate realty by the husband, in fraud of creditors, can be followed by the creditors on the premises where they are put, and the realty can, in favor of the creditors, be charged with the value of such improvements. It would be contrary to the plainest principles of right and justice ¹⁰⁶ to permit an insolvent husband to divert his means, and

invest it in improving his wife's separate estate, which is not liable to his debts, and thus defeat the demands of his creditors."

Appellee insists, however, that, inasmuch as the notes with which it is now sought to charge the trust property were assigned to the bank of Staunton after the erection of the building, appellant would have no right to attack the transaction, even though it were conceded that Hancock had improved the trust property with his own funds, invoking for his protection the principle that "an assignment of a bare right to file a bill in equity for a fraud committed upon the assignor will be held void, as contrary to public policy, and as savoring of the character of maintenance."

It is true that a mere naked right to sue in equity to avoid a fraud is not assignable, but, as stated in 2 American and English Encyclopedia of Law, second edition, pages 1024, 1025, this rule applies only to a case where the assignment does not carry anything which has itself a legal existence and value independent of the right to sue for a fraud. It does not apply to a case where such right is merely incidental to a subsisting substantial property which has been assigned, and which is itself intrinsically susceptible of legal enforcement. In such a case the assignee is entitled to maintain an action to set aside a fraudulent conveyance of the property assigned, if his assignor might have done so.

Wait on Fraudulent Conveyances, second edition, section 92, says that the right to avoid a fraudulent conveyance is not personal to the then existing creditor. His successors and assigns may enforce the right. Thus the subsequent purchaser of a pre-existing note may attack a transfer: Warren v. Williams, 52 Me. 349; Billingsley v. Clelland, 41 W. Va. 234, 23 S. E. 812; Schafermann v. O'Brien, 28 Md. 565, 92 Am. Dec. 708.

2 Minor's Institutes, page 690, treating of the right to avoid voluntary conveyances, says that the statute upon the subject protects persons suing *ex maleficio*, as for adultery or seduction, ¹⁰⁷ or any tort, and a *fortiori*, those claiming *ex contractu*, as for a debt, or for breach of an official bond, and that whether as the original creditors or his assignee: Clough v. Thompson, 7 Gratt. 26; Staton v. Pittman, 11 Gratt. 102; Shirley v. Long, 6 Rand. 735.

This brings us to the consideration of the controlling question in the case: Does the record establish the allegation of the

bill that Hancock, being at the time indebted, diverted his own estate to the improvement of the trust estate, in derogation of the right of his creditors?

It is true that a father, if of ability to do so, is bound to maintain his infant children, even though they may have property of their own: *Evans v. Pearce*, 15 Gratt. 515, 78 Am. Dec. 635; *Griffith v. Bird*, 22 Gratt. 73. This principle is stated in *Perry on Trusts* as follows: "A father is bound to maintain his infant children if he has sufficient ability; therefore a trustee cannot apply any part of the income of an infant's estate to its maintenance without an order of court. If the father has the means to maintain his children, the trustee cannot apply income to their support, although there is a provision for their maintenance in the instrument": *Perry on Trusts*, sec. 612.

There seems, however, to be an exception or modification of this rule, which in the section just quoted from *Perry* is thus stated: "If there is an agreement in a marriage settlement that the father shall have maintenance out of the trust property, the trustee must apply the income to the support of the children without reference to the father's ability to support them. If, however, the trustees have a discretionary power in that respect, the father cannot compel them to exercise it in his favor; nor will the court interfere if they choose to exercise their discretion. But where the income is expressly given to the father for the maintenance of his children, these rules do not apply; for such gift is in some sort a gift to the father."

3 *Pomeroy's Equity Jurisprudence*, in a note to section 1309, gives the ¹⁰⁸ exception to the rule as follows: "Where the property is not given to the infants simply with a direction for their maintenance, but is conveyed upon an express trust for their maintenance, then it must be so applied, irrespective of their father's ability to support and educate them." This distinction is recognized in 2 *Story's Equity Jurisprudence*, page 600, note.

In a note to *Hughes v. Hughes*, 1 Brown Ch. 387, it is said that maintenance of infants is not allowed by courts where the parent is of ability, although directed by the will. In a note it is said that Lord Thurlow continued of this opinion for some time, and the precedents certainly supported him, but that afterward he changed his opinion, and the practice became varied and was settled to the contrary. "It appears, therefore," says the annotator, "that each case must be viewed

by the court so as to meet its exigencies by a sound discretion, unfettered by any strict rule of mere technicality; and that it will not only now allow maintenance for the time past, where it should be allowed at all, but will, in a fit case, direct maintenance although the author of bounty may not have expressly prescribed it. The court will also dispense with any reference as to the father's ability, where the circumstances are strong; as where the fortune of the child is very large and the father has other children, or will be much inconvenienced by the burden of supporting the child adequately to a fortune in which he, the father, cannot participate."

In *Mundy v. Howe*, 4 Brown Ch. 226, the lord chancellor said: "It is perfectly clear, from the cases, that where the fund is given as a bounty, notwithstanding a provision for maintenance, the father, if of ability, must maintain the child; (2) but in this case it is part of the execution of the trust contained in the contract."

In *Davey v. Ward* (1877-78), L. R. 7 Ch. Div. 754, a testator gave a legacy of three thousand pounds to three children, or the survivors or survivor who should attain twenty-one; but if all ¹⁰⁰ three died under twenty-one, there was a gift over. The will contained a direction to the trustees to apply the whole or such part as they should think fit of the income of the legacy for the maintenance and education of the legatees while under twenty-one. The court held that it had power to control the discretion of the trustees in the allowance to be made for children; and the court, in opposition to the trustees, directed that the whole income should be paid to the father of the children for their maintenance, together with an equal amount for past maintenance.

In *Ransome v. Burgess* (1866-67), L. R. 3 Eq. 773, Vice-chancellor Kindersley states the result of the cases to be "that where the trust property is derived from the bounty of a stranger, the father, if of sufficient ability, is not entitled to have the income applied to the maintenance of his children, but that if the trust property is the subject of a marriage settlement, and therefore the creation of the trust is matter of contract, then, if the language of the settlement is so framed as to express a trust to apply the income or any part of the income in maintaining the children, although the quantum of income to be so applied is left to the discretion of the trustees, the father is entitled to have whatever is proper and necessary for the maintenance of his children applied for that purpose,

without reference to his ability to maintain them; but if the language of the settlement expresses merely a power so to apply the income, or any part thereof, to the maintenance of the children, then the father is not so entitled."

In *Hadow v. Hadow*, 16 Eng. Ch. 438, the testator gave one-third of his residuary estate to his wife, and the other two-thirds to trustees in trust for his children at twenty-one; and directed that, until the shares of his children should be payable to them, the income thereof should be paid to his wife, to be by her applied, or, in case of her death, to be applied by the trustees, for the maintenance of the children. It was held "that ¹¹⁰ the wife was entitled to the income of the children's share during their minorities, she maintaining them in a proper manner."

In *Browne v. Paul*, 1 Sim., N. S., 92, the testator gave all his property to trustees in trust, to pay an annuity to his wife, and subject to that payment, to convey, assign or transfer all his property, unto and equally between his children, when and as they severally attained twenty-one; and, in the meantime, to pay to his wife, or otherwise apply the rents and proceeds of their respective shares for or toward their respective maintenance, education and advancement. It was held that "where, during the minority of a child, the interest of such child's legacy is directed to be paid to the parent, to be applied for or toward its maintenance, there the direction as to the application is a mere charge, for the benefit of the child, on what is, substantially, a gift to the parent subject to such charge."

These cases are not cited because of their similarity to the case under consideration, but as showing that the rule which requires a father to support his child is one which has been in later years greatly relaxed, and which depends in its application upon the circumstances of the particular case. As was said by Judge Robertson, in *Evans v. Pearce*, 15 Gratt. 515, 78 Am. Dec. 635: "The court will look with liberality to the circumstances of each particular case, and to the respective estates of father and children, and will authorize the income arising from the estates of infants to be applied to their support whenever, under all the circumstances, it appears to be proper."

In *Griffith v. Bird*, 22 Gratt. 73, the court held that where a father, who was the guardian of two of his children, maintained and educated them at his own expense and made no charge against them, and died in February, 1861, up to which

time his estate was ample to pay his debts, but became insufficient to do so by losses incurred thereafter, that between the father and his ¹¹¹ creditors his child would not be charged in the guardianship account with the cost of their maintenance and education.

The financial condition of James Hancock at his father's death does not appear. The trust property vested in him as trustee, under the fifth clause of his father's will, for the support of his wife and children, passed at once under his control. He collected the rents, commingled them with his own funds, rendered no account, and in January, 1895, claims that he was indebted to that fund in the sum of \$5,765.85, which, if true, proves that he had, during that period, appropriated that much of the rents derived from the trust property to his own use, in violation of the terms of the trust which had been reposed in him. Is that true? Had there been during that period any diversion by the trustee of the trust fund confided to his care? The house, valued at \$14,000, was devised to him by his father as trustee for his wife and children, to be held not subject to his own debts or liabilities, but in trust for the support and maintenance of his present or any future wife that he may take, and his children, the said trust to continue during the life of James Hancock; and if, at his death, he shall leave a wife surviving him, until her death. Upon the death of James Hancock and wife, the trust was to cease, and the property to vest in fee simple absolute in all of his children in equal shares. His claim now is that in 1895 he was indebted to the trust fund, because it was his duty to support his children; that he was of ability to do so, and that he was guilty of a breach of trust in appropriating the trust property in part discharge of the duty which the law had imposed upon him. If the will of A. G. Hancock had merely conferred a power upon the son, as trustee, so to apply the rents and profits of the trust property, it would be a most dangerous precedent, in our opinion, to allow him, after he had exercised that power and appropriated the rents of the trust property to the maintenance and support of his wife and children, to recall the exercise of the discretion ¹¹² with which he had been invested, and permit him to reconstruct the past as between himself and the trust fund and his beneficiaries, and after a lapse of eight years to constitute himself a debtor to the fund which had been confided to his control. If, we repeat, the will had clothed him with the exercise of a mere power, and that power had been exercised in

accordance with its terms, the court would be slow to reopen the transaction and restate the account, for to do so would be to multiply opportunities for fraud and imposition upon innocent creditors. But in the case before us the trustee was not clothed with a mere discretionary power. He received the property impressed with a trust for the support of his wife and children. Its income seems to have been applied during all these years in strict conformity with his duty as prescribed by his father's will, and where is the wrong and injustice of which his beneficiaries can now be heard to complain?

This house and lot, which is the subject of the trust, was, at the date of the testator's death, rented for the sum of \$900. By reason of the improvements which have been placed upon it under the circumstances which have been detailed, a contract for its rental was entered into before its erection at the sum of \$1,750 per year. Its yearly value had been increased more than ninety per cent.

The conduct of the trustee in this case was well calculated to beguile and mislead those who dealt with him. Had he settled his accounts, and charged himself with the accumulation of rents from the trust property, all who extended credit to him would have done so with their eyes open; but there was nothing to disclose the true condition of his affairs, and much to lull them into a false security. He not only stated no account, but for all that appears he kept none. He commingled what he received from the trust with his own money, and drew upon it as a common fund.

A trustee cannot, of course, by such conduct prejudice the ¹¹³ trust, but the question here is whether he shall defeat his creditors, not for the protection of the trust from loss, but its augmentation by the process of capitalizing the rents derived from it. Equity enjoins upon us the duty of being just before we are generous. As we have seen, if the trustees have discretion as to the application of the fund to the support of the children, the court will not, at the father's instance, compel them to exercise it, he being of ability. Nor will the court interfere with their discretion if they see fit to exercise it: 2 Perry on Trusts, sec. 612. So, by parity of reasoning, where the trustee has exercised the discretion and supported the children, the father will not be permitted to restore to the trust fund what had been rightfully appropriated in order that he may augment the trust fund and evade the payment

of his honest debts, for that would be to make the rights of men depend not upon law, but the whim, the caprice, the preference, or the interest of the individual.

If the will is to be construed as not clothing the trustee with a mere discretion, but as creating an express trust for the support of the wife and children, which we think is the true construction, then the case is still stronger for appellant. for then it must be so applied irrespective of their father's ability to support and educate them: 3 Pomeroy's Equity Jurisprudence, *supra*. Either view is conclusive of the case, for if such be the law where there is a discretionary power or an express trust in cases in which the father is not the trustee, the union of the two relations in one person can have no influence upon the result.

The case of *Norris v. Jones*, 93 Va. 176, 24 S. E. 911, seems to be relied upon by appellees. An insolvent son had made a gift to his mother, and a creditor, whose debt arose prior to the gift, brought a suit to hold the mother liable for its payment, and to subject the gift to the payment of his debt, but it appearing that prior to the institution of the suit the mother lent the son an amount larger than the gift, that there was no actual fraud,¹¹⁴ and that the mother had no knowledge of the insolvency of the son, the court held that there was no liability upon her. It could not have been otherwise. There was no actual fraud. There had been a restoration to the son's estate by the mother of what she had received. The ability of the son to meet his obligations had not been diminished, and the creditor in no respect prejudiced by the transaction.

We are of opinion that to sanction what was done in this case would be to permit a trustee to change his course of conduct in the light of subsequent events, and of his altered financial condition, and to permit him to simulate a debt to the estate under his control in order that it might be augmented for the benefit of his wife and children at the expense of existing creditors.

The decree of the circuit court must be reversed.

The Legal Obligation of a Parent to support and maintain his infant children is not clear. Some authorities maintain that there is no such obligation: Kelley v. Davis, 49 N. H. 187, 6 Am. Rep. 499; monographic note to Bennett v. Gillette, 74 Am. Dec. 799. Other authorities take a different view: Rowe v. Raper, 23 Ind. App. 27, 77 Am. St. Rep. 411, 54 N. E. 770; Zilley v. Dunwiddie, 98 Wis. 428, 67 Am. St. Rep. 820, 74 N. W. 126; Porter v. Powell, 79 Iowa, 151,

44 N. W. 295, 17 Am. St. Rep. 353, and cases cited in the cross-reference note thereto. It has been held that a father is bound to maintain his minor children from his own estate if able, though they have a separate estate: *Presley v. Davis*, 7 Rich. Eq. 105, 62 Am. Dec. 396; *Johnson v. Johnson*, 2 Hill Ch. 277, 29 Am. Dec. 72. And no allowance will be made him for that purpose out of their property. He may be entitled to such allowance, however, even for past maintenance: *Note to Myers v. Myers*, 16 Am. Dec. 661-663.

The Effect of Placing Improvements by a husband on his wife's separate property, as against his creditors, is considered in the monographic note to *Morris v. Fletcher*, 77 Am. St. Rep. 92-109; *Selover v. Selover*, 62 N. J. Eq. 761, 90 Am. St. Rep. 478, 45 Atl. 522; *Olson v. O'Connor*, 9 N. Dak. 504, 81 Am. St. Rep. 595, 84 N. W. 359.

HUTCHINSON v. MAXWELL

[100 Va. 169, 40 S. E. 655.]

EXECUTION—Condition That Property shall not be Subject to.—If a condition is annexed to a legal estate that it shall not be liable for the owner's debts, such condition is void. (p. 952.)

SPENDTHRIFT TRUST.—If property is given to be held in trust for the benefit of the beneficiary and to pay the income to him from time to time, with a condition that it shall not be subject to execution, this condition is void, if the statutes of the state declare that estates of every kind held or possessed in trust shall be subject to the debts and charges of the persons to whose use and benefit they are so held. (p. 952.)

SPENDTHRIFT TRUST—Interest of the Beneficiary, When Subject to Creditors' Bills.—When a deed of gift conveys property to be held in trust as follows: (1) Certain horses for the use and benefit of the cestui que trust, with power in the trustees to sell and dispose of the same in accordance with and for the purposes of the trust, and (2) certain real property with power, out of the rents and profits, to apply them in the discretion of the trustees to the comfortable support and maintenance of the beneficiary, paying, from time to time or from week to week, only so much as may seem proper, and, as to any residue not expended for such purpose, that the trustee should invest it along with the capital or principal sum, and upon the death of the beneficiary, that the property remaining shall go to such person as he may appoint, and on default of the appointment, to his heirs at law, his creditors may by suit in equity reach and compel the payment to them of any sum which he could have claimed should be applied to his benefit, though the deed creating the trust declares that it shall not be subjected to the demands of creditors. (pp. 953, 954.)

SPENDTHRIFT TRUST—Discretion of Trustee, When does not Prevent Creditors from Reaching Funds of.—Where property is the subject of a spendthrift trust, the fact that a trustee has a discretion to apply so much of the income as may be necessary for the support of the beneficiary and for other purposes does not remove the funds from a bill for the benefit of creditors, if the trustee has no right to exclude the beneficiary from the benefit of the trust. (p. 954.)

CREDITORS' BILL.—Construction of.—Where a bill is filed in behalf of the complainants, and of all creditors who may be entitled to become parties to the suit, it must be construed as being filed on behalf of lien creditors only. (p. 954.)

A CREDITOR'S BILL may be Maintained Without Alleging a Return Upon Execution of no property found, if it avers that they have sued out execution and maintained a lien on the property. (p. 954.)

EQUITY PRACTICE.—As Against the Objection That the Bill is Indefinite and Uncertain, it must be read in connection with the exhibits filed, and if, when so read, it states complainants' case with such a degree of consistency as will enable the defendants to make their defense, the objection should be overruled. (p. 954.)

EQUITY PRACTICE.—Bill, When not Multifarious.—Where the original bill is to subject the interest of a debtor in trust property to the payment of his debts, and an amendment is filed averring that the property subject to the trust had belonged to the debtor, and had been by him conveyed to hinder and defraud his creditors, and it is apparent from the whole scope of the amended bill that its object is not to have the deeds annulled, but to subject the beneficiary's interest to the payment of his debts, the bill, as so amended, is not multifarious. (pp. 954, 955.)

S. J. C. Moore, C. Kownslar, M. McCormick, and R. M. Ward, for the appellants.

Barton & Boyd, for the appellees.

170 BUCHANAN, J. This suit was instituted to reach and subject the rights and interests of Clark Maxwell, the debtor, in certain real and personal estate conveyed by his wife to a trustee, to the payment of the debts of the appellants which had been reduced to judgment, and upon which execution had issued.

The object of the conveyances of the wife to the trustee was, as is stated in the deeds, to provide "an estate and fund for the maintenance, support, and enjoyment of the said Clark Maxwell, the husband of the said party of the first part, at the same time securing the same against his improvidence, without being alienable by him or in any wise subject to, or chargeable with, his past, present, or future debts or liabilities."

171 The estate conveyed to Scott H. Hansbrough, trustee, by one of the deeds, consisted of horses, wagons, carts, harness, silverware, pictures, etc.; and the right to the use and occupation of, and to the rents and profits arising from, a certain farm lying in part in the county of Clarke and partly in the county of Frederick, containing three hundred and thirty-three acres, during the natural life of the husband, reserving to the grantor the remainder in the farm.

The estate conveyed by the other deed consisted, first, of one-half in value, or a moiety, of the capital or principal sum of all the properties, moneys, investiments, choses in action, and estate, real, personal or mixed, in the charge, custody and management of one George M. Saunders, of London, England, the attorney and agent of the wife; and second, the net income, rents, profits and interest arising out of and derived from the other moiety of the property held by said agent and attorney during the life of the husband. The estate or interest of the husband in the horses and other personal property conveyed by the first-named deed is limited as follows: "The said Scott H. Hansbrough shall, immediately upon the execution and delivery of this indenture, take possession of the personal property aforesaid mentioned in clause 1, and hold the same as trustee aforesaid, free from all debts or liabilities of the said Clark Maxwell, and without any right or power in the said Clark Maxwell to dispose of, alien, or charge or encumber the same, but for the free use and enjoyment of said Clark Maxwell, as provided in the trust herein contained, with power only to said trustee to sell and dispose of the same when and as he may see fit, in accordance with and for the purposes of the trust herein established."

As to the farm, the deed provides that the trustee, "out of the rents and profits arising from said farm after paying all taxes, insurance, and necessary expenses of administering said trust, shall apply the same so far as is necessary in his discretion ¹⁷² and judgment to the proper and comfortable support and maintenance of said Clark Maxwell, paying therefrom from time to time, or from week to week, only so much of said rents and profits, proportionately in such sum or sums as to said trustee may seem proper to be paid, without the right or power of said Clark Maxwell to assign or anticipate the same; and any residue thereof, remaining after the payment of said taxes, costs of insurance and other expenses aforesaid, and the said support and maintenance of said Clark Maxwell, shall be safely invested from time to time by said trustee as other trust funds are required by law to be invested and held in trust, as a capital sum.

"The annual interest or income from which shall be expended for the maintenance and support of said Clark Maxwell as aforesaid, and such capital sum shall, at or after the death of said Clark Maxwell, be paid to such person or persons as said Clark Maxwell shall nominate and appoint by his last will and

testament, and in default of such appointment, the same shall pass and belong to the heirs at law of said Clark Maxwell."

By the terms of the other deeds which convey the property in the hands of Saunders, agent and attorney, it is provided that the property thereby conveyed shall be held in trust "and free from the control and ownership and power of said Clark Maxwell and his assigns, and in no respect or manner subject to any contract, debt or liability of said Clark Maxwell, but upon the further trust that, out of so much of said income, rents and profits as in the discretion and judgment of said trustee shall be necessary therefor, the said trustee shall provide for the proper and comfortable support of said Clark Maxwell, payable to or for the said Clark Maxwell from week to week, or from time to time, proportionately so much of said income, rents and profits in sum or sums as may to said trustee seem proper to be paid therefor; and any residue thereof not so expended by said trustee shall be by him safely invested from time to time and held in trust as a capital sum, along with the aforesaid capital ¹⁷³ or principal sum derived from the moiety of said properties, money, etc." It further provides that "the said trustee, upon the death of said Clark Maxwell, shall pay the principal sum in his hands to such person or persons as Maxwell shall nominate and appoint by his last will, and in default of such appointment, the same shall pass and belong to his (Maxwell's) heirs at law."

Upon appellant's contention, two questions arise: 1. Whether the interest or estate conveyed by the deeds was a gift, or was based upon a valuable consideration; 2. If a gift, whether or not the provisions of the deeds, that it should not be liable for the donee's debts, are void, because repugnant to the nature of the estate conveyed.

If the conveyances were based upon a valuable consideration, the second question does not arise, as it is conceded by appellees' counsel that if the cestui que trust paid a consideration for the property conveyed, the provisions of the deed that it should not be liable for his debts would be a fraud upon the rights of his creditors, and could not be upheld.

The deeds in question, upon their face, purport to convey the estate or interest which passes to the grantee as gifts, and the record does not show that the conveyances were based upon considerations deemed valuable in law. Being gifts, the next question is, Are the provisions of the deeds, declaring that the

donee's estate or interest therein should not be liable for his debts, void?

It is conceded that the question of the liability for debt of a cestui que trust's interest in property, out of the income of which he is to be supported for life, had not been passed upon by this court prior to the case of *Garland v. Garland*, 87 Va. 758, 24 Am. St. Rep. 682, 13 S. E. 478. Numerous cases had been before this court in which trusts making somewhat similar provisions were involved, but they were either cases in which it was not necessary to pass upon the question now under consideration, or cases where the ¹⁷⁴ provisions were for the benefit of two or more beneficiaries, and the question was whether or not their interests could be severed, or whether they were so connected that no part of the trust fund could be reached for the debts of any one of them. Among these cases are *Markham v. Guerrant*, 4 Leigh, 279; *Nickell v. Handy*, 10 Gratt. 336; *Camp v. Cleary*, 76 Va. 140. But it is claimed that in the case of *Garland v. Garland*, 87 Va. 758, 24 Am. St. Rep. 682, 13 S. E. 478, the validity of such trusts was upheld, and that the question is no longer an open one in this state.

The opinion of the court in that case does so hold, but the construction which the court placed upon the will did not, we think, require a decision of the question. It construed the will as giving to the testator's brother, Burr Garland, the mere right to a decent and comfortable support out of the profits of an estate, the legal title to which, as well as the profits, he (the testator) was careful to confer upon the trustee. Burr Garland was dead, and the property sought to be subjected were profits unexpended at the time of his death.

Having placed this construction upon the will, the court says: "On behalf of the appellees it is insisted that the testator, by his will, gave to Burr Garland the profits therein mentioned absolutely, and that the exemption of the profits from liability for Burr Garland's debt is void, because they say it is a fundamental doctrine of the English chancery, and that the same rule prevails in America, that no such estate can be deprived of the incident of alienability or liability for the debts of the owner.

"But this argument seems to me to be beside the mark. In this case the devisee and legatee, Burr Garland, did not take any absolute property in the profits of the estate which he might have assigned or aliened, but, on the contrary, he acquired the mere, although exclusive, right to a perception of so much of said profits as would furnish a decent and comfortable sup-

port for himself, and this was so qualified and limited as to fence out all his creditors except those who furnished him supplies for ¹⁷⁵ his support. Had he undertaken to expend these profits in any other way, he would have been guilty of a breach of trust, for there was, in the eye of a court of equity, as complete a trust in him to apply these profits in this one direction as there was in the trustee to hold the legal title. And while he, Burr Garland, took this qualified right, which we think it is a misnomer to call property, the remaindermen took a vested remainder in all the surplus or unexpended profits."

If Burr Garland acquired no property rights under the will of his brother in the profits sought to be subjected in that case, as the court in effect held, then there was of course nothing for his creditors to subject, and there was no necessity or occasion for the court expressing any opinion upon the validity or invalidity of such provisions where the cestui que trust did take a property interest under the trust. That expression of opinion was, therefore, a mere dictum, and cannot be regarded as an authoritative decision of the question under consideration.

It is well settled in this country and in England, from which country we derive the principles of our jurisprudence, that a gift or grant of a beneficial estate, in fee or absolutely, whether legal or equitable, has certain legal incidents of which the estate cannot be divested, and all conditions adopted for that purpose are necessarily repugnant and void. Among those incidents are the donee's or grantee's power of alienating such estate, and its liability for his debts: Coke on Littleton, 223a; Brandon v. Robinson, 18 Ves. 429; 2 Minor's Institutes, 4th ed., 287, 288; Gray's Restraints on Alienation, 2d ed., secs. 105, 134.

The reasons for this doctrine or principle is the repugnancy of such restraints upon the ordinary rights of property, and that property would thereby be withdrawn from the ordinary rules and channels of commerce and trade.

In Coke on Littleton, 223a, in discussing conditions against alienation, it is said: "The like law is of a devise in fee upon condition that the devisee shall not alien, the condition is void; ¹⁷⁶ and so it is of a grant, release, confirmation, or any other conveyance, whereby a fee simple doth pass. For it is absurd and repugnant to reason that he that hath no possibility to have the land revert to him should restrain his feoffee in fee simple of all his power to alien. And so it is if a man be possessed of a lease for years, or of a horse, or of any other chattel, real

or personal, and give or sell his whole interest or propertie therein, upon condition that the donee or vendee shall not alien the same, the same is void, because his whole interest and propertie is out of him, so as he hath no possibilitie of a reverter; and it is against trade and traffique and bargaining, and contracting between man and man."

The case of a settlement upon a married woman, or in reference to coverture, is an exception, or apparent exception, to the general rule that conditions restraining the power of alienation and exempting property from the liability for the debts of the owner is repugnant and void. But the whole doctrine of the equitable separate estate of a married woman is the creature of equity, the invention of the chancellors, and sets at naught many of the principles of the common law: 2 Minor's Institutes, 4th ed., 948.

"When this court," said Lord Cottonham in *Tullett v. Armstrong*, 4 Mylne & C. 377, "first established the separate estate, it violated the laws of property as between husband and wife; but it was thought beneficial, and it prevailed. It being once settled that a wife might enjoy separate estate as a feme sole, the laws of property attached to this new estate; and it was found, as part of such law, that the power of alienation belonged to the wife, and was destructive of the security intended for it. Equity again interfered, and by another violation of the law of property supported the validity of the prohibition against alienation": *Buckton v. Hay*, 11 Ch. Div. 645.

It is also well settled in England that the right of alienation and liability for debts are inseparable incidents of a life estate, ¹⁷⁷ whether limited by way of trust or otherwise, except in cases where there is a termination, or limitation over, of the estate dependent upon attempted alienation or seizure by creditors: *Brandon v. Robinson*, 18 Ves. 429; *Graves v. Dolphin*, 1 Sim. 66; *Rochford v. Hackman*, 9 Hare, 475; *Gray on Restraints on Alienation of Property*, sec. 134.

It is also equally well settled in this country, even in those jurisdictions where "spendthrift trusts" are upheld, that liability for debts is an inseparable incident of a legal life estate. In the case of *Hahn v. Hutchinson*, 159 Pa. St. 138, 139, 28 Atl. 167, the supreme court of Pennsylvania, where such trusts seem to have had their origin, held, following prior decisions, that "in order to protect the estate from creditors, the legal estate must be in the hands of a trustee, and if the equitable estate become merged in the legal it could be immediately seized in

execution by the creditors." Professor Gray, who has given this subject the most thorough investigation, in his work on Restraints on Alienation, says there is not a shred of authority, on either side of the Atlantic, in favor of the doctrine that a life tenant of the legal estate in land can be restrained from alienation: Secs. 134-138. In our investigation, we have found no case holding a contrary doctrine, unless it be some Illinois cases referred to by Professor Gray. At least, the overwhelming current of authority is that a legal life estate is subject to the legal incidents of property, one of which is that it is liable for the owner's debts: *Ehrisman v. Sener*, 162 Pa. St. 577, 29 Atl. 719; *Wellington v. Janrin*, 60 N. H. 174; *McCleary v. Ellis*, 54 Iowa, 311, 37 Am. Rep. 205, 6 N. W. 571; *Maynard v. Cleaves*, 149 Mass. 307, 21 N. E. 376.

If liability for debts is an inseparable incident of a legal life estate, as it unquestionably is, why should it not be an inseparable incident of a like estate in equity? One reason why it is an inseparable incident of property at common law is, that it is against public policy that a man "should have an estate to live on, but not an estate to pay debts with." Does not this ¹⁷⁸ reason apply as much to equitable estates as to legal? A restraint on alienation and freedom from liability for debt are as much against public policy in the one case as in the other. The English chancery courts recognized this, and applied the rule of the common law to equitable estates. They did not engraft any new doctrine on the common law, as is suggested in some of the cases which uphold spendthrift trusts; but, as Professor Gray shows conclusively, "they walked scrupulously in the ancient ways of the law; and it is these late cases which have departed from the principles of the common law as much as they have from the precedents in equity." "The common law," as he says, "held that legal estates of freehold, whether in fee simple or for life, should not be inalienable; and chancery held the same of equitable estates of freehold. The common law held that a legal life estate might be made determinable on alienation; and chancery held the same of an equitable life estate": Sec. 256.

Not only did courts of equity, in the furtherance of a wise public policy, recognize the fact that equitable as well as legal estates should not be withdrawn from commerce, and should be liable for the obligations of the owner, but at an early day, very soon after we had severed our connection with the mother country, the law-making power of this state, by an act

regulating conveyances, which went into effect January 1, 1787, and which, with some verbal changes, is found in section 2428 of the Code of 1887, declared that "estates of every kind, holden or possessed in trust, shall be subject to debts and charges of the persons to whose use or whose benefit they are holden or possessed, as they would be if those persons owned the like interest in the things holden or possessed, as in the uses or trusts thereof": 12 Henning's Statutes at Large, c. 62, p. 157; 1 Rev. Code of 1819, c. 99, sec. 30.

This statute makes the equitable estate of the cestui que trust liable for his debts to the same extent as if he were the legal owner of the same. If a condition is annexed to a legal life estate that it shall not be liable for the owner's debts, it is void. Why, then, is not a like condition annexed to an equitable life estate void also?

The legislation of this state shows that it was the object and policy of the legislature to make all estates, where the owner is sui juris, liable for debt, whether legal or equitable, except such as might be exempt by express statutory provisions. The effect of upholding spendthrift trusts would be to encourage idleness and lessen enterprise, and to foster a class who become more and more reckless and indifferent to their honest debts from a sense that they are hedged in by the law beyond the reach of their creditors.

The decisions of the American courts upon this question are conflicting, and the reasoning of the cases which uphold spendthrift trusts is unsatisfactory, and, as it seems to us, at war with well-settled principles of law as to the incidents of property, whilst the English courts of chancery, and the American cases which follow them (even if our statute did not make a debtor's equitable property liable for his debts to the same extent as if he were the legal owner), seem to us to be sustained by the better reason, and to be in furtherance of a wise public policy. Whatever rights, whether legal or equitable, a person sui juris has in property, ought to be, and we think are, liable for his debts except so far as exempt therefrom by statute. Whatever rights of property the cestui que trust can demand from his trustees, his creditors ought to have the right to subject to the payment of their debts unless his rights are so connected or blended with the rights of others that it cannot be subjected without prejudice to the latter's rights: *Nickell v. Handly*, 10 Gratt. 336, 339.

Having reached this conclusion, the provisions in the deed of Mrs. Maxwell must be held to be void in so far as they declare that the property rights which her husband acquired under the deeds shall not be liable for his debts.

¹⁸⁰ The next question is, What rights of property did the husband acquire by the deeds?

By the first mentioned deed, filed with the bill and marked "Exhibit 'B,'" he acquired an absolute equitable estate in the horses and other personal property described in clause numbered one of that deed, or in the proceeds thereof, in the event the trustee sold the same, as he had authority to do under the provisions of the deed. Under that deed, and the other deed filed with the bill, marked "Exhibit 'C,'" he was entitled to what, in the judgment and discretion of the trustee, would be a proper and comfortable support and maintenance out of the rents and profits of the farm conveyed by the first named deed, and out of the income, rents and profits of the property conveyed by the second named deed, after paying taxes, insurance and necessary expenses of administering the trust, and which were made prior charges upon the profits and income received by the trustee from the farm, and from the property conveyed by the other deed. And the husband was further entitled, under the provisions of the first named deed, to the annual interest or income on so much of the rents and profits of the farm as were not necessary for the said proper and comfortable support and maintenance of the husband, and which the trustee was required by the deed to invest as a capital sum or interest bearing fund.

We are of opinion, therefore, that the appellants have the right to have subjected to the payment of their debts, so far as may be necessary, the horses and other personal property conveyed by clause numbered one of the deed marked "Exhibit 'B'" and filed with the bill, or the proceeds thereof if that property has been sold by the trustee, and so much of the rents, profits and income derived by the trustee from the other property conveyed by, and also in the fund invested under, the two deeds, after paying the prior charges of taxes, insurance, etc., charged thereon, as the husband would be entitled to receive for his proper and comfortable support and maintenance under the provisions of the said deeds.

¹⁸¹ It is true, there is a discretion vested in the trustee by the deeds as to what amount of the rents, profits and income arising from the property conveyed shall be applied to the husband's support and maintenance, but it seems to be settled that where

trustees are directed to apply the income of a trust fund for the support and benefit of the debtor, and for other purposes, but have no right to exclude the debtor, then the assignee and the creditors can claim from the trustee the amount which the debtor could have claimed should have been applied to his benefits: *Paga v. Way*, 3 Beav. 20; *Kearsley v. Woodcock*, 3 Hare, 185; *Rippon v. Norton*, 2 Beav. 63; *Wallace v. Anderson*, 16 Beav. 533; *Gray on Restraints on Alienation*, 159.

Upon cross-appeal, the action of the court in overruling the demurrer to the bill and amended bill is assigned as error by the appellees. The first objection is that the bill was filed in behalf of all creditors, when it could be filed only on behalf of all lien creditors. The bill is in behalf of complainants and "in behalf of all creditors of Clark Maxwell, who may be entitled to become parties to this suit." As only lien creditors were entitled to become parties to the suit—*Armstrong v. Pitts*, 13 Gratt. 235, 243—the bill must be construed as showing on its face that it was filed in behalf of such creditors only. The complainants were lien creditors, and none other than lien creditors became parties to the suit.

The next objection urged to the bill is that it alleges that the complainants had sued out execution and obtained a lien upon the property sought to be subjected, without showing that they had exhausted their remedy at law.

It was necessary, under decision of *Armstrong v. Pitts*, 13 Gratt. 235, that the creditors should have a lien upon the property sought to be subjected before they could come into a court of equity, but it was not necessary that they should have alleged a return ¹⁸² of no property found upon the executions as a condition precedent to filing their bill: *Freedman's Saving Trust Co. v. Earle*, 110 U. S. 710, 4 Sup. Ct. Rep. 226; *Lewin on Trusts*, 795.

The third objection is that its allegations are indefinite and uncertain. The bill, when read in connection with the exhibits filed, and which are made a part of it, is not, in our opinion, subject to the objection made, but states the complainants' case with such a degree of certainty and consistency as would enable the defendants to make defense, and the court to decree upon the case made, and that is sufficient.

The fourth ground of demurrer is that the bill and amended bill are multifarious.

The object of the original bill was to subject the interest of the debtor in the trust subject to the payment of his debts, not-

withstanding the provisions of the deeds creating the trust declared that it should not be so liable, upon the ground that such provisions were void. In addition to the facts alleged in the original bill, the amended bill alleges that the interest of the debtor in the trust subject was not a gift, but that the deeds conveying it were founded upon a valuable consideration. The amended bill, it is true, further alleges that the property settled by the wife upon the debtor husband had been originally conveyed by him to her with all his other property, and that these conveyances of the husband to the wife and afterward of the wife for the benefit of the husband were executed in pursuance of a plan to hinder, delay, and defraud the creditors of the husband; but in the same paragraph in which that allegation is made, it is alleged that the deeds of the wife vest in the husband the equitable title to all the property conveyed to the trustee, in trust for the former's use and benefit and that such equitable interests are subject to, and liable for, the payment of his debts. It is apparent from the whole frame and scope of the amended bill that it was not filed to have the deeds in ¹⁸³ question set aside and annulled upon the ground that they were made to hinder, delay, and defraud the creditors of the husband, but to subject the debtor's interest in the trust subject to the payment of his debts, the same object for which the original bill was filed.

We are of opinion that there was no error in the court's overruling the demurrer to the bill and amended bill upon either of the grounds assigned.

The decree appealed from must be reversed, and the cause remanded to the corporation court for further proceedings to be had in accordance with the views expressed in this opinion.

Spendthrift Trusts are considered in *Board of Charities v. Lockard*, 198 Pa. St. 572, 48 Atl. 496, 82 Am. St. Rep. 817, and cases cited in the cross-reference note thereto; monographic notes to *Garland v. Garland*, 24 Am. St. Rep. 686-697; *Smith v. Towers*, 9 Am. St. Rep. 405-408; *Freeman on Executions*, 4th ed., secs. 116, 189a, 459. For cases holding that one cannot vest property or funds in a trustee so as to exempt them from liability for the debts of the beneficiary, see *Marshall v. Rash*, 87 Ky. 116, 12 Am. St. Rep. 467, 7 S. W. 879; *Brown v. Macgill*, 87 Md. 161, 67 Am. St. Rep. 334, 39 Atl. 613. But compare *Chestnut St. Nat. Bank v. Fidelity Ins. etc. Co.*, 186 Pa. St. 333, 65 Am. St. Rep. 860, 40 Atl. 486.

Creditor's Bill.—As to the demands which will support a creditor's bill, see the monographic note to *Ladd v. Judson*, 66 Am. St. Rep. 271-290.

BOISSEAU v. BASS.

[100 Va. 207, 40 S. E. 647.]

EXECUTION—Personalty Subject to.—A Policy of Life Insurance on which the premium must be paid quarter-yearly until twenty years' premiums have been paid, and which is forfeited if any of the premiums is not paid when due, but which gives the policy holder the right to surrender the policy after three full annual payments have been made, and to receive a policy for paid-up insurance, is not subject to execution, nor to the lien of that writ, during the lifetime of the assured, though three years' premiums have been paid. (p. 960.)

James H. Guthrie, B. Green, and William Leigh, for the appellant.

Peatross & Harris and E. E. Bouldin, for the appellees.

²⁰⁸ HARRISON, J. The bill in this case alleges that Jennie M. Robinson, on the sixth day of March, 1899, recovered a judgment in the corporation court of the city of Danville against one R. T. Bass, for the sum of one thousand five hundred dollars, with interest and costs; that on the twenty-second day of March, 1899, an execution was issued on this judgment and delivered to the appellant as sergeant of said city to be executed; that said execution was returnable to the first day of the May term of the court from which it issued, and was duly returned by the sergeant, endorsed "no effects." It is further alleged that at the time the execution was delivered to the appellant the judgment debtor was the owner of a policy taken out on his life, payable to himself, in the Mutual Life Insurance Company of New York, and dated the fifteenth day of October, 1887, for the sum of three thousand dollars; that the insured departed this life on the second day of May, 1900, and that Thomas J. Penn, the appellee, had qualified as his administrator. The bill charges that the execution, from the time it was delivered to the appellant, was a subsisting and continuing lien on all the personal estate of the debtor, including the life insurance policy mentioned, and that by virtue of such lien appellant is entitled to recover the amount thereof from the Mutual Life Insurance Company of New York; that his right to collect such insurance policy, to the extent of the execution in favor of Jennie M. Robinson, is paramount and superior to the right of the administrator of R. T. Bass to collect the same. The bill prays that the several parties in interest be

enjoined from collecting the policy; that a receiver be appointed to collect and hold the same subject to the order of the court, and for general relief. An injunction was granted, an answer filed by the appellee, and subsequently a decree entered dissolving the injunction. From that decree this appeal has been taken.

It is suggested in the bill, and is established by the record, ²⁰⁹ that R. T. Bass, in his lifetime, on the sixteenth day of March, 1899, assigned and transferred the policy in question to C. L. Holland to secure the payment of six hundred and fifty dollars obtained by the assured from him. It is not disputed that C. L. Holland has a prior claim upon the policy to the extent of his debt.

The question presented by the record is whether or not, under section 3601 of the code, Jennie M. Robinson, the execution creditor, had, by virtue of her execution in the hands of the appellant, a lien upon the policy here involved. In other words, was this policy such personal estate as a fieri facias lien would fasten upon in contemplation of the section mentioned?

That section provides that every writ of fieri facias shall, in addition to the lien it has under section 3587 of the code on what is capable of being levied on under that section, be a lien, from the time it is delivered to a sheriff or other officer to be executed, on all the personal estate of or to which the judgment debtor is or may afterward and before the return day of the said writ become possessed or entitled, and which is not capable of being levied on under the said section, except as to exempted property, and except also as against certain persons: Code, sec. 3601. And this lien continues so long as the judgment can be enforced: Code, sec. 3602.

Conceding to this statute the most comprehensive scope, and that every species of personal estate or interest therein is contemplated, the question remains whether or not the policy under consideration is such an estate or interest as can be reached or converted into a benefit to the execution creditor.

The policy is known as a "twenty-year distribution policy." A premium of twenty-nine dollars and twenty-two cents had to be paid quarterly on the fifteenth day of January, April, July and October, in every year, during the continuance of the contract, until premiums for twenty full years had been paid to the company. Until the twenty years had expired, the interest or estate of the assured in the policy was wholly contingent, depending upon his completion of the ²¹⁰ contract by

the payment of the premiums therein provided for. The payment of these premiums was a condition precedent to the right of the assured to any claim against the company, and such payment was entirely voluntary. No power could compel the assured to pay them. If the payments ceased, the assured forfeited all those previously made, and the company was discharged from all liability. This policy, or contract of insurance, did not constitute a present fixed liability upon the company to pay the assured anything; nor did it create any present indebtedness that the assured could demand within the twenty years. The assured died before the expiration of the twenty years, and before the payment of all the premiums. Until his death, which occurred after the return day of the execution against him, the policy was liable to be forfeited by the nonpayment of premiums to accrue thereon. It was, therefore, altogether contingent whether an obligation to pay any sum to the assured would ever rest upon the company by reason of such policy.

When a debt has a present existence, although payable at some future day, it is subject to the lien of a *fieri facias*, and may be reached by garnishment or other appropriate proceeding; but the rule is otherwise where the debt rests upon a contingency that may or may not happen, and over which the court has no control.

In *Freeman on Executions* the learned author says: "Debts which are due contingently, and which therefore may never become due, are not subject to garnishment. . . . It is well-settled in England, under the process of foreign attachment, that no lien can be acquired upon a debt the very existence of which is dependent upon a contingency, for the very satisfactory reason that it is in no debt": 1 *Freeman on Executions*, sec. 164.

Again, the same author says: "Where a policy of life insurance has issued, the insurer cannot be garnished during the existence of the life of the assured, because it is not certain whether any sum will ever become due on the policy": 1 *Freeman on Executions*, sec. 164a.

²¹¹ After laying down the well-recognized rule of law that an existing debt, not due at the service of the writ, but which is certain to become due at a future period, may be reached both under execution and attachment, it is said: "This rule has no application to future contingent liabilities, nor to any case where the liability of the defendant to the garnishee depends upon the performance by the latter of some condition precedent,

or upon his full compliance with the terms of some unperformed agreement or contract. The debt itself must be in existence at the time of the service of the writ, free from any contingency, and it may so exist, though the time stipulated for its payment be very remote": Freeman on Executions, sec. 165.

In Drake on Attachments, section 551, it is said: "The debt from the garnishee to the defendant, in respect of which it is sought to charge the former, must moreover be absolutely payable, at present or future, and not dependent on any contingency. If the contract between the parties be of such a nature that it is uncertain and contingent whether anything will ever be due in virtue of it, it will not give rise to such a credit as may be attached; for that cannot properly be called a debt, which is not certainly and at all events payable either at the present or some future period": Brockenbrough v. Ward, 4 Rand. 352; Baltimore etc. R. R. Co. v. McCullough, 12 Gratt. 596; Baltimore etc. R. R. Co. v. Gallahue, 14 Gratt. 563; Metropolitan Life Ins. Co. v. Rutherford, 95 Va. 773, 30 S. E. 383; Case v. Dewy, 55 Mich. 116, 20 N. W. 817, 21 N. W. 911; Wood v. Buxton, 108 Mass. 102; Godfrey v. Macomber, 128 Mass. 188; Edwards v. Roepke, 74 Wis. 571, 43 N. W. 554; Day v. New England Life Ins. Co., 111 Pa. St. 507, 56 Am. Rep. 297, 4 Atl. 748.

In the case last cited it was held that a policy of life insurance payable to the legal representative of the assured is not the subject of an attachment execution during the life of the assured. The policy was payable to the assured, his executors or administrators, for the benefit of his widow, if any. The wife died in the lifetime of the assured thus making ²¹² the policy, which was an ordinary life policy, payable to the legal representatives of the assured at his death. The court said: "No action could by any possibility have been maintained for the recovery of the money of the deceased in his lifetime, nor by any other persons except upon the condition that he had first died. His death was absolutely indispensable to the existence of any right of action on the policy. More than this, if the assured had voluntarily surrendered the policy at any moment before his death, or if it had become forfeited by breach of condition, no right of action could ever have existed, even in his legal representatives. Still more, at no time during his life could the proceedings upon the attachment have been brought to final judgment in favor of the attaching cred-

itor, because it could never be known until the death of the assured had actually transpired, whether any money would become due upon the policy. The law regarding attachments contemplates and provides for actual proceedings resulting in judgment for one party or the other, not for an entire suspension of proceedings for an indefinite and uncertain period. A policy effected at the age of twenty-one, payable at death, might not become payable in fact for sixty or more years. Can it be that an attaching creditor upon such a policy could demand the judgment of the court against the company as garnishee, payable at the death of the assured, or as an alternative claim that the court should suspend all proceedings until the assured shall die? It is incredible. No judgment could be given in advance of death, because no court could possibly know for what amount the judgment should be rendered, nor whether any amount would ever become due."

In that case, like the one at bar, there was no existing indebtedness that could be reached and fastened upon by an execution lien. The condition precedent in each case was that the assured pay the premiums during the time specified in the contract, which made the right to demand anything wholly contingent ²¹³ because the payment of such premiums rested upon the voluntary action of the assured, and therefore might never be made.

The lien of an execution can affect only such subjects as exist when it is alive. It is impossible to conceive the existence of a lien without a subject for it to operate upon. This proposition seems so self-evident that we deem it unnecessary to consider it further.

There are only two authorities among those cited by appellant that appear to be in conflict with the principle we have been discussing, and to these we shall briefly allude. In the case of *Hicks v. Roanoke Brick Co. etc.*, 94 Va. 741, 27 S. E. 596, one of the questions involved was the right of priority of certain execution creditors of a contractor, by reason of their *fieri facias* liens upon a fund in the hands of the city of Roanoke, it being fifteen per cent of the cost of certain work, which the city had the right to retain until the entire work was completed, the work not being then finished. In delivering the opinion of the court, Judge Riely says that the executions were liens on the amount due by the city to Patterson, although the same could not be enforced until the completion of the work. The learned judge seems to have treated the fund in question

as a debt in *præsenti solvendum in futuro*. It does not appear from the opinion that the question was raised as to whether the liability of the city rested upon a contingency. Be that as it may, the decision is not approved, to the extent that it may be regarded as authority for the proposition that a future liability which depends wholly upon a contingency that may or may not happen is subject to the lien of an execution.

The case of *Anthracite Ins. Co. v. Sears*, 109 Mass. 383, is also particularly relied on by appellant. That was a proceeding in equity, to subject, during the lifetime of the assured a policy to the payment of a debt, under a statute which provided for such a proceeding where the subject could not be reached ²¹⁴ by attachment or taken on execution. An important distinction between that case and the one at bar is that it was there admitted, as one of the agreed facts in the case, that the insurance company was in the habit of taking up policies, like the one there involved, when the company and the holder of the policy could agree upon terms, giving it as stated by the court a present market value. No such fact is admitted in the case at bar. On the contrary, we have nothing before us but the policy, under which, as already pointed out, there was no existing indebtedness. If, however, that case can be relied on as contravening the well settled rule to which we have adverted, we must decline to follow it.

In the case at bar, the premium had been paid for more than three years, and the appellants rely upon the following provision of the policy as vesting in the assured a present interest that could be demanded: "Paid-up Policy—After three full annual premiums have been paid upon this policy, the company will, upon the legal surrender thereof before default in payment of any premium, or within six months thereafter, issue a nonparticipating policy for paid-up insurance, payable as herein provided, for the proportion of the amount of this policy which the number of full year premiums paid bears to the total number required."

To avail of the terms of this stipulation of the policy would involve not merely a change of the contract, but the making of a new contract between the assured and the company. Ordinarily, a creditor can only subject to his benefit such contract as exists in favor of his debtor. He cannot compel his debtor to change his contract or make a new and different one in order that he may reach and subject it to the payment of his debt. But if it were conceded that the surrender contemplated

by that clause of the policy could be made by anyone other than the assured, it will be observed that no steps were taken in the lifetime of the assured to carry out that provision, and, upon ~~his~~ his death, any such inchoate right was merged in the higher right of the personal representative of the assured to demand the full face value of the policy. In other words, the conditions necessary to enable the execution creditor to avail himself • of the provision, if indeed he could have done so under any circumstances, as to which we express no opinion, did not arise. This suit was not brought until after the death of the assured, when it was too late to invoke the aid of a court of equity to carry out that stipulation for the benefit of a creditor, because under the terms of the policy the time had been passed when that provision was operative for any purpose.

For these reasons we are of the opinion that the *fieri facias* in the hands of the appellant did not operate as a lien upon the policy in question, because, under the terms of the policy, there was no existing indebtedness against the company in favor of the assured to which such a lien could attach. The decree appealed from must, therefore, be affirmed.

Cardwell, J., concurs in results.

On the Exemption from attachment and execution of the proceeds of life insurance policies, see Talcott v. Field, 34 Neb. 611, 33 Am. St. Rep. 662, 52 N. W. 400; Murdy v. Skyles, 101 Iowa, 549, 63 Am. St. Rep. 411, 70 N. W. 714; Estate of Brown, 123 Cal. 399, 69 Am. St. Rep. 74, 55 Pac. 1055. And on life insurance as a fraud on creditors, see the note to Hise v. Hartford Life Ins. Co., 29 Am. St. Rep. 360-366. A policy of life insurance is not subject to attachment during the lifetime of the insured: Day v. New England Life Ins. Co., 111 Pa. St. 507, 56 Am. Rep. 297, 4 Atl. 748.

TYACK v. BERKELEY.

[100 Va. 296, 40 S. E. 904.]

GIFT to Mother and Children, When Vests in Her Alone.—Under a conveyance to T. in trust for Susanna H. to hold upon a trust to permit her to occupy and enjoy the lands conveyed, and the rents, issues and profits thereof to take for herself and her children, and under a conveyance to have and to hold for the benefit of said Susanna and her children, and to permit her to occupy the land and use its rents and profits for the support and maintenance of herself and family, she takes an estate in fee in which her children have no interest. They are mentioned only to show the motive of the gift. (pp. 969, 970.)

Peatross & Harris, for the appellant.

Berkeley & Harrison, for the appellees.

²⁹⁶ **KEITH, P.** We are called upon in this case to construe the language of two deeds, one dated the 25th of November, 1865, and the other the 28th of the same month and year, and both of them acknowledged and admitted to record a short time thereafter. The corporation court was of the opinion that, by the terms of these deeds, Susanna M. Hickson, the wife of R. L. Hickson, took an estate in fee simple which passed by her deed dated October 25, 1889, in which her husband, and such of her children as were then of age, united, to Berkeley & Harrison, trustees, to secure ²⁹⁷ a debt due from her husband to the Bradley Fertilizing Company of about eight thousand dollars.

Appellants contend on behalf of certain children of Mrs. Hickson, who were infants at the time she made this deed, that the decree of the corporation court is erroneous, and that the deeds dated November, 1865, did not vest in their mother an estate in fee simple, but conveyed to her and her children a joint estate.

The deed of November, 1865, recites that Edward D. Withers and Louisa P., his wife, of the first part, and Joseph L. Tyack, trustee for Susanna M. Hickson, of the second part, "witnesseth. that in consideration of the sum of \$6,000, paid . . . that the parties of the first part do grant and convey to Joseph L. Tyack, trustee for Susanna M. Hickson, of the second part, all that lot, tract, or parcel of land in the county of Pittsylvania." Then follows a description by metes and bounds of the land, which concludes with a period. "To have and to hold the said lot, tract, or parcel of land unto the said trustee

upon the trust that he, the said trustee, shall permit the said Susanna M. Hickson to occupy, possess, and enjoy the said land, and the rents, profits and issues thereof, to take for herself and children, which she now hath or may have by her present husband, clear of and free from all manner of charge or encumbrance of her said husband."

By the deed of November 28, 1865, Thomas D. Stokes, executor of Nathaniel T. Green, in consideration of one thousand dollars, in hand paid, conveyed to Joseph L. Tyack, trustee for Susanna M. Hickson, all that lot, tract or parcel of land in the county of Pittsylvania, which is described by metes and bounds, the description being, as in the former deed, followed by a period. "In trust to have and to hold the said land to and for the use and benefit of the said Susanna M. Hickson and her children by her present husband, and that the said trustee shall permit the said Susanna M. Hickson to occupy the land, and to use and ~~and~~ enjoy and possess the rents, issues and profits for the support and maintenance of herself and family, free from all manner of charge or liabilities of herself or her husband."

In *Wallace v. Dold*, 3 Leigh, 258, the testator bequeathed certain property to trustees to be applied to the maintenance and support of his daughter M. and her child; and at the death of his daughter he directs "the slaves and money to be given to her child or children if she shall have more than one; the above advances to be made to his daughter M. independently of any claim testator might have against her husband."

A similar bequest had been made to trustees for the support and maintenance of his son William, and his daughter Elizabeth, and for the education of their children. The residue of the testator's estate was divided into six equal parts, one-sixth of which he gives to his son Jesse, and two other sixths to his daughters, Catherine and Nancy, and the will then provides: "The other sixth parts I direct my trustees above mentioned to receive and apply one-sixth part to the use and benefit of my daughter Elizabeth, one-sixth part to the use and benefit of my daughter Martha, and the other sixth part to the use of my son William. These parts are severally to be used for the benefit of my said children during their lives, and at their death to be divided as their several money legacies are directed to be divided."

The controversy in that case arose over the bequest to his daughter Martha, it being contended upon the one hand that

her children shared jointly with her the bequest to the trustees for the maintenance of herself and child; while, on the other hand, it was maintained that the child was mentioned merely as the motive for the gift. It was held that the testator's daughter was entitled to the whole profits during her life, and that the child had no right to demand a share of them for her support and maintenance.

In *Stinson v. Day*, 1 Rob. (Va.) 435, the testator directed that his ²⁹⁹ executor should manage the land, the rents and profits to go to A. R. and her children, and should not be sold by them or any of them until her youngest child became twenty-one years of age, and not then without the consent of his daughter, A. R., if then living. At the date of the will A. R. had eight children, all of whom except two were living with her. The annual value of the land devised was about one hundred and seventy-five dollars. It was held that A. R. was entitled to receive the whole rents and profits of the land devised, during her life, and her children could maintain no suit to recover any portion of the same.

In *Leake v. Benson*, 29 Gratt. 153, Anderson conveyed certain real estate to a trustee "for the benefit of my wife and children, giving, granting and conveying for my wife an estate in fee simple." The controversy was as to whether or not the life estate vested in the wife alone, or in the wife jointly with her children, and the court held that the children took no interest in the life estate.

In *Bain v. Buff*, 76 Va. 371, the testator directed that: "After settling my estate and assigning my wife's dower, to invest all surplus money in safe six per cent interest-bearing stocks, making semi-annual payments, in trust for the separate maintenance of my daughter and her child or children, which, with the interest from investments now made by me, the rents of my houses and hires of my negroes, are to be all appropriated and paid over to her for her sole use and the benefit; and the revisionary interest held by my wife during her life is, at her death, to be vested and applied as in the manner and mode above directed, for my said daughter, her child or children; but upon this further provision and trust, that the dividends, interest, rents, hires, issues and profits of my estate aforesaid, when received by my executor, are to be paid over to my said daughter, for her sole and separate use of herself and her child, or children, if she shall hereafter have more than one, so that the same shall in no way whatever be subject to or liable for

the debts or contracts ³⁰⁰ of her husband, and to continue for and during the term of her natural life, and at her death my said estate is to be vested in fee in her child or children, during whose minority the income of my said estate, after the mother's death, is to be applied to their maintenance and education."

The court, citing the authorities which we have considered and the case of *Penn v. Whitehead*, 17 Gratt. 503, 94 Am. Dec. 478, was of opinion that the words "for the sole and separate use of herself and child or children" did not give any estate to the child or children, but indicated the motive for the gift to the mother.

In *Stace v. Bumgardner*, 89 Va. 418, 16 S. E. 252, there was a conveyance in contemplation of marriage to a feme sole of certain land, the rents and profits of which the wife was to receive "as though she were a feme sole for the maintenance and support of herself and any children that might thereafter be born to her."

The court reviewed a great number of authorities, beginning with *Wallace v. Dold*, 3 Leigh, 258, and coming down to *Siebel v. Rapp*, 85 Va. 28, 6 S. E. 478, and came to the conclusion that the wife was entitled to the whole profits of the trust subject during her life, and the "mention of the children was to indicate the motive of the settlement, and not to vest any present interest in them."

For more than seventy years *Wallace v. Dold*, 3 Leigh, 258, has been the law of this state. It has been the subject of dissent and criticism, but has been followed during all that period by an unbroken line of decisions. It constitutes a rule of property, and it is manifest that it is too firmly imbedded in our jurisprudence to be disturbed otherwise than by an act of the legislature.

It is not often that two wills or two contracts are identical in their terms. There is always more or less diversity in the circumstances which surround the parties to contracts and to wills, and the environment in some degree influences their construction. It is therefore oftentimes difficult to apply a rule of interpretation so as not to do violence to the primary object, ³⁰¹ which is to ascertain the true intent and meaning of the instrument to be construed.

To hold that language such as is employed in the cases cited, and that under consideration, vests the right in the wife to the exclusion of the children may sometimes fail to give

effect to the intention of the settler, and may place it in the power of the mother to deprive her offspring of the provision made for their support and devote it to the relief of other and more pressing needs, but, on the other hand, to hold that the children have a joint estate with the mother would be, in many instances, equally destructive. Where the property is small, its division would render it inadequate to support, maintain and educate a large family, but if the children take jointly with the mother, how can such child be denied the right to have its share set apart as he or she attains majority or marries, or in any way become forisfamiliarized?

There is a class of cases in which this result has been achieved, and the property preserved for the joint support of all the members of a family. *Nickell v. Handly*, 10 Gratt. 336, is a notable instance. In that case there was a devise to trustees of property to be managed by them as may be "most advantageous to the interest and support of H. and her children." H. contracted debts and was discharged as an insolvent debtor, and her creditors filed a bill to subject her interest in the property to the debts. The court held: "1. H. and her children are not entitled to have set apart for each of them an equal share of the trust property or its annual products; but it is to be held by the trustee, and the annual products are to be applied to their support according to the necessities of each. 2. The creditors would only be entitled to the ratable portion of H. of any surplus of the annual products of the trust subject, after providing for the support of herself and family; and as any such surplus is not alleged or shown to exist, the bill was properly dismissed. ³⁰² 3. If any surplus product now exists, or shall hereafter exist, plaintiffs may file a bill to subject it, notwithstanding the dismissal of this bill."

In the course of the opinion, Judge Samuels said: "If Mrs. Handly had any interest therein subject to her own disposal, or which could be separated from the interests of others without impairing their rights, such interest might, on familiar principles, be subjected to the payment of her debts. . . . There is nothing in the nature or law of property which would prevent the testatrix, when about to die, from appropriating her property to the support of her poor and helpless relations, according to the different conditions and wants of such relations; nothing to prevent her from charging her property with the expense of food, raiment and shelter for such relations. There is nothing in law or reason, I conceive, which should

prevent her from appointing an agent or trustee to administer her bounty. The difference in the conditions of the beneficiaries necessarily requires a difference in the amounts to be expended on each individual; and the casualties of life may render this inequality still greater. It is impossible to foresee the vicissitudes in affairs, and to provide by will in advance for every event; and no practicable mode exists to meet these difficulties but to authorize the appointment of some agent, trustee or other person to exercise the power which the testatrix is prevented by death from exercising herself. The leading intent here is to support Henrietta F. Handly and her children, and to promote their interests; and the trustee is directed to carry this intent into execution. The duty of supporting a family, especially on a limited amount of property, necessarily requires unequal expenditures upon different members of the family. An infant of tender years is sustained at less expense than an adult. A child in good health will grow, and in time be able to sustain itself, whereas another, in a sickly condition, or of unsound mind, may require long-continued assistance, and the expenditure ³⁰³ of large sums of money; all of which clearly fall within the scope of the duty to support the family. The will obviously intends that the property shall be kept together for the lifetime of the daughter. Its products are charged with the unequal and varying amounts necessary to support the beneficiaries. The products of every part of the property are charged with the whole burden, the amount of which can only be known from time to time, whilst the trust is in the process of execution. It may be, and very probably is, the case that the property, if kept together and economically managed, would do no more than support the family. If, however, Mrs. Handly, either by direct conveyance or indirectly by operation of law, can withdraw from the trust property one-sixth part thereof, or any other given proportion, then it must be held that another beneficiary may do the same thing; and thus the charge upon the whole property may be thrown upon a fragment of it. By keeping a small amount of property upon a little farm, a family living thereon may be supported; but, if divided, the shares of each would be inadequate to his or her support. If testatrix had intended to give equal benefits to her daughter and each child, nothing was easier than to have said so. Yet she has not said so, but, on the contrary, has conferred benefits

which in any event must be unequal and varying from time to time, and which, in certain contingencies likely to occur, may become greatly unequal."

The decision in this case is as much opposed to the idea of a joint interest in the mother and children as is that of *Wallace v. Dold*, 3 Leigh, 258. The one relies on the trustee to devote the estate to the objects of the trust in varying proportions as his discretion may see fit; the other reposes confidence in the wife and mother, but neither vests in the mother and children a joint estate in the ordinary sense which would carry with it equality of interest and control.

Adopting the language of Judge Burks in *Bain v. Buff*, 304 76 Va. 371, which is equally applicable here: "There is certainly no express limitation on the power of Mrs. Cutherell to dispose of or to encumber the fund arising under the will; but it is earnestly contended that the power is impliedly denied or restrained, because its exercise would or might defeat the purposes of the trust—namely, the support and maintenance of herself and her children, and thus thwart the supposed intention of the testator. This argument assumes the important fact that the children have an estate or interest in the trust subject, cognizable by the courts, and so blended with that of the mother as to make alienation by her impossible without a destruction of the whole trust. Some such cases are found in our reports: See *Markham v. Guerrant*, 4 Leigh, 300; *Nickell v. Handly*, 10 Gratt. 336; *Coutts v. Walker*, 2 Leigh, 268. But we do not regard the present case as belonging to the class mentioned. All the dividends, rents, hires, issues and profits, which constitute the trust fund, are required by the will to be paid over by the trustee to Mrs. Cutherell. The whole interest is vested in her absolutely and solely—not jointly with the children. The words 'for her sole and separate use of herself and her child and children,' etc., do not, we think, give any estate to the 'child or children,' but indicate the motive for the gift to the mother."

As Judge Staples wisely observes in *Leake v. Benson*, 29 Gratt. 153: "It was the intention of the grantor to give to his wife the trust property for her life, relying upon her discretion and affection for the children so to dispose of the income as would most conduce to the support and comfort of the family. He very properly thought it best to intrust her with the management and control of the property, rather than to raise

unpleasant contentions between her and the children in respect to the proper use and application of the trust estate."

The wit of man has not yet discovered a safer repository than the mother for the rights and interests of children. Under the ~~see~~ stress of some great emergency she may sacrifice the apparent and immediate interest of the child, but even in such a case a full knowledge of the surrounding facts and circumstances might go far to vindicate the propriety and wisdom of her conduct. As a rule, her love and spirit of self-abnegation, where her children are concerned, may be trusted to do what is wisest and best to conserve and promote their interests, and if we are to choose between the peril of defeating the provision for the family by adhering to that line of decisions which vests the entire interest in the mother, and its destruction by subdivisions which would surely follow the vesting of the interest jointly in the mother and children, we must abide by the course of decision which has prevailed in this state for nearly three-quarters of a century.

After a careful review of all the cases, we are of opinion that the deeds which are the subject of this litigation vested in Tyack, trustee, an estate in fee for Susanna M. Hickson, and that the declaration of trust which follows the description of the property did not give to her children a joint interest with her in the rents, issues and profits.

The decree of the corporation court must be affirmed.

For Authorities bearing upon the question considered in the principal case, see Penn v. Whitehead, 17 Gratt. 503, 94 Am. Dec. 478; Weaver v. Weaver, 92 Ky. 491, 36 Am. St. Rep. 604, 18 S. W. 228; Hunter v. Hunter, 58 S. C. 382, 79 Am. St. Rep. 845, 36 S. E. 734. A bequest to the testator's "wife and our sweet little children" creates a joint estate in the mother and children: Fitzpatrick v. Fitzpatrick, 100 Va. 552, post, p. 976, 42 S. E. 306.

WESTERN UNION TELEGRAPH CO. v. REYNOLDS.

[100 Va. 459, 41 S. E. 856.]

TELEGRAPH CORPORATIONS—Domestic Messages, What are, When Transmitted Over Lines Partly in Another State.—Where the intermediate and terminal points are in the same state, and a telegram is transmitted over the lines of the same corporation, and concerns only citizens of that state, it is a domestic message, though the line passes in part over territory of another state in which the corporation has established a relay office. (p. 973.)

TELEGRAPH CORPORATIONS—Conflict of Laws.—Where a telegraph corporation contracts to transmit a message from one point to another, both in this state, it is not material that in the transmission the message is sent to a point without the state, where a relay office has been established, whence it is transmitted to the point of destination, and the error or neglect in transmission occurs in that office. The contract is to be deemed a contract of this state, and the rights and remedies of the parties under it are controlled exclusively by its laws. (p. 973.)

INTERSTATE COMMERCE—Telegraph Corporations.—A contract by a telegraph corporation made with a citizen of this state to transmit a telegram from one point to another, both within the state, is not a part of interstate commerce, though in the process of transmission the telegram is sent to a point without the state, to be thence transmitted to its point of destination. (p. 973.)

JURISDICTION—When No Longer an Open Question.—If jurisdiction is dependent upon whether the constitutionality of a statute is any longer open for argument, jurisdiction cannot be sustained if the question has been twice decided by the highest court of the state. (p. 975.)

TELEGRAPH CORPORATIONS—Penal Amercement of.—The penalty imposed by the code of Virginia for failure to promptly deliver telegrams is not a penal amercement. (p. 975.)

Scott & Staples and M. H. Altizer, for the plaintiff in error.

Longley & Jordan, for the defendant in error.

⁴⁶³ **WHITTLE, J.** This was an action of debt instituted by the defendant in error against the plaintiff in error, in the Hustings court of the city of Radford, to recover the penalty prescribed by section 1291 of the Code for its failure to transmit faithfully and impartially, and as promptly as practicable, and in the order of its delivery, the following telegram, sent by the defendant in error from East Radford, Virginia:

"To A. Collier, Tom's Creek, Va.:

"Please send transportation myself and one by wire. Answer immediately.

'C. M. REYNOLDS.'

Upon the trial, the company demurred to the evidence. The jury found a verdict for the plaintiff for the statutory penalty, one hundred dollars, in usual form. Whereupon the court overruled the demurrer, and rendered judgment for the plaintiff.

It appears that the company's telegraph line from East Radford, Virginia, to Tom's Creek, Virginia, is by way of Bluefield, in the state of West Virginia; that at the latter point it has established a relay office—that is to say, an office at which messages are taken from one wire and sent over another to their destination. The wire from East Radford ends at Bluefield, from which place there is another wire extending to Tom's Creek. Both wires are the property of the company. The relay office at Bluefield is its office, and the agent in charge of that office is its agent, whose duty it is to receive and transmit messages.

It further appears that the telegram in question was transmitted, in accordance with the requirements of the statute, from East Radford to Bluefield, but was never forwarded from the relay office, at that place to its destination at Tom's Creek.

⁴⁶⁴ The defendant in error insists that the message is purely a domestic message, in no wise involving any question of interstate commerce, and that, inasmuch as the amount of the recovery is less than five hundred dollars, this court is without jurisdiction in the premises. Contrariwise, the company maintains that, as the line passes in part over the territory of another state, and the default complained of was that of its agent engaged in handling messages beyond the borders of this state, the transaction was not embraced by section 1291.

It is further insisted that, if the effect of the statute is to regulate the business of the company outside the state, it is contrary to the commerce clause of the constitution of the United States, and void. Where the initial and terminal points are both in the same state, and the telegram is transmitted over the wires of the same company, and concerns only citizens of that state, the message is a domestic message, and its character, in that respect, is not altered by the circumstance that the line passes in part over territory of another state. Nor is it affected by the fact that the company has established a relay office in such other state. The statute deals with the company, not its agents. The company in this case undertook to transmit the message from one point to another in Virginia, and it cannot escape the penalty imposed by statute

for its dereliction of duty on the theory that the statute has no extraterritorial force. The default complained of was not the stoppage of the message at Bluefield, but the failure to transmit it as promptly as practicable to Tom's Creek. And the response of the company that it was guilty, but guilty at a point beyond the limits of the state, constitutes no defense.

The contract was with the company and not with its agent. It was an entire contract, and it is wholly immaterial at what particular point in the line the breach occurred. ⁴⁶⁵ The company necessarily transacts its business through the instrumentality of agents; their acts are its acts, and unless it can be held responsible for their negligence, it can under no circumstances be made liable.

The continuity of the contract to transmit the message from East Radford to Tom's Creek was no more affected by the relay office at Bluefield, than would be the undertaking of a stage-coach company or a railroad company to transport passengers or freight between the same points, by a change of horses or drivers, or by substituting one locomotive for another, or one train crew for another, along the route. The contract imposed a continuous duty. It was between a citizen of Virginia and the company, and in no wise affected or concerned any business in West Virginia, either as regards the company or citizens of that or any other state. It, therefore, contained no element of interstate commerce.

It was held in the case of *State v. Western Union Tel. Co.*, 113 N. C. 213, 18 S. E. 389, that the regulation of the telegraph rates between points in North Carolina was not an interference with interstate commerce, although the line passed into Virginia between the points, where it was all owned and operated by one corporation. So in the case of *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192, 12 Sup. Ct. Rep. 806, the state of Pennsylvania levied a tax on the gross receipts of all railroad companies derived from the transportation by continuous carriage from points in Pennsylvania to other points in the same state—that is to say, passing out of Pennsylvania into another state and back again into Pennsylvania, in the course of transportation. The Lehigh Valley Railroad Company had no road of its own from Mauch Chunk, Pennsylvania, to Philadelphia, but in transporting its coal, and general freight traffic, it used its own line from Mauch Chunk to Phillipsburg, New Jersey, from which point it was, under an arrangement for a continuous passage with

the Pennsylvania Railroad Company, transported ⁴⁶⁶ by the latter road, via Trenton, to Philadelphia. It was insisted that the state could not tax that part of the gross receipts derived from so much of the transportation as was wholly within the state of Pennsylvania, because the freight, during its entire transportation, was impressed with the character of interstate commerce. The validity of the tax was sustained. The court, speaking through the chief justice, said in part (quoting from the opinion of Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. 189): "Commerce undoubtedly is traffic, but it is something more. It is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse," and proceeds: "The point of departure and the point of arrival were alike in Pennsylvania. The intercourse was between these points, and not between any other points. Is such intercourse, consisting of continuous transportation between two points in the same state, made interstate, because, in its accomplishment some portion of another state may be traversed? Is the transmission of freight or messages between two places in the same state made interstate business by the deviation of the railroad or telegraph onto the soil of another state? . . . It is simply whether, in the carriage of freight and passengers between two points in the same state, the mere passage over the soil of another state, renders that business foreign which is domestic. We do not think such a view can reasonably be entertained, and are of opinion that this taxation is not open to constitutional objection by reason of the particular way in which Philadelphia was reached from Mauch Chunk."

The court further says: "We will observe, however, that we think the principle laid down by that [the trial] court is peculiarly adapted to cases like the present, in which there is such an exceptional facility for the evasion of state authority to fix the rate of charges. This may be done in an instant, and without ⁴⁶⁷ expense, by so adjusting the wires that messages must go through a part of the territory of another state." The case under consideration falls within the influence of these decisions, which show that the telegram in question was a domestic message, and that no federal or constitutional question is involved.

In the case of *Western Union Tel. Co. v. Tyler*, 90 Va. 297, 44 Am. St. Rep. 910, 18 S. E. 280, this court held that section 1292 of the Code was not in conflict with the constitution of

the United States, or any act of Congress passed in pursuance thereof, and that decision was reaffirmed in the case of *Western Union Tel. Co. v. Bright*, 90 Va. 778, 20 S. E. 146. In the case of *Western Union Tel. Co. v. James*, 162 U. S. 650, 16 Sup. Ct. Rep. 934, a similar provision of a Georgia statute was declared to be a reasonable exercise of the police power of the state, and not unconstitutional. In the more recent case of *Western Union Tel. Co. v. Powell*, 94 Va. 268, 26 S. E. 828, it was said: "When this writ of error was awarded section 1291 had not been held by this court to be constitutional, nor had the decision in the *James* case been made by the supreme court of the United States, holding such legislation to be a valid exercise of the police powers.

"Under the circumstances surrounding this case, we cannot say that the jurisdiction of this court was not invoked in good faith to determine the constitutionality of the statutes in question. Its jurisdiction having been properly invoked upon one of the grounds provided in the constitution and laws, it has jurisdiction for all purposes, although the amount involved is less than five hundred dollars."

The latest expression of this court on the subject is found in the case of *Western Union Tel. Co. v. Goddin*, 94 Va. 513, 27 S. E. 429, where this language occurs: "At the time the writ of error in the case before us was awarded the constitutionality of section 1292 had been twice passed ⁴⁶⁸ upon in this court, and it was no longer a debatable question. The test of 'good faith' does not fully meet the difficulty. Counsel and parties may with perfect good faith ask the reiterated judgment of this court upon any question, and we do not clearly perceive how this court could say at just what point the appeal to it was wanting in good faith. A better test, perhaps, is to be found in considering whether or not the point presented is any longer open for argument. Is it a debatable question? . . . Applying this test, it is plain that the constitutionality of section 1292 is not an open one in this court. It is no longer debatable." That case is conclusive of this on that alleged ground of jurisdiction.

On the remaining ground, namely, that the recovery is a penal amercement, it is sufficient to say that the decision last referred to is equally conclusive. The recovery in that case was the one hundred dollar penalty imposed by section 1292 for the failure to deliver promptly a telegram, and sections 1291 and 1292 are in *pari materia*.

It follows from these views that this case must be dismissed for want of jurisdiction.

A State may Subject Telegraph Companies to penalties for acts of negligence occurring within its limits, although such acts may be committed in dealing with messages to be transmitted to points in other states: Western Union Tel. Co. v. Howell, 95 Ga. 194, 51 Am. St. Rep. 68, 22 S. E. 286. And a statute creating a liability for failure to deliver messages promptly is not unconstitutional when applied to messages sent from one state to another for delivery in the state enacting the statute: Gray v. Telegraph Co., 108 Tenn. 39, 91 Am. St. Rep. 706, 64 S. W. 1063; Western Union Tel. Co. v. Tyler, 90 Va. 297, 44 Am. St. Rep. 910, 18 S. E. 280. See, in this connection, Marshall v. Western Union Tel. Co., 79 Miss. 154, 27 South. 614, 89 Am. St. Rep. 585, and cases cited in the cross-reference note thereto.

FITZPATRICK v. FITZPATRICK.

[100 Va. 552, 42 S. E. 306.]

GIFT to Mother and Children, When Vests All with an Estate.
A bequest to testator's "wife and our sweet little children" creates a joint estate in the mother and children. (p. 978.)

Suit by the widow of Thomas P. Fitzpatrick against their minor children for the construction of a will. Decree that she and they take a joint estate, from which she appealed.

Caskie & Coleman, for the appellant.

William Kinckle Allen, for the appellees.

⁵⁵³ HARRISON, J. We are called upon to construe the following brief will, dated December 21, 1897:

"I, Thos. P. Fitzpatrick, of Nelson county, Va., do this day make my last will. I leave to my dear wife and our sweet little children all that I possess. I am nervous about my condition. I had intended to make a long will to-day. I barely can write."

It is contended on behalf of appellant that, under the line of decisions beginning with *Wallace v. Dold*, 3 Leigh, 258, and ending ⁵⁵³ with the recent case of *Tyack v. Berkeley*, 100 Va. 296, ante, p. 963, 40 S. E. 904, the children take nothing under this will; that a devise to a mother and her children vests the fee simple estate in the mother, the mention of the children being merely the expression of the motive for the gift to her. The decisions relied on to sustain this proposition do not hold that the language, to "the mother and her children,"

is alone sufficient to create a fee simple in the mother. Such a conclusion would ignore the cardinal rule in the construction of wills that the intention of the testator must be ascertained and made to prevail. In some of the cases mentioned unguarded expressions are used, but, upon the whole, the doctrine clearly established is that where the language of the gift is to "the mother and her children" the children are excluded, and the mother given a fee simple only when it appears from the context, or the whole instrument taken together, that such was the intention of the testator. In these cases, as in all others, the effort was to ascertain and give effect to the intention, and the whole instrument was looked to for such light as it might shed upon the particular language under consideration. This is well illustrated by the case of *Vaughan v. Vaughan*, 97 Va. 322, 33 S. E. 603, in which Judge Riely says: "If the testator had stopped at the end of the first clause, 'I do hereby bequeath to my wife, Emma Lee Vaughan, and to my children, all my property of every kind, real and personal,' if this stood alone, and constituted all that related to the gift, it could not be doubted that she and the children would have taken a joint estate in all of the property." But the learned judge does not stop at the first clause. The whole will is read, and from the context the conclusion is reached that the testator intended to give a fee simple to his wife.

The view we have taken, that the language to "the mother and her children," standing alone, does not create a fee simple in the mother, is vigorously maintained by the late Judge E. C. Burks in a note to *Nye v. Lovitt*, 2 Va. Law Reg. 29, in which he says: "All the Virginia cases on this subject, we believe, ⁵⁵⁴ are cited by Judge Lewis in *Stace v. Bumgardner*, 89 Va. 418, 16 S. E. 252. We invite an examination of each one of them, and we think it is safe to say that in no one of them is the decision that the children take no interest rested on the language alone that the gift is to 'the woman and her children.' The intention to give exclusively to the woman is deduced from the context and the language of the instrument taken as a whole. We submit that if the language is to 'the woman and her children,' they take—the woman and her children—a joint estate, unless there is some other language in the instrument manifesting the intention that the woman should take the whole estate, and the children nothing. 'It was resolved in *Wild's* case, as reported in 6 Coke, 228, and has been hitherto treated as an undeniable position, that under

a devise to a parent and children, the children, if there be any, and if no manifest and certain intent appears in the will to the contrary, will take jointly with their parent by purchase': Judge Moncure, in *Nickell v. Handly*, 10 Gratt., at page 344. It is true it is broadly stated by Judge Lacy in *Siebel v. Rapp*, 85 Va., at page 30, 6 S. E. 479, that 'from the case of *Wallace v. Dold*, 3 Leigh, marginal page 258, it has been held—with some respectable dissent at first—that the gift to the wife and her child was a gift to the wife—the reference to the children indicating the motive for the gift.' The cases cited by him do not support the proposition as stated by him. They only show, as has been before mentioned, that when the gift is to the woman and her child or children, or is in trust for them. or like phraseology is used, the children are excluded only when it appears from the context of the whole instrument taken together that it was the intention to exclude them. We insist that the resolution in *Wild's* case, above cited, is still the law of Virginia, and that the decisions do not go counter to it, although some incautious expressions of the judges in delivering their opinions may give color to the contrary doctrine. We challenge the examination in detail of the cases to this point."

⁵⁵⁵ These observations by Judge Burks have been adopted with approval by this court in the case of *Lindsey v. Eckels*, 99 Va. 668, 40 S. E. 23.

In the case at bar, the testator, in disposing of his estate, employs the following language: "I leave to my dear wife and our sweet little children all that I possess." This is the whole will. There is no other word to look to for aid in ascertaining the intention. Where the gift of a joint estate is proposed, it would be difficult to express that purpose in clearer or more explicit terms than are here employed. To hold that this brief but apt and expressive language for creating in the mother and children a joint estate was intended to vest a fee simple to the whole estate in the mother, would be to destroy the testator's will, and substitute one of our own making in its place.

For these reasons the decree appealed from, which holds that the appellant and her four children took a joint estate in equal portions, under the will in question, must be affirmed.

A Devise by a Testator "to my beloved wife and children," naming them, gives the persons named a joint and equal interest in the property: *Hazelett v. Farthing*, 94 Ky. 421, 42 Am. St. Rep. 365, 22 S. W. 646. See *Tyack v. Berkeley*, 100 Va. 296, ante, p. 963, 40 S. E. 904.

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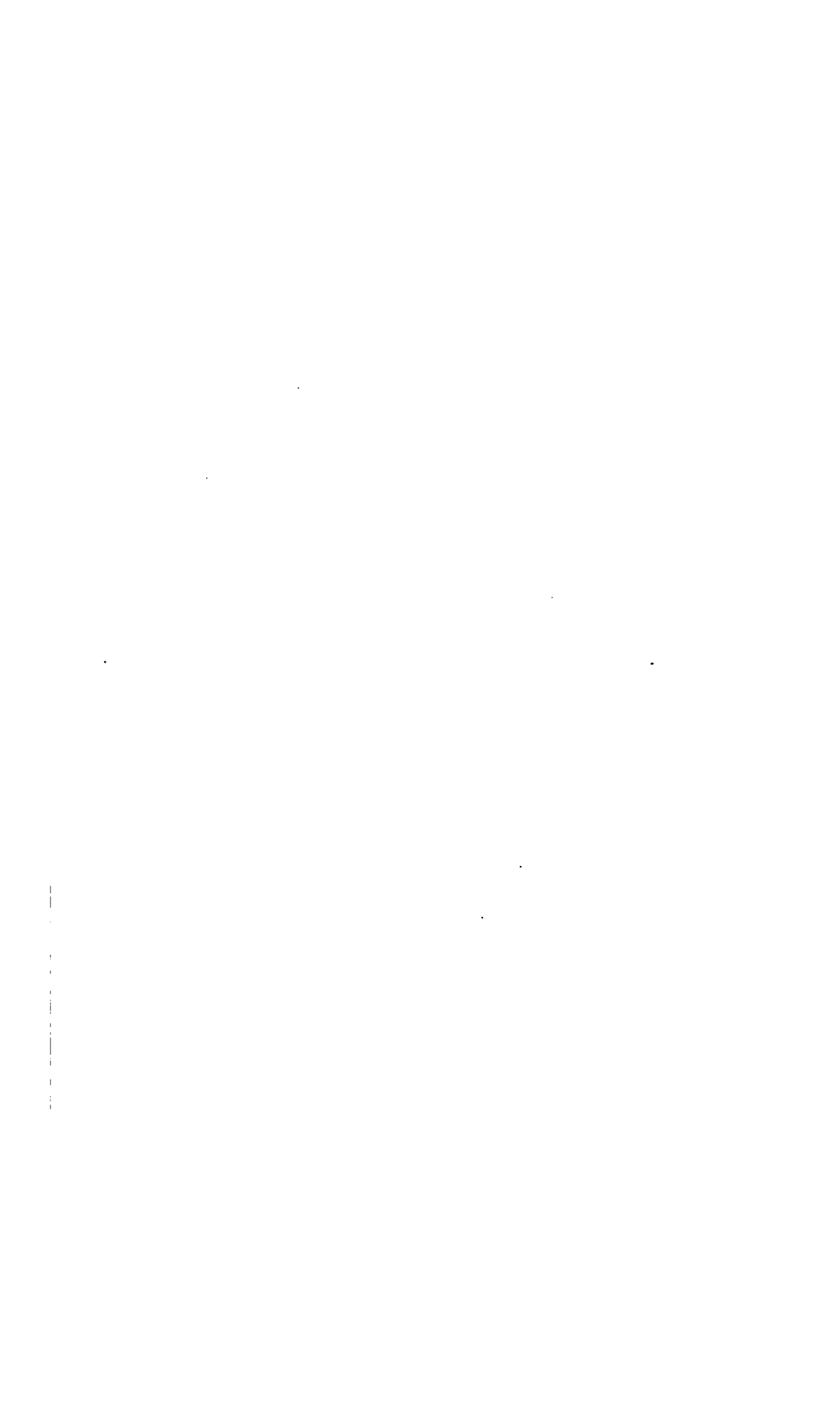
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2. **ADOPTION.**—The Failure of the Petition for the Adoption of a Child to state the place of residence of its parents, where the written consent of such parents is filed with the petition in which their residence is stated, does not avoid the adoption. (Ill.) Flannigan v. Howard, 201.

3. **ADOPTED CHILD.**—Right of to Inheritance as Against Pre-existing Will.—If a child is adopted after the making of a will by its subsequently adopting parent, in which it is not mentioned, it takes the same share in his estate as would a child born to him after the execution of his will. (Ill.) Flannigan v. Howard, 201.

4. **ADOPTION.**—Assent of Parent.—A decree of adoption is not necessarily invalid because it does not recite, nor the petition allege, the assent of the parents to facts excusing their assent. (N. H.) Wilson v. Otis, 564.

5. **ADOPTION.**—Validity of Decree.—If, upon a petition for adoption omitting allegations of consent of the parents, or of facts excusing such consent, the court finds the necessary facts, its decree of adoption is valid, and not subject to collateral attack. (N. H.) Wilson v. Otis, 564.

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1. **APPELLATE PRACTICE**.—Objections to the admissibility of evidence presenting no definite ruling for consideration cannot be reviewed on appeal. (Iowa) *Flam v. Lee*, 242.

2. **APPELLATE PRACTICE**.—Upon a Petition for a Rehearing a party is not allowed to raise new questions. (Colo.) *Clipper Min. Co. v. Eli Min. etc. Co.*, 89.

3. **APPELLATE PRACTICE**—Nonprejudicial Error.—If, in an action for malicious prosecution, the testimony of plaintiff's father as to his statements to the sheriff in reference to plaintiff's whereabouts on the evening of his arrest, though immaterial or hearsay, if not clearly prejudicial, does not justify a reversal of the verdict. (Iowa) *Flam v. Lee*, 242.

4. **APPELLATE PRACTICE**.—Where a Finding is the Result of Conflicting Evidence, or the record recites that certain evidence was introduced in behalf of the plaintiff tending to establish his claim and certain other evidence on behalf of the defendant to establish his defense, an appellate court will not undertake to determine on which side the preponderance of evidence is. (Colo.) *Clipper Min. Co. v. Eli Min. etc. Co.*, 89.

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APPEARANCE.

1. **JURISDICTION**—Special Appearance—Waiver.—If a defendant claims that the court has acquired no jurisdiction over his person, by reason of defects or irregularities in the process or service thereof, his remedy is by special appearance and objection to the jurisdiction, and if he goes further, and enters a general appearance, or invokes the powers of the court for any purpose other than quashing the pretended process, or service thereof, the defects are waived. (Neb.) *Baker v. Union Stockyards Nat. Bank*, 484.

2. **JURISDICTION**—Special Appearance—Answer—Privilege.—If the defendant is privileged from suit in the county where, or at

the time when, he is sued, he may set up want of jurisdiction by answer along with any other defenses he may have without first making special appearance to object to the jurisdiction, but in such case he must plead want of jurisdiction as soon as called upon to answer, and if he answers without so doing he waives want of jurisdiction and cannot afterward make that defense in an amended answer. (Neb.) *Baker v. Union Stockyards Nat. Bank*, 484.

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EQUITY—When Cannot Put a Party in Possession or Issue a Writ of Assistance.—One claiming to have title to real property, and suing to set aside a conveyance thereof as fraudulent, will not, although the decree is in his favor, be put in possession by the court, but, as to possession, will be left to his remedy at law. (Ill.) *Clay v. Hammond*, 146.

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2. **ATTACHMENT—Jurisdiction to Proceed Against Property of Deceased Defendant.**—The jurisdiction of the court to grant a continuance and proceed against the executor depends on a valid attachment, and the judgment can be effectual only so far as the property has been attached. (Or.) *White v. Ladd*, 732.

3. **ATTACHMENT—Presumption in Favor of Judgment.**—Every intendment of the law is in favor of the sufficiency of an attachment, where the writ issues from a court of superior or general jurisdiction unless the record affirmatively shows want of jurisdiction. (Or.) *White v. Ladd*, 732.

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1. **ATTORNEYS AT LAW—Solicitors in Chancery—Plaintiff's Right to Dismiss Suit Without Consent of.**—A complainant in chancery has the right to dismiss the suit without the knowledge or consent of his solicitor. (Ill.) *Cameron v. Boeger*, 165.

1a. **ATTORNEYS AT LAW Who Have Agreed with the Plaintiff that They Shall Receive as Compensation for their services in prosecuting a certain litigation, one-third of whatever is realized as the result of the litigation or of any settlement thereof, are not assignees of the plaintiff as to any part of his cause of action, and therefore are not entitled to have vacated on a dismissal of the suit made or authorized by him, without their consent.** (Ill.) *Cameron v. Boeger*, 165.

2. **AN ATTORNEY AT LAW Has no Lien for His Compensation upon any judgment or decree rendered in an action or suit brought by him, nor upon the property recovered as a result of his labors, though for his services the complainant agreed to pay him a share of the property obtained.** (Ill.) *Cameron v. Boeger*, 165.

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2. **BANKING—Paying Check to Person in Possession Without Authority.**—The mere fact that an agent of the payee of a check has possession of it, and indorses it to another, who thus gets possession and presents it for payment, does not authorize the banker to make payment of it where the agent had not, in fact, authority to indorse the check. (Ill.) Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 113.

3. **BANKING—Right of Action on Checks.**—When the check of a depositor is presented to a banker, it is an absolute appropriation of the amount of the check to the holder, if the deposit is sufficient to pay it, and if payments is refused, the holder may maintain an action against the banker. (Ill.) Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 113.

4. **BANKS AND BANKING—Liability of Cashier.**—A bank cashier charged with the duty of carrying on its business cannot be held responsible for neglect of duty in not consulting its officers and committees who hold no meeting and systematically absent themselves from the performance of their duties. (Neb.) Fiala v. Ainsworth, 420.

5. **BANKS AND BANKING—Liability of Assistant Cashier.**—Within the scope of a bank cashier's authority, and so long as he is apparently acting on behalf of the corporation, his directions may control the assistant cashier and teller, and the latter may not be required to look beneath the surface of his superior's acts; but

when the assistant cashier is led to believe that the cashier is violating his duty to the bank and is taking its funds for his own ends, irregularly and without authority from the directors, the former has no right to aid in, or connive at, such misappropriation than if it were being perpetrated by a stranger, and he is liable on his bond therefor. (Neb.) *Fiala v. Ainsworth*, 420.

BENEFICIAL ASSOCIATIONS.

1. BENEFICIAL ASSOCIATIONS—Notice of Assessments.—If the prescribed form of notice is provided in the by-laws of an association or the contract of membership, such form must be followed. If the notice is required to bear the official stamp of the collector or the seal of the council, a notice omitting both is void. (Ill.) *Cronin v. Supreme Council etc.*, 127.

2. BENEFICIAL ASSOCIATIONS.—The Official Notice of an Assessment can Date Only from the time of its actual receipt by the member to whom it is addressed, or where it is mailed, after a sufficient time has elapsed to enable it to reach him in due course of mail. (Ill.) *Cronin v. Supreme Council etc.*, 127.

3. BENEFICIAL ASSOCIATIONS.—The Time Within Which to Pay an Assessment is not to be computed from the date of the notice, but from the time of its receipt or the time it should have reached the member in due course of mail. (Ill.) *Cronin v. Supreme Council etc.*, 127.

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BILLS AND NOTES.

1. NEGOTIABLE INSTRUMENTS—Conflict of Laws.—The question whether an indorsee's knowledge of the payee's fraud in obtaining an indorsed note was of such character as to constitute him a holder with notice of such fraud is governed by the construction of the contract in the state where the note is made payable. (N. H.) *Limerick Nat. Bank v. Howard*, 489.

1a. NEGOTIABLE INSTRUMENTS—Consideration.—If money is advanced upon the representation and in the expectation that a person named will sign a note given therefor, and he afterward signs it, there is sufficient consideration for the note. (Neb.) *Baker v. Union Stockyards Nat. Bank*, 484.

2. NEGOTIABLE INSTRUMENTS—Accommodation Paper—Defenses—Indorsee.—The fact that a note was executed by way of accommodation is a good defense against the payee, but not as against the indorsee, from whom the money was obtained by virtue thereof, even though he had notice of the relations of the parties to each other. (Neb.) *Baker v. Union Stockyards Nat. Bank*, 484.

3. NEGOTIABLE INSTRUMENTS.—An Indorsement Without Recourse does not Constitute a Contract in Writing and serves

merely to transfer the title as in case of delivery when payable to bearer. (Or.) Carroll v. Nodine, 743.

4. NEGOTIABLE INSTRUMENTS—Indorsement Without Recourse—Parol Evidence to Vary.—One who has indorsed a negotiable instrument without recourse, and who is sued on the implied warranty that the indorsement of a payment appearing thereon was genuine and true, is entitled to prove, by parol evidence in his defense, that the indorsee, at the time of the purchase, agreed and guaranteed that the indorser should never be held liable thereon in any capacity. (Or.) Carroll v. Nodine, 743.

5. NEGOTIABLE INSTRUMENTS.—On an Indorsement Without Recourse there is an Implied Warranty by the seller that the paper is what it purports to be, and that no payments have been made except those which appear to be indorsed thereon, and that such as so appear are genuine and operate to continue the obligation in force as against the statute of limitations. (Or.) Carroll v. Nodine, 743.

See Corporations, 9, 10; Judgments, 2, 8; Principal and Agent, 5-7.

BONDS.

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BOUNDARIES.

STREETS—Title to When Property Owner Sells Lots by a Plat. If an owner of real property sells lots, describing them by reference to a plat, the title to the soil to the center of the street in front of the lots thus conveyed by operation of law attaches and passes with the lots so conveyed. (Ill.) Thompson v. Maloney, 133.

BUILDINGS.

BUILDING—Common-law Right to Erect and to Determine the Character of.—Every citizen has the common-law right to acquire title to a tract of land in a city, and build thereon as his taste, convenience, or interest suggests, or his means justify, without taking into consideration whether his building will conform in general character and appearance to others previously erected in the same locality. (Md.) Bostock v. Sams, 394.

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BURGLARY—Attempt to Commit.—Persons who procure tools and start toward a building with the intent to break it open, but whose design is frustrated while they are reconnoitering or inspecting it, are engaged in an attempt to commit burglary. (N. Y.) *People v. Sullivan*, 582.

BURNED RECORDS ACT.

See Judgment, 12.

CANCELLATION OF INSTRUMENTS.

1. **DURESS.**—To Authorize the Cancellation of a Conveyance for duress upon the grantor, the conveyance must have been procured solely by duress, independently of false promises. (Ala.) *Pratt Land etc. Co. v. McClain*, 35.

2. **FRAUD**—Cancellation of Conveyance for.—Before cancellation can be decreed for fraud practiced in the procurement of a deed, the bill must aver facts from which fraud is the legal result. Mere averments of conclusions are insufficient to raise the issue of fraud. It is also essential to allege and prove that the defendant participated in the fraud or had notice of it, actual or constructive, before paying for the land. (Ala.) *Pratt Land etc. Co. v. McClain*, 35.

3. **LACHES**, Being Defensive Matter, need not be negated by bill in equity seeking cancellation of a deed. (Ala.) *Pratt Land etc. Co. v. McClain*, 35.

CARRIERS.

1. **CARRIERS' Liability to Passengers Injured on Their Trains.**—A contract stipulating to waive the liability of a carrier for injuries to a passenger from its negligence while riding on a freight train is void, if it has been designated by the railway company as a train upon which all persons may ride as passengers on payment of fare though the contract purports to be made in consideration of being granted the privilege of riding at less than the regular rates. (Or.) *Richmond v. Southern Pac. Co.*, 694.

2. **NEGLIGENCE of a Common Carrier While Engaged as a Private Carrier.**—A railroad company may become a private carrier and escape its liability for negligence by its contract to that effect when, as a matter of convenience to, or by special agreement with, a passenger, it undertakes to carry him by means not designed to accommodate the general public. (Or.) *Richmond v. Southern Pac. Co.*, 694.

3. **NEGLIGENCE OF CARRIERS—Contract Limiting Liability for.**—Public policy forbids a railroad company from relying upon a contract entered into with a passenger releasing it from liability resulting from its negligence while performing a duty which it owes to the public as a common carrier. (Or.) *Richmond v. Southern Pac. Co.*, 694.

4. **RAILWAYS—Acceptance of Condition of Ticket, When Inferable.**—When a ticket is purchased at a reduced rate, on which is printed certain conditions, and there is stamped on it, before delivery, that all its conditions are fully understood and agreed to, evidence of the consent of the purchaser is as complete as if he had signed the ticket. (Pa.) *Crary v. Lehigh Valley R. R. Co.*, 778.

5. RAILWAYS—Limitation of Liability by Ticket Sold at Less than the Regular Rates and Subject to Printed Conditions.—By accepting a ticket at less than the regular rates, indorsed that the purchaser will assume all risks of accident and damage to his person, he agrees that the common-law rule making the common carrier insurer of his safety shall be set aside, except that the carrier is not relieved from liability for its negligence. (Pa.) *Crary v. Lehigh Valley R. R. Co.*, 778.

6. RAILWAYS—Presumption of Negligence—Effect Upon of Accepting a Ticket with Conditions.—One who accepts a ticket with a condition thereon that he will assume all risks of accident and damage to his person, while he may, nevertheless, recover for negligence, is not entitled to the presumption that negligence is to be inferred from the accident, but must affirmatively establish the specific negligence complained of. (Pa.) *Crary v. Lehigh Valley R. R. Co.*, 778.

7. CARRIERS—Through Freight Contract, What is.—A bill of lading showing the receipt by the carrier of goods to be transported "to destination, if on its road, or otherwise to the place on its road, where the same is to be delivered to any connecting carrier," but not stating any point where the goods are to be delivered to another carrier, nor the portion of the freight that was to be paid the receiving or the connecting carrier, is a through freight contract. (Ill.) *Elgin, Joliet etc. Ry. Co. v. Bates Machine Co.*, 218.

8. CARRIERS—When Common and not Private.—A railroad corporation which voluntarily designates its freight train to carry passengers between specified places becomes, as to them, a common and not a private carrier, though it was not under any obligation to carry passengers on such train. (Or.) *Richmond v. Southern Pac. Co.*, 694.

9. CARRIERS—Liability of for Connecting Lines.—Under a bill of lading constituting a through freight contract, the receiving carrier is answerable for any injury or damage occurring to the goods during the transit, though on the line of a connecting carrier. (Ill.) *Elgin, Joliet etc. Ry. Co. v. Bates Machine Co.*, 218.

See Express Companies; Railroads.

CASHIER OF BANK.

See Banks and Banking, 4, 5; Principal and Surety.

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See Sales, 5.

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See Banks and Banking.

CINDER PATH.

See Highways.

CLOUD ON TITLE.

See Quieting Title.

COMMERCE.

INTERSTATE COMMERCE.—The inspection fee required to be paid by the statute of Colorado as a condition of permitting

Hvestock to be admitted from south of a designated parallel of latitude is not an impost, tax, or duty, but merely covers the actual costs of inspection, which is the usual and ordinary method employed to protect the property of citizens of the state. (Colo.) Reid v. People, 69.

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CONFIDENCE GAME.

See Criminal Law, 3, 4.

CONSTITUTIONAL LAW.

1. CONSTITUTIONAL LAW—Statutes Providing Hours Each Day for Which Labor may be Contracted for on Public Works.—A statute undertaking to limit the hours of daily service of employes

upon public works, or work done for the state, or any political subdivision thereof, and making it unlawful for any contractor to require or permit his workmen to labor more than eight hours in any one calendar day is unconstitutional, because it interferes with the liberty of contract. (Ohio) *Cleveland v. Clements Bros. etc. Co.*, 670.

1a. **CONSTITUTIONAL LAW.**—A Statute in Effect Prohibiting an Employe from Assuming the Risk of a hazardous appliance forbidden by the statute is constitutional, because it is for the protection of the poor and helpless, and is in the interest of the public welfare. (Vt.) *Kilpatrick v. Grand Trunk Ry. Co.*, 887.

2. **CONSTITUTIONAL LAW.**—Contracts and Hours of Employment.—Power of the Legislature to Control.—What the terms and stipulations of a contract shall be is a matter to be determined by the contracting parties, and the right has not been delegated to, nor is it within the general power of, the assembly, by mandatory laws, to prescribe the terms and provisions which shall be inserted in contracts made between persons legally competent to contract. The number of hours of labor that shall be performed in a day is an important feature and constitutes an essential part of every contract of service, and to deny effect to an agreement between employer and employe touching the number of hours the employe shall labor each day is, in effect, to impair the obligation of the contract and to deny them the right of contract touching that matter. (Ohio) *Cleveland v. Clements Bros. etc. Co.*, 670.

3. **CONSTITUTIONAL LAW.**—If a constitution prohibits special legislation in certain enumerated cases, and declares that in all other cases when a general law can be made applicable no special law can be enacted, this declaration is addressed to the legislature alone, and when it concludes that a special law is necessary, its conclusion, except in the cases expressly prohibited, is not subject to judicial review. (Ill.) *Sanitary District of Chicago v. Ray*, 102.

4. **CONSTITUTIONAL LAW.**—Powers not in Themselves Judicial, and not to be exercised in the discharge of the functions of the judicial department cannot be conferred on courts or judges designated by the constitution as part of the judicial department of the state, (Iowa) *State v. Barker*, 222.

5. **CONSTITUTIONAL LAW.**—Provisions inserted in contracts in obedience to an unconstitutional statute demanding their insertion must be disregarded. (Ohio) *Cleveland v. Clements Bros. etc. Co.*, 670.

6. **CONSTITUTIONAL LAW.**—Vested Right.—A Judgment for Alimony, as a vested interest, is property, of which the legislature cannot divest the plaintiff by a subsequent statute authorizing the courts to annul or modify such judgments upon the application of either party. (N. Y.) *Livingston v. Livingston*, 600.

7. **CONSTITUTIONAL LAW.**—Impairing Contract.—A Judgment is not a contract in the ordinary sense of an agreement reached between persons, and it is in that sense that the word is used in the federal constitution. (N. Y.) *Livingston v. Livingston*, 600.

8. **CONSTITUTIONAL LAW.**—Statute Invalid in Part.—If portions of a statute are unconstitutional, and the valid and invalid portions are not so connected as to be incapable of separation, and the valid part is a complete act, not dependent on the part which is void, the latter alone will be disregarded, and the remainder upheld, except in cases where it is apparent that the rejected part was an inducement to the adoption of the remainder. (Neb.) *Redell v. Moores*, 431.

9. CONSTITUTIONAL LAW.—Quarantine and Inspection Laws of the State having for their object the health of its citizens or the prevention or suppression of disease among its domestic live-stock are within the province of state legislation. (Colo.) *Reid v. People*, 69.

10. CONSTITUTIONAL LAW—Interstate Commerce.—A statute making it unlawful to import into the state within designated days any cattle or horses from south of the thirty-sixth parallel of north latitude unless they have been held at some place north of such parallel for at least ninety days prior to their importation, and a certificate of health is procured from the state veterinary sanitary board, and requiring the owner to pay the expenses of inspecting such stock, is not void as a regulation of interstate commerce, nor is it in conflict with the animal industry act of Congress, approved May 29, 1884, and the rules and regulations prescribed thereunder. (Colo.) *Reid v. People*, 69.

11. CONSTITUTIONAL LAW—Appointment of Municipal Officers.—A statute authorizing the appointment of trustees for a city water supply system by a district court, in advance of litigation or dispute concerning the management or control of such system, is unconstitutional, as authorizing the performance by such court of non-judicial functions, foreign to the exercise of judicial powers conferred on such court by the constitution. (Iowa) *State v. Barker*, 222.

See Attorney and Client, 3; Lotteries, 2; Municipal Corporations.

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CONTAGIOUS DISEASES.

1. INFECTIOUS DISEASE—Right of Action in Favor of Person Contracting.—When the duty to prevent the spread of a contagious disease rests upon a corporation or private person, an obligation arises in favor of each member of the community and a right of action accrues in favor of him who suffers from its breach. (Tex.) *Missouri etc. Ry. Co. v. Wood*, 834.

2. NEGLIGENCE in Permitting the Escape of Smallpox Patients—What is.—The diligence required of a railway corporation maintaining a hospital or detention camp in which one of its employes was confined while suffering from smallpox depends on the character of the disease and the danger of communicating it to others. It assumes the duty of using ordinary care to prevent him from exposing himself in delirium or being exposed otherwise so as to communicate the disease to others. (Tex.) *Missouri etc. Ry. Co. v. Wood*, 834.

3. RAILWAY CORPORATIONS Maintaining Hospitals—Liability of for the Escape of Persons Suffering from Contagious Diseases.—If a railway corporation maintaining a hospital for its employes suffers one of them, while delirious from smallpox, to escape from the detention camp and thereby to communicate the disease to another, the latter may recover of the corporation for the damages thus inflicted on him, if it or any of its employes was guilty of negligence to which such escape was due. (Tex.) *Missouri etc. Ry. Co. v. Wood*, 834.

See Disease.

CONTRACTS.

1. CONTRACT BY LETTER for Sale of Land.—Where an attorney of the purchaser of real estate, at the latter's request, writes to the trustee of the property, offering to take it at the price fixed by him at previous interviews with the purchaser, and pay cash upon delivery of the trustee's deed, without warranty, title to be taken in the name of an agent, which letter the attorney for the trustee answers at his request, stating that the property is held by adverse possession only, but that if the purchaser is satisfied with the title he will make the usual trustee's deed without warranty, to which letter the attorney of the purchaser replies that those terms the purchaser wishes him to accept, and that, assuming the consideration, as to which the letter was silent, is the same as previously named, the terms as to it, are accepted on behalf of the purchaser, the contract is complete, and cannot be revoked by a subsequent letter of the trustee. (N. Y.) *Gates v. Dudgeon*, 608.

2. CONTRACTS—Mutual Misunderstanding as to Terms—Recovery for Work Done.—If a contract for services fails by reason of a mutual misunderstanding as to material terms of payment, the person who has partially performed the contract as he understands it may recover reasonable compensation for his services. (N. H.) *Russell v. Clough*, 507.

3. ELECTIONS—Contracts Against Public Policy.—A contract to pay for the support or influence of a newspaper in securing a nomination for public office is against public policy, and therefore void. (Vt.) *Livingston v. Page*, 901.

See Constitutional Law, 5; Municipal Corporations.

Note.

Contracts of newspapers, when against public policy, 905-912.

CONVERSION.

See Trover and Conversion.

Note.

Conveyances. See Conditions Subsequent.

CONVICT LABOR.

See Municipal Corporations.

CORPORATIONS.

1. **CORPORATIONS Attempted to be Formed for Two or More Purposes.**—A statute purporting to authorize the formation of corporations for certain specific purposes, and "for any other purposes intended for mutual profit or benefit not herein otherwise specially provided for," does not sanction the formation of a corporation for two or more purposes, if the statute also declares that the charter must state the purpose for which the corporation is formed. (Tex.) *Ramsey v. Tod*, 875.

2. **CORPORATIONS—Capital Stock—Subscription for, When Controlled by an Amended Charter.**—If a subscription for capital stock is made on a basis as to amount and number and value of shares different from that fixed by the charter of the corporation, it must be regarded as a subscription to become effective whenever the corporation shall be authorized to issue stock of the kind subscribed for, and it is not material that the amendment of the charter is not made until some time after the subscription. (Md.) *Gettysburg Nat. Bank v. Brown*, 339.

3. **CORPORATIONS—Capital Stock—When Deemed Original and When Increased.**—If, after the original certificate of incorporation has been executed, and a certain number of shares of stock have been subscribed for, all the subscribers resolve to change the number of shares and the par value of each share, such change, when effected, does not operate to increase the capital stock, but obliterates the old stock, and in lieu thereof, establishes another differing in amount, number of shares, and par value, and any subsequent subscription must be for the stock as thus changed. (Md.) *Gettysburg Nat. Bank v. Brown*, 339.

4. **CORPORATIONS—Subscriptions to Capital Stock—Estoppel.** The mere fact that a subscriber pays part of his subscription, knowing that the whole capital stock has not been subscribed, and that the corporation is incurring debts, does not estop him from setting up the defense that the capital stock has not all been subscribed for. (Md.) *Gettysburg Nat. Bank v. Brown*, 339.

5. **CORPORATIONS—Subscription to Capital Stock—Liability for.**—Not Until the Whole Capital Stock is Taken is a subscriber liable to assessments or calls, unless there is a provision to that effect in the recorded certificate or general law under which the company is incorporated, or unless the subscriber, knowing that the whole has not been subscribed, attends meetings of the corporators and votes for expenditures of money or other acts which can be properly done only when the subscribers intend to proceed with the stock partially taken up. (Md.) *Gettysburg Nat. Bank v. Brown*, 339.

6. **CORPORATIONS.**—Subscriptions to Increased Capital Stock may be Enforced, although the whole of the contemplated increase has not been subscribed for. (Md.) *Gettysburg Nat. Bank v. Brown*, 339.

7. **CORPORATIONS—Stock of, in Whose Possession Deemed to be.**—The stock of a corporation for which a certificate has been issued to a subscriber or purchaser is, nevertheless, deemed to be in possession of the corporation, and, as property in its possession, may

be subjected to proceedings in aid of execution against a stockholder. (Ohio) *Ball v. Towle Mfg. Co.*, 682.

8. **DIRECTORS OF CORPORATION—Waste of Funds.**—Directors of an insurance company, who use its funds to purchase the interest of the incorporators of another company, the latter having no interest that the purchasing company could buy, and the thing accomplished being the resignation of the officers of the second company and the substitution of the directors of the first, are joint tortfeasors, and liable for wasting the corporate funds. (N. Y.) *Gilbert v. Finch*, 623.

9. **NEGOTIABLE INSTRUMENTS—Power to Indorse—When not Inferable.**—One who sees another opening the mail of a corporation, giving orders to its employés, and countersigning some of its checks, is not justified in inferring that he has authority to indorse checks drawn in its favor. (Ill.) *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 113.

10. **NEGOTIABLE PAPER—Authority to Indorse—When Does not Exist.**—A superintendent of a corporation, who is under the direction of its treasurer, and who as such superintendent has charge of the buying of material, and the hiring of men and looking after the manufacture and sale of paper, has no implied authority to indorse a check delivered to him in payment of a debt due his principal. (Ill.) *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 113.

11. **CORPORATIONS, Foreign, Right of to do Business Within the State.**—A foreign corporation may be permitted to do business in this state, or may be entirely excluded therefrom. If such permit is granted, it may be under such conditions and regulations as the state chooses to impose, provided matters of a federal nature are not affected thereby. (Vt.) *Cook v. Howland*, 912.

12. **CONSTITUTIONAL LAW—Nonresident Agents—Right to Exclude from Doing Business for Foreign Corporations.**—A state may deny to a foreign corporation the right to do business therein except by licensed resident agents, and may hence refuse to issue a license except to a resident. (Vt.) *Cook v. Howland*, 912.

See Executions, 3.

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COTENANCY.

See Tenancy in Common.

COURTS.

1. **COURTS.**—Implied Power of.—Every court has inherent power to do all things reasonably necessary for the administration of justice within the scope of its jurisdiction. (Ohio) *State v. Townley*, 636.
2. **COURTS** have Power to Administer Oaths in the Trial of a Cause, though no statute purporting to confer such power exists. (Ohio) *State v. Townley*, 636.
3. **JURISDICTION.**—Between Courts of Coequal Authority, the one first acquiring jurisdiction is allowed to pursue it to the end, to the exclusion of all others, and it will not permit its jurisdiction to be impaired or subverted by a resort to some other tribunal. (Kan.) *Ewing v. Mallison*, 299.
4. **STARE DECISIS.**—If an Erroneous Decision has been made, it ought to be corrected speedily, especially when it can be done before the litigation in which the error has been committed has terminated finally. (Kan.) *Missouri etc. Ry. Co. v. Merrill*, 287.

See Jurisdiction.

CREDITORS' BILL.

1. **CREDITORS' BILL.**—Construction of.—Where a bill is filed in behalf of the complainants, and of all creditors who may be entitled to become parties to the suit, it must be construed as being filed on behalf of lien creditors only. (Va.) *Hutchinson v. Maxwell*, 944.
2. **A CREDITOR'S BILL** may be Maintained Without Alleging a Return Upon Execution of no property found, if it avers that they have sued out execution and maintained a lien on the property. (Va.) *Hutchinson v. Maxwell*, 944.

CRIMINAL LAW.

1. **CRIMINAL LAW.**—To Constitute an Attempt to Commit a Crime, it is not necessary that the act done should be the last proximate one for the completion of the offense. (N. Y.) *People v. Sullivan*, 582.
2. **CRIMINAL LAW.**—Advertising for Divorces.—One who published in a newspaper the following advertisement: "Loyal, wealthy atty. guarantees family freedom in month; no advance cost; witnesses quietly volunteered.—K. 333, Tribune office," is guilty of a criminal offense under the Illinois act to punish the offense of advertising for divorces. (Ill.) *People v. Smith*, 206.
3. **CRIMINAL LAW.**—The Confidence Game is any Swindling Operation in which advantage is taken of the confidence reposed by the victim in the swindler. (Ill.) *Du Bois v. People*, 183.

4. CRIMINAL LAW—Confidence Game—False Telegrams of Confederates.—One who induces another to purchase worthless stocks on representations that they can be sold for an advanced price, and by having confederates telegraph under fictitious names from another city that they will purchase at such price, is guilty and subject to punishment under a statute providing that every person who shall obtain, or attempt to obtain, any money or property by means of any false or bogus checks, or by any other means, instrument, or device commonly called the confidence game shall be imprisoned in the penitentiary. (Ill.) *Du Bois v. People*, 183.

5. CRIMINAL TRIAL—Credibility of Evidence.—If, on a trial for murder, an accomplice testifies that the defendant told him that they met the deceased and he fired at them and then they fired at him, the jury may find that the defendants fired first, since they may believe that the defendants shot at the deceased and disbelieve the statement that the deceased fired first. (N. Y.) *People v. Sullivan*, 582.

6. CRIMINAL TRIALS—Eye-witnesses, Calling of by the Court When the Prosecution Announces that It will not Vouch for Their Testimony.—If on a trial for murder, just before the close of the case for the prosecution, the state's attorney announces that there is another eye-witness whom he requests the court to call, so that both sides can cross-examine him, and declares that the state will not call him, because it will not vouch for the truth of his testimony, the court may call and examine such witness, permitting both sides to cross-examine, and the remarks of the prosecuting attorney cannot be regarded as improper. (Ill.) *Carle v. People*, 208.

7. CRIMINAL TRIALS—Failure to Call all the Eye-witnesses. The Prosecution is not Compelled to call all the eye-witnesses to a shooting whose names appear on the back of an indictment for murder. (Ill.) *Carle v. People*, 208.

8. EVIDENCE of Other Crimes than that for which the defendant is on trial may be admitted when it is offered for the purpose of proving, and it tends to prove, guilty knowledge. (Ill.) *Du Bois v. People*, 183.

9. EVIDENCE.—The Admission of Incompetent Evidence does not entitle the accused to a reversal, if the evidence clearly justifies the verdict, and it must have been the same if the incompetent evidence had not been admitted. (Ill.) *Du Bois v. People*, 183.

See Gambling.

DAMAGES.

1. DAMAGES FOR FRIGHT Causing Nervous Prostration.—Nervous prostration arising from fright to a woman caused by stealthily entering her home in the night-time and committing a trespass on her husband's property justifies a recovery in damages against the trespasser, as the physical injury is the proximate result of his wrong. (Iowa) *Watson v. Dilts*, 239.

2. DAMAGES for Humiliation and Regret.—In an action by a married woman to recover for personal injuries which to some extent impaired the use of her hands, an instruction which permits the jury to consider, in addition to physical and mental suffering caused by the injury and the disability resulting from it, the humiliation and regret she may have felt because of her inability to attend to her household duties and to perform services she had before performed for her husband, is erroneous. (Pa.) *Linn v. Duquesne Borough*, 800.

3. DAMAGES—Several Actions for—When Maintainable.—A judgment against a sanitary district for damages to a tenant's crops, caused by the wrongful obstruction of the waters of a river in times of freshet, does not bar a subsequent action by him for damages afterward suffered. (Ill.) *Sanitary District of Chicago v. Ray*, 102.

See *Death*; *Malicious Prosecution*; *Sales*; *Telegraph Companies*; *Trover and Conversion*.

Note.

Damages, measure of for breach of agreement to subscribe for stock, 353.

DEATH.

1. DEATH—Damages for—What Children Entitled to Participate in.—Under the Pennsylvania statute providing that the persons entitled to recover damages for an injury causing death shall be husband, widow, children, or parents of the deceased, children who are over age, and whose family relations, therefore, have been severed, are not entitled to share in moneys recovered by the widow, because, not being members of the decedent's family at the time of his death, they are not entitled to recover on their own account. (Pa.) *Lewis v. Hunlock's Creek etc. Turnpike Co.*, 774.

2. DEATH OF HUMAN BEING—Damages not Lessened by Insurance.—In an action by a widow and minor children for negligently causing the death of the husband and father, evidence that they had received money on a policy of insurance on his life is not admissible. (Tex.) *Lipscomb v. Houston etc. Ry. Co.*, 804.

3. DEATH of Human Being—Statute Creating Liability for—Construction of.—An action commenced under a statute creating a cause of action for the death of a human being must stand or fall by the terms of the statute, which cannot be extended to a cause omitted from its provisions. (Tex.) *Lipscomb v. Houston etc. Ry. Co.*, 804.

4. DAMAGES—Subjects Too Remote for Consideration.—That the decedent was a member of a church, and did not use profane language, is too remote to be of value in determining the pecuniary loss resulting from his death. (Tex.) *Lipscomb v. Houston etc. Ry. Co.*, 804.

See *Express Companies*.

DEDICATION.

1. IN THE CONSTRUCTION of Maps and Plats all doubts as to the intention of the proprietor of the plat should be resolved against him. (Ill.) *Thompson v. Maloney*, 133.

2. STREETS—Dedication of—Adoption of Plat Made by Owner. Although when a plat was filed, he who filed it did not have title to the lands purported to be subdivided, yet if the owner subsequently makes conveyances referring to the plat and designating the property by it, he thereby adopts it and the subdivisions thereof as his own. (Ill.) *Thompson v. Maloney*, 133.

3. STREETS—Dedication of—Attachment, When Subject to Plat on File.—If a plat of property is filed on which it is subdivided into lots, blocks, and streets, which plat the owner of the property thereafter adopts by making conveyances of lots by reference to it, any attachment afterward levied, though it purports to be of the whole tract, without reference to any plat, is necessarily subject thereto,

and one acquiring title under the attachment takes it subject to the same defects and obligations to which the owner was subject when the writ was levied. (Ill.) *Thompson v. Maloney*, 133.

4. **STREETS**—Dedication of Does not Require a Name on the Plat.—Where on a plat filed a strip of ground one-half of the width of the streets dedicated is designated adjacent to a block, but without naming it as a street, the presumption is that the strip so platted is one-half of the street, the other half of which the proprietor intends to be furnished out of adjacent premises when they should be platted. (Ill.) *Thompson v. Maloney*, 133.

5. **STREETS**—Plats Dedicating, Notice of.—If the owner of real property conveys lots describing them according to a plat on file, a subsequent purchaser from him of other lots designated on the same plat acquires title with notice of the former conveyances and of the plat, and obtains no title or right in the premises which the grantor did not have or was not entitled to enforce. (Ill.) *Thompson v. Maloney*, 133.

6. **STREETS**—Statutory Dedication of.—A plat executed and acknowledged for the proprietor by his attorney in fact cannot constitute a statutory dedication of streets and alleys in the state of Illinois. (Ill.) *Thompson v. Maloney*, 133.

7. **STREETS**—Withdrawal of Plat.—If the owner of property has filed or adopted a plat, and conveyances have been made by him in accordance therewith, one who subsequently acquires title cannot withdraw a street or public way from such platting and replat it into lots and hold them as individual property. (Ill.) *Thompson v. Maloney*, 133.

DEEDS.

1. **A CONDITION SUBSEQUENT** is created in a grant to a city of a plat on which to build a city hall, if the deed provides that in case the land ever ceases to be used for city buildings, it shall revert to the grantor. (N. Y.) *Trustees of Union College v. City of New York*, 569.

2. **CONDITION SUBSEQUENT**.—Ten Years is a Reasonable Time in which compliance should be made with a condition subsequent in a grant to erect a city building. (N. Y.) *Trustees of Union College v. City of New York*, 569.

3. **CONDITION SUBSEQUENT, Breach of**.—By Way of Damages, the grantor of land on a condition subsequent which has not been complied with, is entitled, on recovering judgment in ejectment against the defendant in possession, to the rents and profits, or the value of the use and occupation of the land, from the commencement of the action. (N. Y.) *Trustees of Union College v. City of New York*, 569.

4. **CONDITION SUBSEQUENT, Breach of**.—Long-continued Silence of the grantor, where the grantee has failed to comply with an express condition subsequent, does not preclude him from insisting on a forfeiture and claiming possession of the premises. (N. Y.) *Trustees of Union College v. City of New York*, 569.

5. **CONDITION SUBSEQUENT, Breach of**.—Proof of Demand for possession before bringing ejectment, where a condition subsequent has not been complied with, is unnecessary. (N. Y.) *Trustees of Union College v. City of New York*, 569.

See Cancellation of Instruments; Conditions; Insane Persons; Quiet-ing Title.

Note.

Dentist, duties and liabilities of are subject to the rules applicable to physicians and surgeons, 667.

DISBARMENT.

See Attorney and Client, 4.

DISCOVERY, BILL OF.

1. DISCOVERY—Personal Chattels.—A bill of discovery may be employed to compel the production of personal chattels for inspection and examination, in aid of an action at law. (N. H.) *Reynolds v. Burgess Sulphite Fibre Co.*, 535.

2. DISCOVERY—Personal Tort.—A bill of discovery may be invoked in aid of an action at law for a personal tort arising from negligence not involving moral turpitude, a crime, or misdemeanor, or a forfeiture of property. (N. H.) *Reynolds v. Burgess Sulphite Fibre Co.*, 535.

3. DISCOVERY, Bills of—Personal Chattels.—A bill of discovery may be maintained to compel the production and right of inspection of fragments of broken machinery in the possession of the defendant in aid of the proper preparation for a trial of a suit at law for a personal injury. (N. H.) *Reynolds v. Burgess Sulphite Fibre Co.*, 535.

4. DISCOVERY—Personal Chattels—Expert Testimony.—A bill of discovery may be employed to compel the production of personal property for inspection and examination in order to enable expert witnesses to testify in relation thereto in an action at law. (N. H.) *Reynolds v. Burgess Sulphite Fibre Co.*, 535.

5. DISCOVERY.—Statutes removing the disability of parties as witnesses authorizing the taking of depositions, and the court to order a view, do not furnish such a complete remedy for obtaining information concerning personal property in the possession of the defendant as to oust the court of jurisdiction to grant a bill of discovery in aid of an action at law. (N. H.) *Reynolds v. Burgess Sulphite Fibre Co.*, 535.

6. DISCOVERY.—To Warrant Discovery, it is not necessary that there should be absolutely no means of proving the plaintiff's case without it. (N. H.) *Reynolds v. Burgess Sulphite Fibre Co.*, 535.

DISEASES.

See Contagious Disease.

Note.

Disease, contagious, animals subject to, liability for selling, 847.

contagious, care which must be exercised to prevent exposing persons to, 841.

contagious, contributory negligence as a defense in actions for exposing persons to, 842.

contagious, criminal liability for exposing the public to, 852.

contagious, landlord's liability for leasing house which is infected by, 843, 846.

contagious, liability for exposing persons to, cannot exist in the absence of knowledge of the disease, 841, 842.

contagious, liability for exposing persons to, cannot exist except where there is a negligent or willful act, 844.

Disease, contagious, liability for exposing persons to may be contractual, 843, 844.
contagious, liability for letting house infected with, 846.
contagious, liability of one who exposes another to, 841.
contagious, master's liability for exposing servant to, 845.
contagious, municipal corporations, liability of, for acts of officers in exposing persons to, 848, 849.
contagious, negligence in exposing persons to, liability for, 841, 842.
contagious, officers, public, liability of, for exposing persons to, 848.
contagious, physicians' liability for, causing the spread of, 844, 845.
contagious, railway companies, when liable for exposing persons to, 844.
contagious, risks assumed by persons who lease premises infected by, 843.
contagious, risks, when and by whom assumed, 842, 843.
venereal, criminal liability for communicating, 853.
venereal, liability of one person for communicating to another, 850.

See Physicians and Surgeons.

DIVORCE.

1. DIVORCE—Party also in Fault cannot Procure.—One who has been guilty of adultery, and has been denied a divorce on that ground cannot obtain a divorce in another suit charging adultery. (Md.) Fisher v. Fisher, 334.

2. DIVORCE—Denial of, for a Cause Known to the Court, but not Pledged or Proved by the Parties.—In an action for divorce on the ground of adultery, it is not improper for the court to inquire whether the parties are not the same as were before it in a prior suit, when both were denied relief on the ground that both had been guilty of adultery, and on the admission they are such parties, then to deny relief in the second suit. (Md.) Fisher v. Fisher, 334.

3. DIVORCE—Estoppel to Attack.—A decree of divorce obtained by a wife in Massachusetts in an action against her husband in New York, in which he was personally served with the papers, but did not appear or submit to the jurisdiction of the court, is competent evidence as tending to defeat her claim that she is his widow, and entitled to dower in real estate acquired after the decree, since, having invoked the jurisdiction of the Massachusetts court and submitted thereto, she cannot question the validity of its decree. (N. Y.) Starbuck v. Starbuck, 631.

4. JURISDICTION to Order Payment of Alimony Out of Moneys Belonging to a Nonresident.—The fact that a resident of a state has in his hands moneys due to a nonresident defendant in a divorce suit does not give the court jurisdiction to order such moneys to be paid to the plaintiff for alimony. Nor is it material that an injunction issued in the case prohibiting the payment or transfer of such money. (Vt.) Smith v. Smith, 882.

5. DIVORCE—Alimony—Jurisdiction to Order Payment of.—As against a nonresident not served with process in the state, and who does not appear in the action, the court cannot decree payment of alimony. (Vt.) Smith v. Smith, 882.

6. DIVORCE—Citizenship of the Plaintiff—Naturalization.—A statute declaring that no person shall be entitled to a divorce in

the state, unless he has been a bona fide resident and citizen thereof for one year prior to the commencement of the action, does not preclude an unnaturalized plaintiff of foreign birth from maintaining an action, if he has come to the state in good faith for the purpose of making it his home, and has there resided for the time designated, and does not maintain a domicile or exercise a right of citizenship in any other state. (Colo.) *Cairnes v. Cairnes*, 55.

7. **DIVORCE**—Pleading not Sufficiently Informing Defendant of the Cause of Action Relied on.—Evidence of the refusal of the defendant to cohabit with plaintiff should not be admitted under a complaint which merely charges her with desertion on the day on which she actually left plaintiff's home, especially when such evidence, when connected with other testimony, must prove a want of chastity on her part. Such complaint does not give her reasonable notice of the character of the offense sought to be proved against her. (Colo.) *Cairnes v. Cairnes*, 55.

8. **DIVORCE**—Provision for Wife Pendente Lite.—If the plaintiff is unable to make reasonable provision for his wife during the pendency of the suit against her for divorce, the suit should be abated until he is able to do so. (Colo.) *Cairnes v. Cairnes*, 55.

9. **DIVORCE**—The Allowance of Alimony Pendente Lite Depends on the Existence of the Marriage Relation, and, unless this appears prima facie, alimony should not be awarded, but it should be allowed if a prima facie case is established. (Colo.) *Eickhoff v. Eickhoff*, 64.

10. **ALIMONY Pendente Lite**.—The Existence of the Marriage is not Put in Issue so as to Prevent the Allowance of Alimony by the using in evidence as an affidavit of a paper prepared and intended to be, but not in fact filed as, an answer in the cause. (Colo.) *Eickhoff v. Eickhoff*, 64.

11. **DIVORCE**—Alimony to Pay Traveling Expenses of Wife.—If a nonresident wife sued for divorce desires to come to the state to make a defense, the court should require the plaintiff to deposit in court a sum sufficient to pay her expenses from her home to the state, to be paid on her arrival here. (Colo.) *Cairnes v. Cairnes*, 55.

12. **ALIMONY Based on Marriage De Facto**.—If a statute provides for divorce on the ground that the husband or wife had a husband or wife living at the time of the marriage, and that at all times after the filing of the complaint for divorce, the court may grant upon application alimony and counsel fees pendente lite, alimony may be allowed, though there is some question whether there has been a marriage de jure, provided there is one de facto. (Colo.) *Eickhoff v. Eickhoff*, 64.

13. **DIVORCE**—Alimony—Discretion of the Court.—The allowance to a complainant for temporary alimony of fifty dollars per month and two hundred and fifty dollars attorneys' fees and twenty-five dollars suit money is not excessive where she is in indigent circumstances and the defendant is worth fifty thousand dollars. (Colo.) *Eickhoff v. Eickhoff*, 64.

14. **ALIMONY**.—Where a Marriage De Facto is Admitted and the Parties in Good Faith Cohabit as Husband and Wife, and the legal proposition presented is debatable and one concerning which able courts have disagreed, and which has not been determined in the jurisdiction where the question is raised, the court will not decide it upon an application for alimony pendente lite, and if such court grants such application for alimony, its action will not

be reviewed by the supreme court on an appeal from the order where such review requires the decision of the validity of the marriage. (Colo.) *Eickhoff v. Eickhoff*, 64.

15. **AN APPEAL or Writ of Error Lies From a Judgment for Temporary Alimony.** (Colo.) *Eickhoff v. Eickhoff*, 64.

16. **DIVORCE—Appealable Order.**—An order changing a judgment of divorce, by reducing the amount of alimony, is appealable. (N. Y.) *Livingston v. Livingston*, 600.

See Constitutional Law, 6; Criminal Law, 1.

DOWER.

DOWER—Limitations.—An action for the recovery of dower is within the statute of limitations. (Neb.) *Beall v. McMenemy*, 427.

DURESS.

See Cancellation of Instruments.

EJECTMENT.

EJECTMENT—Defenses.—A defendant in ejectment, even under a general denial, may interpose any defense, legal or equitable, tending to rebut the right of the plaintiff to possession, or to establish the right of the defendant to possession. (Kan.) *Kelso v. Norton*, 308.

See Mortgages.

ELECTIONS.

See Contracts, 3.

ELECTRIC WIRES.

See Municipal Corporations, 39.

EMINENT DOMAIN.

CONDEMNATION PROCEEDINGS—Claim for Damages—When not Barred by.—A judgment condemning land for a sanitary district and fixing the amount of compensation, is not a bar to a subsequent action based on negligence in construction and maintenance, whereby the land was caused to overflow. (Ill.) *Sanitary District of Chicago v. Ray*, 102.

See Attorney and Client, 3.

EQUITY.

1. **A COURT OF EQUITY, Once Having Assumed Jurisdiction,** will draw into consideration the entire subject matter and bring before it the parties interested therein, that a complete, effectual, and final decree adjusting the rights of all parties may be entered and enforced. (Kan.) *Hazen v. Webb*, 276.

2. **JURISDICTION Incidentally Affecting Property in Another State.**—Though the situs of property in dispute is in another state, and a decree of the court of this state cannot operate upon or di-

rectly affect it, yet a court of equity in this state, having jurisdiction of the parties, may determine their rights to the property and enforce them by proper process in personam. (Pa. St.) *Schmaltz v. York Mfg. Co.*, 782.

3. **EQUITY—Jurisdiction to Prevent Interference with Property in Another State.**—Where the complainant and the defendant both reside in this state, a court of equity here may enjoin the defendant from removing from property in another state certain fixtures thereof of which, under the laws of that state, he has no right to remove. (Pa. St.) *Schmaltz v. York Mfg. Co.*, 782.

4. **EQUITY PRACTICE.—As Against the Objection That the Bill is Indefinite and Uncertain**, it must be read in connection with the exhibits filed, and if, when so read, it states complainants' case with such a degree of consistency as will enable the defendants to make their defense, the objection should be overruled. (Va.) *Hutchinson v. Maxwell*, 944.

5. **EQUITY PRACTICE—Bill, When not Multifarious.**—Where the original bill is to subject the interest of a debtor in trust property to the payment of his debts, and an amendment is filed averring that the property subject to the trust had belonged to the debtor, and had been by him conveyed to hinder and defraud his creditors, and it is apparent from the whole scope of the amended bill that its object is not to have the deeds annulled, but to subject the beneficiary's interest to the payment of his debts, the bill, as so amended, is not multifarious. (Va.) *Hutchinson v. Maxwell*, 944.

See Assistance, Writ of.

Note.

Equity, assistance, jurisdiction of, to issue writs of, 156-165.

jurisdiction of, to decree the surrender of the possession of land, 155, 156.

jurisdiction of, to put party in possession of land to which it has given him the title, 154, 156.

jurisdiction to put purchaser of property in possession, 155.

ESTATE OF DECEDENT.

See Executors and Administrators.

ESTOPPEL.

See Municipal Corporations, 47; Party-walls.

EVIDENCE.

1. **EVIDENCE—When not Limited by an Agreement.**—An agreement that the defendant may use an abstract of title as evidence without producing the record does not preclude him from offering in evidence the record itself, and showing therefrom that the abstract is incorrect. (Tex.) *Taffinder v. Merrell*, 814.

2. **EVIDENCE—Joint Enterprise—Statement of One Party.**—Statements of one of the parties to a joint enterprise made while borrowing money to be used and which is used therein, and as part of the transaction, are admissible against the other parties to the enterprise. (Neb.) *Baker v. Union Stockyards Nat. Bank*, 484.

3. **EVIDENCE—Entries Made by a Deceased Person.**—If in a pass-book several entries are made by a deceased person, but under such circumstances as to indicate that they are not original entries

in the usual course of business, but merely summaries copied from his ledger, they are not admissible in evidence. (Or.) *Harmon v. Decker*, 748.

4. **EVIDENCE—Admission of—Charge of Interest as Proof of Principal.**—Though the defendant's books disclose that they agree with the plaintiffs as to a charge of annual interest due to the latter, this does not furnish conclusive proof of the principal indebtedness especially when it seems that there must be an easy mode of proving such principal, if it exists. (Or.) *Harmon v. Decker*, 748.

5. **EVIDENCE.—Books of Account are not Admissible, When Kept by a Merchant to Prove Advances made to, or checks in favor of, persons other than his debtor, in the absence of testimony tending to show that such advances were for moneys loaned to him or furnished to others upon his order.** (Or.) *Harmon v. Decker*, 748.

6. **EVIDENCE.—Books of Account—Right to Vary.**—Though a party in his books of account makes a charge against another, which is there designated "note," parol evidence is admissible to prove that what was so described as a note should have been goods, wares, and merchandise delivered and the value thereof. (Or.) *Harmon v. Decker*, 748.

7. **EVIDENCE of Books of Account to Prove Loans.**—While books of original entry are admissible to prove the price, sale, and delivery of articles, or the performance of labor, or the rendition of services, they are not generally admissible to prove the loan of large sums of money. An exception to this rule exists in favor of the books of a banker or broker kept in pursuance of his ordinary business methods. (Or.) *Harmon v. Decker*, 748.

8. **EVIDENCE—Immaterial Error in Excluding.**—If a deed is offered in evidence in corroboration of an entry in a pass-book and is excluded on a ground which may not be sustainable, this is an immaterial error, if it appears that the pass-book must be excluded, and hence that there is no evidence on the subject to be corroborated. (Or.) *Harmon v. Decker*, 748.

9. **EVIDENCE, Secondary, of a Lost Writing.**—No precise rule can be prescribed as to what shall constitute a reasonable effort, but the party alleging the loss or destruction of a document must show that he has in good faith exhausted, in a reasonable degree, all sources of information and means of discovery which the nature of the case would suggest and which are accessible to him. If the testimony shows that the document was last seen by the witness in a certain courthouse, and there is no direct statement that it has been searched for there, secondary evidence of its contents is not entitled to be admitted on the witness' general statement that he has searched in all places where it could be to his knowledge and also all the files and records that he has in his office. (Or.) *Harmon v. Decker*, 748.

10. **EVIDENCE—Powers of Railway Station Agent.**—If the duties and authority of railway station agents are largely evidenced by usage rather than by express instructions, a witness may be permitted to state what powers he had known such agents to habitually exercise; but it is not competent for him to deduce from what he has seen the possession of further powers, the exercise of which he has not known. (Tex.) *Lipscomb v. Houston etc. Ry. Co.*, 804.

11. **EVIDENCE.—The Opinion of a Witness Respecting the Duties of a railway station agent is not admissible.** (Tex.) *Lipscomb v. Houston etc. Ry. Co.*, 804.

12. EXPERT EVIDENCE that a Particular Place is Dangerous is properly excluded, where there is nothing in the situation which a brief description would not enable the jury to fully understand. (Pa. St.) *Siegler v. Mellinger*, 767.

See Criminal Law, 5-9; Witnesses.

EXECUTION.

1. EXECUTION—Condition That Property shall not be Subject to.—If a condition is annexed to a legal estate that it shall not be liable for the owner's debts, such condition is void. (Va.) *Hutchinson v. Maxwell*, 944.

2. EXECUTION—Personalty Subject to.—A Policy of Life Insurance on which the premium must be paid quarter-yearly until twenty years' premiums have been paid, and which is forfeited if any of the premiums is not paid when due, but which gives the policy holder the right to surrender the policy after three full annual payments have been made, and to receive a policy for paid-up insurance, is not subject to execution, nor to the lien of that writ, during the lifetime of the assured, though three years' premiums have been paid. (Va.) *Boisseau v. Bass*, 956.

3. EXECUTION—Lien Created on Corporate Stock—Proceedings in Aid of.—By a proceeding in aid of execution under which an order is made and served on a corporation requiring it to appear and answer concerning property of the defendant in its control, a lien is created on all stock owned by the judgment debtor therein, where the statute provides that the order binds all property in the possession and control of the corporation from the time of service, though the certificate for such stock is not in the possession of the corporation, but in that of the debtor. (Ohio) *Ball v. Towle Mfg. Co.*, 682.

EXECUTORS AND ADMINISTRATORS.

1. LETTERS OF ADMINISTRATION—Collateral Attack.—The action of a probate court in appointing an administrator, if jurisdiction is obtained, is not subject to collateral attack. (Kan.) *Ewing v. Mallison*, 299.

2. LETTERS OF ADMINISTRATION—Collateral Attack—The Actual Fact of Residence of the deceased in the county of the court at the time of death, being essential to uphold the jurisdiction of a probate court, is not concluded by the decision of the court that such fact exists, but may be inquired into in a proper collateral proceeding to show a want of jurisdiction in the court assuming to administer the estate. (Kan.) *Ewing v. Mallison*, 299.

3. LETTERS OF ADMINISTRATION.—The Essential Jurisdictional Facts in granting letters of administration are the death, an estate to administer, and the residence or inhabitancy of the deceased at the time of his death. (Kan.) *Ewing v. Mallison*, 299.

4. THE GRANTING OF LETTERS of Administration is in the exercise of judicial authority, and the letters, if regular in form, are prima facie evidence of the regularity of the prior proceedings. (Kan.) *Ewing v. Mallison*, 299.

5. EXECUTOR'S DELEGATION OF POWER under a Will.—An executor or trustee, to whom a power has been given by a will, may not delegate his judgment and discretion in the execution of the power, but having exercised his judgment and discretion, he

may delegate the performance of his determination. (N. Y.) *Gates v. Dudgeon*, 608.

EXEMPTIONS.

1. **EXEMPTIONS.**—If a Wagon is a tool of the debtor's occupation it is exempt from attachment. (N. H.) *Johnson v. Lang*, 509.

2. **EXEMPTIONS—Necessity of Claim of.**—If a tool of a debtor's occupation is attached, he may maintain trover against the officer without specifically claiming the right of exemption. (N. H.) *Johnson v. Lang*, 509.

3. **EXEMPTIONS—Waiver and Revocation.**—A waiver of claim of exemption arising from the failure of the owner of attached property to claim it as exempt is revoked by a subsequent demand therefor before the rights of third persons have intervened. (N. H.) *Johnson v. Lang*, 509.

See Execution.

EXPERT TESTIMONY.

See Evidence, 11, 12.

EXPLOSIVES.

1. **NUISANCE in the Transportation of Dangerous Explosives.**—What is not.—The mere fact that a railway corporation has in its cars for transportation explosives of a highly dangerous character does not make it guilty of creating a nuisance, either public or private, though danger to persons or property along its line is necessarily incident to such transportation. (Tex.) *Fort Worth etc. Ry. Co. v. Beauchamp*, 864.

2. **NEGLIGENCE in Delaying Transportation of Dangerous Explosives.**—If a railway car loaded with giant or blasting powder is unnecessarily and unreasonably delayed at a place, so as to subject property to danger for a longer time than would have attended a transportation made with reasonable dispatch, such keeping of the car at that place is a nuisance. A like result follows if ordinary care is not exercised in keeping or caring for the car, and its absence gives rise to a degree of danger which would have been avoided by the exercise of such care. (Tex.) *Fort Worth etc. Ry. Co. v. Beauchamp*, 864.

3. **RAILWAY CORPORATIONS—Negligence Respecting High Explosives.**—If a car known to be loaded with blasting and giant powder is left standing an unnecessary and unreasonable length of time on a switch adjacent to a city and within quarter of a mile of many residences with no guard or watch, and in a locality frequented by tramps, who are in the habit of building fires and entering empty cars, the trial court may properly conclude that there was negligence on the part of the railway corporation having the custody and control of the car. (Tex.) *Fort Worth etc. Ry. Co. v. Beauchamp*, 864.

4. **NEGLIGENCE—Damages—When Proximate Caused by.**—If a railway corporation negligently suffers a car known by it to be loaded with giant and blasting powder to remain an unnecessary and unreasonable time upon a switch near many residences, where an explosion resulting from a fire started in an empty car caused damage to the plaintiff's property, such negligence must be deemed to be the proximate cause of the damage. (Tex.) *Fort Worth etc. Ry. Co. v. Beauchamp*, 864.

EXPRESS COMPANIES.

CARRIERS—Express Companies—Liability of for the Death of a Human Being.—A statute creating a cause of action when death is due to the negligence of the proprietor, owner, charterer, or hirer of a steamboat, stagecoach, or other vehicle for the conveyance of goods or passengers, or by the negligence of their servants or agents, does not apply to express companies carrying goods upon or in cars furnished by a railway company. (Tex.) *Lipscomb v. Houston etc. Ry. Co.*, 804.

FELLOW-SERVANTS.

See Master and Servant, 7-12.

FRAUD.

See Cancellation of Instruments, 2; Vendor and Vendee.

FRAUDS, STATUTE OF.

1. STATUTE OF FRAUDS—Contract by Agent.—Unless an agent is lawfully authorized in writing, any contract made by him as agent for his principal with respect to the sale of lands, is void under the statute of frauds. (Ala.) *Thompson v. New South Coal Co.*, 49.

2. STATUTE OF FRAUDS—Contract of Agent—Memorandum.—If an agent makes an unauthorized contract for the sale of land, and a check is given reciting that it is "part payment on coal lands," without specifying the particular lands, the check is not a sufficient memorandum of the sale to take the contract out of the operation of the statute of frauds. (Ala.) *Thompson v. New South Coal Co.*, 49.

3. STATUTE OF FRAUDS—Sale by Agent Part Payment of Purchase Money.—Acceptance of money as part payment of the purchase price of lands, with full knowledge that it is paid on account of an attempted, but unauthorized and void, sale by an agent, does not by itself estop the principal from asserting the invalidity of the contract under the statute of frauds. (Ala.) *Thompson v. New South Coal Co.*, 49.

4. STATUTE OF FRAUDS.—Part Payment of Purchase Money does not alone take a parol contract for the sale of lands out of the operation of the statute of frauds. (Ala.) *Thompson v. New South Coal Co.*, 49.

5. STATUTE OF FRAUDS.—The Only Parol Contract for the Sale of Lands not Void under the statute of frauds is where part or the whole of the purchase money is paid, and the purchaser is put into possession by the seller. (Ala.) *Thompson v. New South Coal Co.*, 49.

6. STATUTE OF FRAUDS—Defense of—Demurrer.—If the contract relied upon is shown by a bill for specific performance, the defense that it is obnoxious to the statute of frauds may be set up by demurrer. (Ala.) *Thompson v. New South Coal Co.*, 49.

FRAUDULENT CONVEYANCES.

1. CREDITOR'S RIGHT to Subject Improvements Made by the Debtor on the Lands of Another must be sustained. (Va.) *National Valley Bank v. Hancock*, 933.

2. FRAUDULENT TRANSFERS—Who may Attack.—An Indorsee or Assignee of a Debt may maintain a creditor's bill to avoid a fraudulent transfer and obtain other equitable relief which the assignor could have maintained but for the assignment. (Va.) National Valley Bank v. Hancock, 933.

See Sales, 7-11.

GAMBLING.

1. POLICE—Criminal Use of Article, How to be Established as to Warrant Its Seizure by.—Articles which may or may not be used for a criminal purpose cannot be seized by the police until it has been first established that the article was procured, held, or used for an illegal purpose, and that cannot be so established except by proceedings in a court of criminal jurisdiction. (Md.) Wagner v. Upshur, 412.

2. POLICE—Right to Seize Property Which may be Used for a Criminal Purpose.—If Property may be Used for Legal as Well as Illegal Purposes, as where it is a musical slot-machine, which may also be used for gambling, the presumption cannot be indulged that the owner intended to use it for the illegal purpose, and the police have no authority to seize it as a preventive measure, unless it is first established that the article was procured or held for an illegal purpose. (Md.) Wagner v. Upshur, 412.

See Criminal Law, 3, 4.

GIFTS.

1. EVIDENCE.—The Declarations of the Owner of a Life Insurance Policy are admissible to prove a gift thereof. (Tex.) Lord v. New York Life Ins. Co., 827.

2. GIFT OF LIFE INSURANCE POLICY—What Sufficient to Establish.—The declaration of the holder of a policy of insurance on his own life that it was his sister's justifies the jury in inferring a gift from him to her, and the delivery of the property given. (Tex.) Lord v. New York Life Ins. Co., 827.

GUARDIAN AND WARD.

1. GUARDIANS' SALES are not Invalid Because the Petition Therefor does not Show a Statutory Cause of Sale, where the order of sale does not show on its face that it was made for the reasons stated in the application, or that facts not therein set up did not exist which, under the law, authorized the sale. (Tex.) Taffinder v. Merrell, 814.

2. GUARDIAN'S SALE.—The Entering of the Order of Confirmation Before the Time After the Report was Filed Which the Statute Requires to Elapse between the report and the action on it is an error which does not render the order void. (Tex.) Taffinder v. Merrell, 814.

3. GUARDIANS' SALES.—The Fact That a Conveyance was Made by a Guardian for Part of a Lot to a Person Other Than One Named as Purchaser in the report of the sale and the order for its confirmation does not entitle the minors to avoid the sale and conveyance by a collateral attack, if the purchase price for the whole

lot was received and accounted for by the guardian. (Tex.) Taffinder v. Merrell, 814.

4. **GUARDIAN'S SALE.**—The Failure of a Guardian in His Report of a Sale of a Lot to State the Purchase Price is an irregularity which does not avoid the sale. (Tex.) Taffinder v. Merrell, 814.

5. **SURETYSHIP—Guardian's Bonds—Statute of Limitations.**—If a guardian dies before final settlement of his guardianship, or before rendition of a judgment or decree against him, no case can arise, either in law or equity, falling within the terms of a statute fixing six years as a bar to actions against sureties of guardians for any misfeasance or malfeasance whatever of their principal (Ala.) Presley v. Weakley, 39.

6. **SURETYSHIP—Guardian's Bonds—Limitations.**—The death of a guardian terminates his trust and fixes the period from which the time for suing the sureties must be computed, and if a longer time than that prescribed by statute elapses before a bill is filed against the sureties for an accounting, without anything to excuse the delay, such bill cannot be maintained. (Ala.) Presley v. Weakley, 39.

7. **SURETYSHIP—Liability.**—An action at law cannot be maintained against a surety on the bond of an executor, administrator, or guardian, until there has been, in a separate proceeding, a judicial ascertainment of the fact and extent of the principal's liability, and the rendition of a judgment against him. The act which fixes the liability of the surety is, not the act of misfeasance or malfeasance of the principal, but the rendition of a judgment or decree against him. (Ala.) Presley v. Weakley, 39.

HEALTH.

See Constitutional Law, 9; Contagious Diseases.

HIGHWAYS.

1. **HIGHWAYS—Negligence in Using the Side Rather than the Middle.**—The presumption is that it is negligence to walk on the side instead of the middle of a country road on a dark night. (Pa. St.) Siegler v. Mellinger, 767.

2. **HIGHWAYS—Negligence.**—Township Supervisors are not Guilty of Negligence because they permit third persons to construct a cinder path on the side of a country road and at places several feet above its level, if the road itself remains safe for travel and of sufficient width, though a person walking in the night-time takes such path and is injured by falling therefrom into such road. (Pa. St.) Siegler v. Mellinger, 767.

HOMICIDE.

1. **MURDER in Attempt to Commit Burglary.**—If one starts to commit a burglary, with the intent to shoot any person who interferes with him, and encounters and kills a policeman, he is chargeable with such premeditation as constitutes his offense murder in the first degree. (N. Y.) People v. Sullivan, 582.

2. **MURDER IN FIRST DEGREE—Proof.**—Under an indictment in the common-law form for murder in the first degree, the prosecution may prove facts to bring the case within any of the provisions of the statute defining that crime. (N. Y.) People v. Sullivan, 582.

3. MURDER TRIAL—Submitting Case in Two Aspects.—In a prosecution for murder in the first degree, it is not improper to submit the case to the jury in both aspects, premeditated and deliberate design and killing in the commission of a felony. (N. Y.) *People v. Sullivan*, 582.

4. MURDER—Instruction to the Jury to Find the Accused Guilty. If the instructions of the court are full and adequate on the subject of self-defense, it is not error to instruct the jury that if they believe from the evidence, beyond a reasonable doubt, that the defendant, with malice aforethought, express or implied, inflicted upon the deceased the mortal wound charged in the indictment, not in self-defense, as it is defined in these instructions, and not upon any sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible, from which wound the deceased afterward died, then defendant should be found guilty of murder. (Ill.) *Carle v. People*, 208.

5. EVIDENCE—On a Trial for Murder the Defendant is not Entitled to Put in Evidence Statements Made by Himself to a third person in reference to his purpose in going to the place where the killing occurred, the decedent not being present when the statement was made. (Ill.) *Carle v. People*, 208.

6. MURDER—Evidence that the Deceased was a Dangerous, Vicious Man, Accustomed to go Armed, and that the defendant had knowledge of this fact, is properly excluded, if, at the time it was offered, no evidence had been introduced tending to show that the deceased had made any attack on the defendant, nor does the action of the court become erroneous on the subsequent introduction of such evidence, unless defendant recalls the witness whose testimony was excluded, and the court again refused to receive it. (Ill.) *Carle v. People*, 208.

HUSBAND AND WIFE.

1. HUSBAND AND WIFE—Conveyance of Wife in Payment of Husband's Debt.—Although the statute impliedly forbids a conveyance of a married woman's property as security for her husband's debt, such conveyance may be made in absolute payment thereof. (Ala.) *Pratt Land etc. Co. v. McClain*, 35.

2. HUSBAND AND WIFE—Statutory Trusteeship—Adverse Possession.—If a husband in foreclosing a mortgage on his wife's land, and while acting as her representative with her knowledge, purchases the land for her, but takes a deed in his own name, this constitutes a repudiation by the husband and wife of the statutory trusteeship between them, and if he and those claiming under him continuously occupy such lands, claiming them as their own for ten years thereafter, they acquire a perfect title, free from any trust. (Ala.) *Lide v. Park*, 17.

3. HUSBAND AND WIFE—Adverse Possession by Him of Her Lands.—The trust relation of a husband toward his wife's statutory estate ceases upon her death, and if he and those claiming under him continuously occupy her land, thereafter claiming it as their own for ten years, they acquire a perfect title, free from any trust. (Ala.) *Lide v. Park*, 17.

4. WOMAN—Husband and Wife—Nonjoinder of Husband.—If power to foreclose a mortgage is bestowed on a wife before her marriage, she has power to execute it afterward without her husband's co-operation. (Ala.) *Lide v. Park*, 17.

IMPROVEMENTS.

See Fraudulent Conveyance.

INDICTMENT.

INDICTMENT.—An Offense may be Charged in Several Counts, and the prosecution will not be compelled to elect on which count it will proceed. (N. Y.) *People v. Sullivan*, 582.

See Homicide.

INDORSEMENT.

See Bills and Notes.

INFANTS.

See Parent and Child.

INJUNCTION.

1. **INJUNCTION—Injury—When Irreparable.**—Equity will interfere when the injury threatened will occasion damages estimable only by conjecture, and not by any accurate standard, or will be ruinous to the property in the manner in which it has been enjoyed, or will permanently impair its future enjoyment. (Pa. St.) *Schmaltz York Mfg. Co.*, 782.

2. **INJUNCTION—Irreparable Injury Against Which may Issue.** If a refrigerator is attached to and is an essential part of a brewery plant necessary to its operation, its removal must be deemed an irreparable injury which, if wrongful, should be enjoined. (Pa. St.) *Schmaltz v. York Mfg. Co.*, 782.

3. **INJUNCTION—Threat to Remove Property—When Justifies Granting of.**—Where a refrigerating machine is attached to and is a part of a brewery plant, the claimants of which threaten to remove it immediately, and ask that work be stopped to facilitate such removal, an injunction against the removal should not be denied on the ground that it does not appear that it is intended to be accomplished otherwise than by legal proceedings. (Pa. St.) *Schmaltz v. York Mfg. Co.*, 782.

4. **INJUNCTION—Title to Office.**—The title to an office cannot be tried by injunction. A court of equity is without jurisdiction to issue an injunction to compel the plaintiff to be admitted to a public office, or, if he claims to be a member of a board, to prevent the other members from refusing to admit him where he does not hold a certificate of election. (Colo.) *People v. District Court of Lake County*, 61.

See Municipal Corporations, 40, 46; Party-walls, 4; Prohibition; Taxation.

INSANE PERSONS.

1. **INSANE PERSONS.**—Every Person Dealing with an Insane Person, with Knowledge of the Insanity, is deemed guilty of meditated fraud. (Ill.) *Clay v. Hammond*, 146.

2. INSANE PERSONS—Rights of Successors in Interest of.—A grantee or other successor in interest of a person who has conveyed property while insane has the same right as his grantor would have if he retained title to sue to set aside the deed, because made during the continuance of the insanity. (Ill.) *Clay v. Hammond*, 146.

3. INSANE PERSONS—Vacating Deeds of.—Whether a deed executed by an insane person is void or voidable, it may be set aside by him after his restoration to sanity, or by his vendee to whom he has conveyed after such restoration. (Ill.) *Clay v. Hammond*, 146.

4. INSANE PERSONS—Restoration to Sanity—When Conceded.—One who commences a suit against a person who has been insane, treating him during such suit as if in the possession of his reasoning faculties, concedes his restoration to sanity. (Ill.) *Clay v. Hammond*, 146.

5. INSANE PERSONS—Evidence of Restoration to Sanity.—A discharge of a patient from a lunatic asylum is evidence of his recovery. (Ill.) *Clay v. Hammond*, 146.

INSTRUCTIONS.

See Trial, 3, 4.

INSURANCE.

1. INSURANCE—Indemnity—Notice of Action.—Under an employer's liability insurance policy failure of the insured to forward to counsel for the insurer the process served upon him in an action by an employé for injury from an accident, does not exempt the insurer from liability in the absence of a special provision to that effect in the policy. (N. H.) *Ward v. Maryland Casualty Co.*, 514.

2. INSURANCE—Misstatement by Agent.—If an applicant for insurance truly states the condition of the property with reference to encumbrances to the insurance agent, who incorrectly states them in writing the application, such incorrect statement does not avoid the policy. (Iowa) *Taylor v. Anchor Ins. Co.*, 261.

3. INSURANCE.—Entirety of Premium does not necessarily prove that a contract of insurance is indivisible, and if distinct items or classes of property are separately insured, the policy may be valid as to one item or class, although invalid as to another item or class by reason of breach of condition of the policy with reference thereto, provided it appears that the risk which it was intended to exclude by the condition which is broken does not apply to the other items or classes of property. (Iowa) *Taylor v. Anchor Ins. Co.*, 261.

4. INSURANCE—Severability—Breach of Condition.—Entirety of premium in a policy of insurance on a dwelling-house and livestock as separate items, with a certain amount of insurance on each, does not prevent the policy from being severable, and recovery may be had for loss on the house, although the policy is void as to the livestock, because of subsequent encumbrance thereon, if both classes of property are not exposed to the same risk. (Iowa) *Taylor v. Anchor Ins. Co.*, 261.

5. INSURANCE.—A Condition Against Allowing Gasoline on the Insured Premises Should be Construed to mean allowing it to be kept or used, and does not forbid the bringing of the gasoline on the premises on a single occasion. (Tex.) *Springfield Fire etc. Ins. Co. v. Wade*, 870.

6. **INSURANCE.**—A condition against keeping, using, or allowing gasoline on the premises, contained in a policy of insurance, is not broken by the bringing of a gallon of gasoline on the premises on a single occasion, though their destruction by fire resulted therefrom. (Tex.) *Springfield Fire etc. Ins. Co. v. Wade*, 870.

7. **INSURANCE.**—A Condition Against Keeping, Using, or Allowing Gasoline on the Premises is not Violated unless it is brought there for the purpose of being stored or kept. The purpose of the word "used" is to provide against the danger which would arise from the habitual, constant, or continued exposure of the property through the presence or use of the article. The one word forbids the permanent or habitual keeping of the dangerous thing, and the other a like use of it without the actual depositing or storing of it on the premises. (Tex.) *Springfield Fire etc. Ins. Co. v. Wade*, 870.

8. **INSURANCE.**—A Suit in Foreclosure is Commenced when a petition is served on the insurer, within the meaning of a condition in a policy making it void on the commencement of such suit. (Vt.) *Findlay v. Union Mut. Fire Ins. Co.*, 885.

9. **INSURANCE.**—Commencement of Suit—Conditions Against.—A condition that the policy shall be void if the property is alienated without the consent of the insurer, and that the commencement of foreclosure proceedings shall be deemed an alienation, is not void as against public policy. (Vt.) *Findlay v. Union Mut. Fire Ins. Co.*, 885.

10. **INSURANCE.**—Waiver of Condition—What is.—If a policy has become void by reason of the commencement of a suit in foreclosure, the statement of the secretary of the insurer two weeks afterward that the company will not rely on this condition is not a waiver of the right to claim the forfeiture, nor does it estop the insured from relying thereon. (Vt.) *Findlay v. Union Mut. Fire Ins. Co.*, 885.

11. **INSURANCE** Taken as Security—Right to Use Proceeds for Restoring Property.—Where real property is subject to a contract of sale and is insured for the security of the vendor, he has the right, on the destruction or injury of the property by fire, on the payment of the amount of the insurance to him, to use it in the restoration of the property, and is under no obligation to pay it to the vendee or apply it to the satisfaction of the purchase price remaining unpaid, but not due by the terms of the contract. (Tex.) *Naquin v. Texas Savings etc. Inv. Assn.*, 855.

12. **VENDOR AND VENDEE.**—Insurance of Property—Respective Interests in.—If a contract for the sale of real estate stipulates that the vendee shall keep the property insured for the benefit of the vendor, the insurance is not intended as a fund with which to pay the debt, but to furnish indemnity to both parties. It is not the fund of either, but one in which both have a common interest for the accomplishment of a common purpose. (Tex.) *Naquin v. Texas Savings etc. Inv. Assn.*, 855.

13. **VENDOR AND VENDEE.**—Insurance of Property—When cannot be Applied to the Payment of the Balance of the Purchase Price.—When property which is the subject of a contract of purchase and sale is insured for the benefit of the vendor as security for the payment of his debt, and is damaged by fire, and the amount of the insurance is paid to the vendor, the vendee has no right to have such amount applied to the satisfaction of the purchase price remaining unpaid, if it is not then due. (Tex.) *Naquin v. Texas Savings etc. Inv. Assn.*, 855.

14. INSURANCE—Waiver of Proof of Loss.—The finding of the jury as to waiver of proof of loss under a policy of insurance is conclusive, and binding upon the appellate court. (Iowa) *Taylor v. Anchor Ins. Co.*, 261.

15. INSURANCE—Death of Beneficiary.—If a husband takes out a policy of insurance on his life in favor of his wife and children, "their executors, administrators, and assigns," the death of the wife before that of her husband terminates her interest in the policy. (Ala.) *Roquemore v. Dent*, 33.

16. LIFE INSURANCE—Theft of Policy.—A Demand for a New Paid-up Policy by an assured will not be denied in equity, because his policy has been stolen and he is unable to surrender it as conditioned for, where he has used due diligence to reclaim it and is still the owner. And he need not plead the execution of some instrument operating as a surrender of the policy and a discharge of the defendant's liability. (N. Y.) *Wilcox v. Equitable Life Assurance Society*, 579.

17. INSURANCE—Life—Construction of Policy.—If a life insurance policy is made payable to such children of the assured as may survive him, the beneficiaries under the policy are all of the surviving children of the assured as a class, and include those born after the issuance of the policy, and all of those by a second, as well as by a first wife. (Ala.) *Roquemore v. Dent*, 33.

18. INSURANCE, Life, Change to a More Hazardous Occupation, What is.—One who, being insured against accident as proprietor of a gristmill, goes to his father's farm to assist temporarily during the latter's disability in overseeing the work of haying, changes his employment, and, if injured, must be deemed to have received his injury while in an occupation other than that in which he was insured. (Vt.) *Estabrook v. Union Casualty etc. Co.*, 916.

19. INSURANCE—Accident—Full Particulars.—An employer's liability insurance policy requiring the insured to furnish to the insurer "full particulars" of an accident does not call for unnecessary details, but only such as will enable the insurer to determine whether a claim is likely to be made. Such provision does not call upon the insured to make and report an exhaustive examination of the circumstances attending the accident, or to decide the facts upon conflicting evidence. Whether the information furnished is sufficiently full under the circumstances to answer the requirement of the policy is a question of fact. (N. H.) *Ward v. Maryland Casualty Co.*, 514.

20. INSURANCE—Notice of Accident or Claim.—Under an employer's liability insurance policy providing that the insured shall give the insurer "immediate notice" of an accident, a claim thereunder, or of a suit to enforce such claim, it is intended that the notice in each case shall be given as soon after the fact as, in view of all the circumstances, makes it reasonably immediate, and if such notice is given with due diligence under the circumstances and without unnecessary or unreasonable delay, it answers the requirement of the contract. Whether the notice as given is reasonably immediate is a question of fact. (N. H.) *Ward v. Maryland Casualty Co.*, 514.

See Beneficial Associations; Gifts, 1, 2.

Note.

Insurance, vendor and vendee, respective interests of in, 861.

Interstate Commerce, animal industry act, state regulations which may be made notwithstanding, 85, 86.

Interstate Commerce, animals, transportation of as a part of, 84.
animals, transportation of, state regulation of is not excluded by
the animal industry act, 84.
police power of the state, extent to which may affect, 87.
statute, purpose of, tests by which may be determined, 87.

See Commerce.

JOINT TORT-FEASORS.

See Torts.

JUDGMENTS.

1. JUDGMENTS AS RECORDS.—The fact that the pleadings and blank decree in a case are taken from the files of the court and afterward returned, does not affect their character as public records. (N. H.) *Wilson v. Otis*, 564.

2. JUDGMENT—When Necessary to Bind an Indemnitor.—If one is liable to another on a decision adverse to the latter of an action pending against him, the former is entitled to a reasonable notice of the pendency of the action and an opportunity to participate in or interpose such defenses as he may desire, but not to a request to take charge of or assume the responsibility of the defense. (Or.) *Carroll v. Nodine*, 743.

3. JUDGMENT—Indemnitor—Notice to Bind by a Judgment, What Sufficient.—If one who has agreed to be present and to testify in an action which may be brought by his indorsee is called to testify only a few hours before the trial, he having no previous notice of the pendency of the action and no request being made on him to participate in or to assist the prosecution of the action, he is, nevertheless, bound by the judgment if he appears and testifies. (Or.) *Carroll v. Nodine*, 743.

4. A JUDGMENT on Attachment Cannot be Set Aside or held void on its face on the ground that several parcels of real property were included in one levy, or that it extended to property not owned by the defendant, if these facts did not appear in the return of the writ. (Or.) *White v. Ladd*, 732.

5. A JUDGMENT Void on Its Face may be Set Aside or Vacated at Any Time, whether within the term or afterward, when the attention of the court in which it was rendered is called to it, or the court may act at its own suggestion. (Or.) *White v. Ladd*, 732.

6. JUDGMENT.—A Party cannot be Heard to Impeach a judgment which he himself has procured to be entered in his own favor. (N. Y.) *Starbuck v. Starbuck*, 631.

7. JUDGMENTS—Blank Decree—Collateral Attack.—If the court having jurisdiction of the subject matter and parties makes specific finding of fact relating to the merits of the action and signs a blank decree, the work of filling up the blanks is merely clerical, requiring the exercise of no judicial function, and may be done by the clerk. Such decree is not subject to collateral attack. (N. H.) *Wilson v. Otis*, 564.

8. JUDGMENTS—Collateral Attack.—If Jurisdiction Depends upon some collateral fact which can be decided without going into the case on its merits, then the jurisdiction may be questioned collaterally, even though the jurisdictional fact is averred of record, and was actually found to exist by the court rendering the judgment. (Kan.) *Ewing v. Mallison*, 299.

9. **JUDGMENTS—Jurisdiction—Collateral Attack.**—If, upon competent evidence it appears that the court having jurisdiction of the subject matter determined the issue or point presented by the petition, the parties are concluded thereby, and whether the judgment was actually entered in the technical form of a decree, is not material, is a collateral proceeding. (N. H.) *Wilson v. Otis*, 564.

10. **RES JUDICATA.**—A decree of the orphans' court authorizing the mortgage of the real property of a decedent for the payment of his debts is conclusive of everything involved in it, including the death of the decedent at the time stated in the petition and the existence of the debts set up in the schedule, and the mortgagee may rely on the court's adjudication, and is not bound to examine for himself. (Pa. St.) *Grubb v. Galloway*, 764.

11. **RES JUDICATA.**—A Judgment by Default or One Confessed is attended with the same legal consequences as if it had resulted from a trial on contested issues, and there exists no tenable ground of distinction between title confessed and one tried and determined, but if the second action is upon a different claim, the former judgment operates as an estoppel only as to matters actually litigated or as to facts distinctly in issue in that action. (Or.) *White v. Ladd*, 732.

12. **RES JUDICATA—Burnt Records Act.**—A proceeding under the burnt records act against the city of Chicago and others resulting in favor of the petitioner cannot conclude persons not parties thereto from claiming that a strip of land is in fact a public street. (Ill.) *Thompson v. Maloney*, 133.

13. **RES JUDICATA—Decision Involving the Validity of an Attachment.**—Where a motion is made to continue a cause against an executor on the ground that property of his testate had been levied upon in his lifetime, and the executor makes a counter-motion to set aside the service of summons and the continuance on the ground that the court was without jurisdiction, and his motions are denied, and, on appeal, the action of the court is affirmed, and the question of the validity of the attachment is necessarily passed upon, it becomes *res judicata*, and the same question cannot be subsequently raised by a motion to set aside the sale of the attached property and vacate the judgment ordering such sale, or to refuse confirmation to the sale. (Or.) *White v. Ladd*, 732.

14. **RES JUDICATA—Decision of Motions.**—The tendency of recent adjudications is to inquire whether the issue or question has been in fact presented for decision and necessarily determined, and if so, to treat it as *res judicata*, though the decision is a determination of a motion or a summary proceeding. (Or.) *White v. Ladd*, 732.

15. **RES JUDICATA—Default in an Attachment Suit.**—Where the plaintiff's amended complaint presents the jurisdictional question of the sufficiency of an attachment, and the defendant makes default by failing to controvert it, and judgment is rendered based on the attachment, the question of its validity becomes *res judicata*. (Or.) *White v. Ladd*, 732.

16. **RES JUDICATA.**—The Determination of the Validity of Municipal Bonds in an action on interest coupons is conclusive in a subsequent action between the same parties to recover on other coupons attached to the same bonds. (Kan.) *Garden City v. Merchants' etc. Nat. Bank*, 284.

17. **RES JUDICATA.**—The Potency of a Judgment as an Estoppel concludes every fact necessary to uphold it, and extends not only to matters actually determined, but to every other matter which the

parties might have litigated and have had decided as incident to, and essentially connected with, the subject matter of litigation, and every matter within the legitimate purview of the original action, both in respect to matters of claim and of defense. (Or.) *White v. Ladd*, 732.

18. **RES JUDICATA**.—When a Matter is Once Adjudicated, it is conclusively determined between the same parties and their privies as to all matters which were or might have been litigated; and this determination is binding as an estoppel in all other actions, whether commenced before or after the action in which the adjudication was made. (Kan.) *Garden City v. Merchants' etc. Nat. Bank*, 284.

19. **FOREIGN JUDGMENTS**—Conclusiveness of.—A foreign judgment upon the merits upon a cause of action arising within one of the states of the United States, rendered by a competent court having jurisdiction of the parties and the subject matter, if valid, final, and unreversed, is conclusive against a subsequent suit in such state between the same parties for the same cause of action. (N. H.) *Macdonald v. Grand Trunk Ry. Co.*, 550.

20. **FOREIGN JUDGMENTS**—Conclusiveness—Mistake of Law. The conclusiveness of a foreign judgment as a defense is not affected by the fact that it contravenes the policy of the country where the cause of action arose, especially if it appears that the decision resulted from a failure to furnish information of such policy. (N. H.) *Macdonald v. Grand Trunk Ry. Co.*, 550.

See Constitutional Law, 6, 7.

JURISDICTION.

1. **IF JURISDICTION Depends on the Finding of a Particular Fact**, the exercise of jurisdiction implies the finding of such fact. (Kan.) *Ewing v. Mallison*, 299.

2. **JURISDICTION**—When No Longer an Open Question.—If jurisdiction is dependent upon whether the constitutionality of a statute is any longer open for argument, jurisdiction cannot be sustained if the question has been twice decided by the highest court of the state. (Va.) *Western Union Tel. Co. v. Reynolds*, 971.

See Appearance; Courts, 3; Equity; Venue.

LANDLORD AND TENANT.

LANDLORD AND TENANT—Abandonment by Tenant—Set-off.—If a landlord, after abandonment of the leased premises by the tenant, takes possession thereof without indicating to the tenant an intention to hold him for the rent or to lease to others on his account, he thereby accepts the abandonment as a surrender of the lease, and cannot offset the difference in the rent stipulated for and what he was able to realize for the remainder of the term, against the claim of the tenant for goods sold to him. (Iowa) *Armour Packing Co. v. Des Moines Pork Co.*, 270.

Note.

Liens, of attorneys do not exist before judgment on the cause of action, 175.

of attorneys on judgments recovered, 173.

of attorneys on judgments, statutes creating, 175.

of attorneys, settlements and other action of clients, whether may prejudice, 175-179.

LIMITATIONS OF ACTIONS.

See Dower; Guardian and Ward, 5, 6; Physicians and Surgeons, 3; Trusts, 11, 12; Waters and Watercourses.

LOTTERIES.

1. **LOTTERIES—Gift Enterprises, When Amount to.**—If, on the sale or purchase of goods, a trading stamp is given, entitling the purchaser to something which is uncertain, indeterminate, and then unknown to him, the transaction involves the elements of chance, and a statute prohibiting the giving of such stamp is not unconstitutional. (Md.) *State v. Hawkins*, 328.

2. **CONSTITUTIONAL LAW.**—A Statute Prohibiting the Redeeming of a Trading Stamp at a place other than that where, or by a person other than him by whom, the sale was made, is unconstitutional, because the place where and the person by whom the redemption is to be made does not introduce an element of chance into the transaction. (Md.) *State v. Hawkins*, 328.

MALICIOUS PROSECUTION.

1. **MALICIOUS PROSECUTION—Damages for Distress of Mind.** Evidence is admissible in an action for malicious prosecution to show that on the arrest of plaintiff in his home his mother fainted or was prostrated by the shock, thereby causing him to suffer great distress of mind. (Iowa) *Flam v. Lee*, 242.

2. **MALICIOUS PROSECUTION—Damages for Mental Suffering.** Evidence of a description of the place or prison in which plaintiff was confined, and of his mental suffering while in custody is admissible in an action for malicious prosecution to enhance the damages. (Iowa) *Flam v. Lee*, 242.

3. **MALICIOUS PROSECUTION of Civil Action.**—Damages may be recovered for the prosecution of a civil action maliciously and without probable cause, without the restraint of person or seizure of property. (Neb.) *McCormick Harvesting Machine Co. v. Willan*, 449.

4. **MALICIOUS PROSECUTION—Evidence.**—In an action for malicious prosecution on a charge of attempting to murder the defendant's daughter, the defendant cannot, without special plea, give evidence of statements by plaintiff that such daughter was unchaste, to mitigate the damages, nor are such statements admissible to show that plaintiff was probably guilty of making the assault on the daughter, nor to rebut the presumption of malice arising from causing the plaintiff's arrest, especially when it is not shown that such statements were known to the defendant at the times in question. (Iowa) *Flam v. Lee*, 242.

5. **MALICIOUS PROSECUTION—Exemplary Damages—Instructions.**—In an action for malicious prosecution an instruction on exemplary damages that if the defendant in instituting such prosecution was actuated solely by personal malice against "defendant" is not so misleading or prejudicial as to require a reversal of the verdict and judgment. (Iowa) *Flam v. Lee*, 242.

6. **MALICIOUS PROSECUTION—Loss of Social Standing as Element of Damage.**—In an action for malicious prosecution where loss of social standing is alleged as cause for damages, evidence that immediately after plaintiff's arrest he ceased to be invited to social

entertainments, as he had formerly been, is admissible without showing that such arrest caused the loss of such social favor, (Iowa) *Flam v. Lee*, 242.

7. IN MALICIOUS PROSECUTION, Probable Cause depends upon the question whether the defendant as an ordinarily prudent and careful man, under the facts as they appear to him, in the exercise of reasonable care to ascertain the true facts, would be justified in believing that plaintiff committed the crime alleged, and to arrest him therefor. (Iowa) *Flam v. Lee*, 242.

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MALPRACTICE.

See Physicians and Surgeons.

MANDAMUS.

MANDAMUS Will Issue to Compel the Granting of a Building Permit when the requisite formalities prescribed by ordinance have been complied with. (Md.) *Bostock v. Sams*, 394.

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MARRIED WOMEN.

See Husband and Wife.

MASTER AND SERVANT.

1. **MASTER AND SERVANT**.—The Liability to a Servant ceases with the control of the master over his actions. (Kan.) *Missouri etc. Ry. Co. v. Merrill*, 287.

2. **MASTER AND SERVANT**—Test of Master's Liability.—The rule of respondeat superior does not make the master's liability depend upon the question whether the injury inflicted by the servant was willful and intentional or unintentional, but upon the question whether the servant, when he did the wrong, acted in the prosecution of his master's business, and within the scope of his authority. (Tex.) *Lipscomb v. Houston etc. Ry. Co.*, 804.

3. **MASTER AND SERVANT**—Negligence, Liability for.—A master who neglects his duty to use reasonable care to provide a safe place in which his servant may work, and negligently fails to advise him of the danger to which he is exposed by such omission, is answerable for injuries suffered from such negligence. (Ill.) *Morris & Co. v. Malone*, 180.

4. **MASTER AND SERVANT**—Safe Place and Appliances—Contributory Negligence.—It being the duty of the master to provide the servant with a safe place and safe appliances to work with, the servant is not bound to inspect to see whether the master's duty in this behalf has been performed, but may, without being subjected to the consequences of contributory negligence, proceed with his work, relying upon the presumption that the master's duty has been performed and recover for an injury received because it has not, unless, notwithstanding the duty of the master and the presumption of performance, the servant ought, in the exercise of ordinary care, to discover the master's default and avoid the danger arising from it. (N. H.) *Thompson v. Bartlett, Hayward & Co.*, 504.

5. MASTER AND SERVANT—Appliances—When Master not Liable for Defects in.—If material of apparent good quality is furnished to an employé and accepted and used by him for a long time without objection, the master is not answerable for its breaking and injuring the employé, when there is nothing to indicate any defect known before the accident. (Pa. St.) *Ehni v. National etc. Co.*, 761.

6. MASTER AND SERVANT—Duty of Inspection of Material by a Third Person.—An employer does owe to his employé the duty of having an inspection by a third person of a plank in the constant use of the employé. It is his duty to discover and report any defect which may arise in the course of the use of the material and to exercise reasonable care for his own protection. (Pa. St.) *Ehni v. National etc. Co.*, 761.

7. MASTER AND SERVANT—Fellow-servants.—A servant who is injured by the negligence of a fellow-servant in the course of their common employment without any fault on the part of the master cannot maintain an action against him for such injury. (N. H.) *McLaine v. Head & Dowst Co.*, 522.

8. MASTER AND SERVANT—Fellow-servants—Dangerous Place to Work.—If the supplying of a work place is part of, or necessarily results from, the work being done, and is to be done, by the servants themselves, the master is not liable for a co-servant's negligence in the progress of the work rendering the place unsafe. (N. H.) *McLaine v. Head & Dowst Co.*, 522.

9. MASTER AND SERVANT—Fellow-servants' Test.—If one person is injured through the negligence of another in the same service, the test as to whether they are fellow-servants is not found in the fact that they are engaged in a common employment under the same general control and paid by the same principal, but is whether the negligent servant in the act or omission complained of represents the master in the performance of any duty owed by the master to the servant injured. The responsibility of the master is determined by the nature of the act in question, and not by the difference in the rank or grade of service between particular servants. (N. H.) *McLaine v. Head & Dowst Co.*, 522.

10. MASTER AND SERVANT—Guaranty of Protection by Fellow-servant.—The promise of a servant that he will exercise care in the work intrusted to him to avoid injury to a fellow-servant is not the promise of the master, and he is not liable therefor unless it is expressly authorized by him. (N. H.) *McLaine v. Head & Dowst Co.*, 522.

11. MASTER AND SERVANT.—Negligence of a Foreman in failing to notify a servant working in a ditch of the dumping of a load of earth into the ditch is not a breach of the duty of the master to provide a safe place for the servant to do the work delegated to him. (N. H.) *McLaine v. Head & Dowst Co.*, 522.

12. MASTER AND SERVANT—Dangerous Employment—Obeying Order of Superior.—If a servant is directed to perform an act undoubtedly dangerous, but with the dangers of which he could have informed himself by the exercise of ordinary care, the fact that he is injured while acting under the direct order of his superior does not give him a right of action. (N. H.) *O'Hare v. Cocheeco Mfg. Co.*, 499.

13. MASTER AND SERVANT—Act of Vice-principal.—If ordinary care requires that a warning of dangers arising from the work should, from time to time, be given by a master to his servants as the work progresses, he must provide for such a warning, and if he

intrusts this duty to a competent person he is not liable for the negligence of such person. (N. H.) *McLaine v. Head & Dowst Co.*, 522.

14. MASTER AND SERVANT—Negligent Act of Superintendent. If a superintendent of employes, while exercising an act of superintendence, playfully tickles, punches, or pushes an employé, thus causing him to injure himself, such negligent act is not an act of superintendence nor one for which the master is liable. (Ala.) *Western Ry. etc. v. Milligan*, 31.

15, 16. MASTER AND SERVANT—Promise of Protection by Foreman.—A promise by a foreman to a servant working under him to protect him from the danger of the employment, is not binding upon the master, unless authorized by him. (N. H.) *McLaine v. Head & Dowst Co.*, 522.

17. MASTER AND SERVANT.—Obligation of the Servant to Exercise Care is not satisfied by an unexplained absence of action and thought in a situation of known danger. (N. H.) *O'Hare v. Cochecho Mfg. Co.*, 499.

18. NEGLIGENCE, Contributory, Where an Employe has not Assumed the Risk.—Though by a statute an employé cannot be regarded as having assumed the risk of an appliance forbidden thereby, yet he may be guilty of such contributory negligence in its use as precludes his recovery for injuries received therefrom. (Vt.) *Kilpatrick v. Grand Trunk Ry. Co.*, 887.

19. NEGLIGENCE—Master and Servant.—If a servant does not exercise due care in executing the instruction or rendering the service, he is guilty of negligence for which his master is answerable. (Tex.) *Lipscomb v. Houston etc. Ry. Co.*, 804.

20. NEGLIGENCE.—The Choosing of a Dangerous Method of Performing Work when other and safer methods are open to him does not expose the plaintiff to a charge of contributory negligence, unless it appears that he knew, or that a man of prudence would have known, that other and safer methods were so open, and that the method he was choosing was dangerous. (Vt.) *Kilpatrick v. Grand Trunk Ry. Co.*, 887.

21. MASTER AND SERVANT—Risk Assumed.—If danger to a servant arises, not from the work place itself, but from the use of it for the work, and no special skill or experience beyond that involved in doing the work is required to maintain the safety of the place, the maintenance of such safety is the duty of the servant, because it is part of the work. (N. H.) *McLaine v. Head & Dowst Co.*, 522.

22. MASTER AND SERVANT—Risks of the Breaking of Appliances.—It is not negligence on the part of a master if an appliance or machine breaks, whether from external, original fault not apparent when it was first used, or from an external apparent one produced by time and use, but not brought to the master's knowledge. This is one of the ordinary risks of the employment which the servant takes upon himself. (Pa. St.) *Ehni v. National etc. Co.*, 761.

23. MASTER AND SERVANT—Negligence—Risks Assumed by Servant.—A master is under no obligation to give warning of dangers incident to the service of which the servant knows or ought to know, and the servant assumes the risk of injury from dangers incident to the service which are obvious, or of which he knows, or which ordinary care would disclose to him. (N. H.) *O'Hare v. Cochecho Mfg. Co.*, 499.

24. MASTER AND SERVANT—Negligence—Warning of Danger. If a servant is chargeable with knowledge which he could have acquired with ordinary care, and such care would have disclosed to him the danger of which he complains he was not warned, failure to warn him thereof is not ground of action against his master. (N. H.) *O'Hare v. Cocheco Mfg. Co.*, 499.

25. MASTER AND SERVANT—Warning of Danger—Act of Fellow-servant.—A master is not liable for the negligence of a servant in failing to notify a coemployé of the approach of a transitory peril which, as the work progresses, will render the environment unsafe for a brief period, but which may easily be avoided if due warning is given. (N. H.) *McLaine v. Head & Dowst Co.*, 522.

See Constitutional Law, 1, 1a, 2; Railroads, 11.

Note.

Master and Servant, contagious disease, master's liability for exposing servant to, 345.

MINES AND MINERALS.

1. MINING CLAIMS.—Mere Proof that Lodes Exist within certain territory, or within the boundaries of a placer mining location, cannot authorize persons to enter within such location after an application for its patent to prospect for and develop a lode claim. Before it can be said that a lode claim is known to exist, there must be actual knowledge as distinguished from supposition or surmise. (Colo.) *Clipper Min. Co. v. Eli Min. etc. Co.*, 89.

2. MINING CLAIMS.—Right to Enter on Placer to Prospect for Lode Claims.—One may not go upon a prior valid placer location prospecting for unknown lodes and get title to lode claims thereafter discovered within the placer boundaries, unless the placer owner abandons his claim, waives the trespass, or is by his conduct estopped to complain of it. (Colo.) *Clipper Min. Co. v. Eli Min. etc. Co.*, 89.

3. MINING CLAIMS.—Res Judicata.—The rejection of an application for a patent to a placer mining claim not founded on a decision that the ground is not placer, but merely for the reason that there is not such a showing by the applicant as entitles him to a patent, is not conclusive in a subsequent controversy between him and the person claiming the same ground as part of a lode claim that it is not placer ground. (Colo.) *Clipper Min. Co. v. Eli Min. etc. Co.*, 89.

See Trover and Conversion.

MORTGAGES.

1. MORTGAGEE in Possession.—A mortgagee who purchases and enters into possession under a void foreclosure, the mortgagor acquiescing therein, is a "mortgage in possession." (Kan.) *Kelso v. Norton*, 308.

2. EJECTMENT Against a Mortgagee in possession cannot be maintained, the mortgage debt remaining unpaid, whether or not the right of foreclosure is barred by the statute of limitations. (Kan.) *Kelso v. Norton*, 308.

3. MORTGAGES.—Priorities.—If a new mortgage is substituted in ignorance of an intervening lien without intent to affect the security, the mortgage released through mistake may be restored in equity and given its original priority as a lien. (N. H.) *Laconia Sav. Bank v. Vittum*, 561.

4. MORTGAGES—Discharge—New Mortgage—Priority.—If a creditor holding a first mortgage belonging to his debtor as collateral security for his debt, allows it to be canceled and surrendered, and takes a new mortgage upon the same premises in his own name to secure his debt, in ignorance of a second recorded mortgage thereon, and without intention to postpone his mortgage or affect his security, his mortgage is a superior lien to that of the second mortgagee. (N. H.) *Laconia Sav. Bank v. Vittum*, 561.

See Husband and Wife, 4.

MOTIONS.

See Judgments, 14.

MUNICIPAL CORPORATIONS.

1. MUNICIPAL CORPORATIONS—Power to Impose Limitations.—The power to create a municipal corporation implies power to create it with such limitations as the legislature may see fit to impose, and to impose such limitations at any stage of its existence. (Neb.) *Redell v. Moores*, 431.

2. STATUTORY POWER may be Conferred upon the governor to appoint members of the board of fire and police commissioners of cities of the metropolitan class. (Neb.) *Redell v. Moores*, 431.

3. MUNICIPAL CORPORATIONS—City Officers—Quo Warranto. A citizen and taxpayer residing in a city, who contributes to the support of its water supply system, is interested in the appointment of trustees therefor, so as to be entitled to maintain quo warranto proceedings to test the validity of their appointment, under a statute conferring such right upon any citizen having an "interest" upon the refusal of the county attorney to act. (Iowa) *State v. Barker*, 222.

4. CONSTITUTIONAL LAW—Municipal Control.—A statute authorizing a district court to appoint trustees for city waterworks in cities of the first class is unconstitutional, as taking from the city the right of local self-government, and as divesting the city of the management and control of its property. (Iowa) *State v. Barker*, 222.

5. MUNICIPAL CORPORATIONS—City Officers—Quo Warranto. The superintendent of a city waterworks system has such interest in the validity of a statute providing for the appointment of trustees and a new superintendent for such system, as to entitle him to maintain a quo warranto proceeding to test the validity of such statute. (Iowa) *State v. Barker*, 222.

6. CONSTITUTIONAL LAW—Street Improvement.—A provision in a city charter for the assessment against property owners of the costs of street improvements to be measured by the "special benefits accruing by reason of said paving or improving, and in no case to exceed four dollars per front foot," does not violate a constitutional provision that "no municipality shall make any assessment for the costs of street paving in excess of the increased value of such property by reason of the special benefits derived from such improvements." (Ala.) *Inge v. Board of Public Works*, 20.

7. MUNICIPAL CONTRACTS.—A provision in a city charter that certain contracts shall be let to the lowest responsible bidder, is mandatory, and a compliance with its provisions is essential to the

validity of such contracts. (Ala.) *Inge v. Board of Public Works*, 20.

8. **MUNICIPAL CONTRACTS.—Additional Stipulations** contained in a municipal contract awarded to one who is not the lowest responsible bidder, and which were not embraced in the published notice for bidding, though of advantage to the city, if they constitute a material charge, and therefore a departure from the basis of bidding and become an element of consideration in determining who is the lowest and best bidder, will invalidate the contract entered into. (Ala.) *Inge v. Board of Public Works*, 20.

9. **MUNICIPAL CONTRACTS—Alien or Convict Labor.**—A stipulation in a municipal paving contract against the employment by the contractor of alien or convict labor renders the contract void, as tending to increase the cost of the work, and as being against the interests of the taxpayer and abutting property owner. (Ala.) *Inge v. Board of Public Works*, 20.

10. **MUNICIPAL CONTRACTS—Assumption of Responsibility by Contractor.**—A municipal paving contract under which the contractor assumes "all risk of damages to property, along or near the line of work," is void as tending to increase the amount bid for the contract and the burden to be borne by the taxpayer and abutting owners. (Ala.) *Inge v. Board of Public Works*, 20.

11. **MUNICIPAL CONTRACTS—Fraud—Lowest Bidder.**—In the absence of fraud or gross abuse, courts will not interfere with the exercise of discretion by administration boards or officers in their determination of who is the lowest responsible bidder for a municipal contract. (Ala.) *Inge v. Board of Public Works*, 20.

12. **MUNICIPAL CONTRACTS—Lowest Bidder—Presumption.**—When the action of a board in letting a municipal contract is directly assailed on the ground that it was not let to the lowest responsible bidder, it cannot be presumed from the mere acceptance of a bid by such board that the latter, in the exercise of its judicial discretion, after due consideration of all bids, determined such one as being the lowest responsible bid. (Ala.) *Inge v. Board of Public Works*, 20.

13. **MUNICIPAL CONTRACTS—Lowest Responsible Bidder.**—The determination of who is the lowest responsible bidder for a municipal contract rests, not in the exercise of an arbitrary unlimited discretion of the officer or board awarding the contract, but upon the exercise of a bona fide judgment, based upon facts tending reasonably to support such determination. (Ala.) *Inge v. Board of Public Works*, 20.

14. **MUNICIPAL PAVING CONTRACTS** are not rendered invalid by the fact that the authority granted by the legislature for street paving involves a considerable outlay; and that in the event of a failure to collect the assessments against abutting property it would have to be met out of the general revenues of the city. (Ala.) *Inge v. Board of Public Works*, 20.

15. **MUNICIPAL CONTRACTS—Street Improvements—Presumption.**—If no work has been done under a municipal contract, and it does not appear what will be the amount of the assessment for such work when made, it will not be presumed that the assessment when made will exceed the amount of the constitutional limitation. (Ala.) *Inge v. Board of Public Works*, 20.

16. **MUNICIPAL CORPORATIONS—Authority of the Legislature Over the Contracts of.**—The authority of the legislature over

a municipal corporation is not so absolute and arbitrary that it may direct the terms upon which it may contract, and may prescribe what stipulations and conditions its contracts must contain, where such contracts relate to matters purely of local improvement. (Ohio) *Cleveland v. Clement Bros. etc. Co.*, 670.

17. **BICYCLES—Ordinance Regulating Use of.**—A city having power to provide for the safety of its inhabitants has authority to pass an ordinance requiring bicycles used on its streets after dark to carry lights. (Iowa) *Des Moines v. Keller*, 268.

18. **BICYCLES—Ordinance Regulating Use of.**—An ordinance entitled "an ordinance to regulate bicycles" has a title sufficient to cover a provision requiring the use of a light on a bicycle used on the streets of a city after dark. (Iowa) *Des Moines v. Keller*, 268.

19. **BICYCLES—Regulation of Use of.**—The use of the bicycle on a public street or highway is subject to all just and reasonable requirements for the safety and convenience of other users of such streets and highways. (Iowa) *Des Moines v. Keller*, 268.

20. **CONSTITUTIONAL LAW—Ordinance Regulating Use of Bicycles.**—A city ordinance requiring all bicycles used on the city streets after dark to carry a light is not unconstitutional as applying only to bicycles, and not to other silently running vehicles, not as abridging any of the privileges or immunities of the citizen. (Iowa) *Des Moines v. Keller*, 268.

21. **MUNICIPAL CORPORATIONS—Buildings, Ordinances Undertaking to Determine Character of.**—A municipal ordinance authorizing the withholding of a permit for the erection of a building if it does not conform in general character to the buildings previously erected in the same locality, and will tend to materially diminish the value of the surrounding improved or unimproved property, is not justified by a grant to the municipality of the power to regulate buildings and pass ordinances for the preservation of order and securing property and persons from danger, violence, and destruction, and maintaining the peace, good government, health, and welfare of the city. (Md.) *Bostock v. Sams*, 394.

22. **MUNICIPAL ORDINANCES Limiting Speed of Trains—Interference with Trade.**—The mere fact that an ordinance may operate to restrain trade or retard transportation will not justify the court in holding invalid an ordinance regulating the speed of trains, when the speed is not below the limit prescribed by the legislature, and when it does not clearly appear that the ordinance is unreasonable and unnecessary for the safety of the public, and for the protection of life and property. (Ill.) *Chicago etc. R. R. Co. v. Carlinville*, 190.

23. **MUNICIPAL ORDINANCES Regulating the Speed of Trains—Power of the Courts to Question as Unreasonable.**—A statute giving municipal corporations the right to regulate the speed of trains within their limits, but providing that no passenger train shall be limited to less than ten, nor any freight train to less than six, miles per hour, does not preclude the courts from declaring that an ordinance limiting trains to the speed designated in the statute is invalid, if it clearly appears to be an unreasonable exercise of the power given to the municipality. (Ill.) *Chicago etc. R. R. Co. v. Carlinville*, 190.

24. **CONSTITUTIONAL LAW—Municipal Limitations upon Speed of Railway Trains.**—A municipal ordinance limiting the speed of passenger trains within a city to ten miles per hour is not in-

valid as imposing an unreasonable restraint on interstate commerce and the speedy transportation of the United States mails. (Ill.) Chicago etc. R. R. Co. v. Carlinville, 190.

25. **RAILWAYS—Speed of Trains.**—A Municipal Ordinance Limiting the Speed of Passenger Trains Within a City to Ten Miles Per Hour will not be declared void and unreasonable. (Ill.) Chicago etc. R. R. Co. v. Carlinville, 190.

26. **RAILWAYS—Speed of—Municipal Ordinances Regulating—**Cities and villages have the power by ordinance to regulate the speed of trains within their corporate limits, provided the regulation is reasonable. (Ill.) Chicago etc. R. R. Co. v. City of Carlinville, 190.

27. **MUNICIPAL CORPORATIONS—Repair of Sidewalks—Liability of Lot Owner.**—The duty of repairing sidewalks may be lawfully imposed on adjacent lot owners, and they may be held liable according to the intention of the legislature for all the consequences of their defaults in that respect. (Neb.) Lincoln v. Janesch, 478.

28. **MUNICIPAL CORPORATIONS—Repair of Sidewalks—Snow and Ice—Liability of Lot Owners.**—A statute imposing upon owners and occupants of city lots the duty of keeping the sidewalks adjacent to their premises in repair and free from snow and ice is constitutional and a legitimate exercise of the state police power. (Neb.) Lincoln v. Janesch, 478.

29. **MUNICIPAL CORPORATIONS—Sidewalks—Liability of Abutting Owners.**—A statute conferring upon city authorities complete jurisdiction and control over streets and sidewalks, requiring adjacent owners or occupiers of lots to build and repair sidewalks in compliance with notice from the city authorities, and making such owners or occupiers liable for all damages resulting from defective sidewalks, does not impose upon them an absolute duty to repair upon their own motion, but only the duty to repair after notice from the city authorities. (Neb.) Lincoln v. Janesch, 478.

30. **MUNICIPAL CORPORATIONS—Public Streets.**—A municipal corporation must keep the streets in a reasonably safe condition when it can do so. What is a reasonably safe condition depends upon circumstances, and no city or town can be required to keep them absolutely safe under all circumstances. (Md.) Magaha v. Hagerstown, 317.

31. **MUNICIPAL CORPORATIONS—Public Streets—Liability for Ice or Snow Upon.**—A municipal corporation, having power to prevent, remove, or abate nuisances or obstructions in or upon its streets, alleys, and drains, is answerable to a person injured by falling upon such ice while crossing the street at night if, though notified, it permits ice to remain for a space of four or five feet in width and sixty feet in length in a driveway on a public street for a month or more. (Md.) Magaha v. Hagerstown, 317.

32. **MUNICIPAL CORPORATIONS—Ice on the Public Streets—Distinction Between Rough and Smooth.**—A recovery may be had against a municipal corporation by one injured by falling upon ice in a public street, when such ice is smooth, as well as when it is in ridges or mounds. (Md.) Magaha v. Hagerstown, 317.

33. **MUNICIPAL CORPORATIONS—Ice or Snow on the Public Streets—When not Answerable for.**—A municipal corporation is not under obligation to keep its streets at all times in such condition that foot-passengers may be able to cross with a reasonable degree of safety, if there may be times when this is not possible. (Md.) Magaha v. Hagerstown, 317.

34. MUNICIPAL CORPORATIONS—Liability for Ice on the Public Streets—When a Question for the Jury.—In an action to recover of a municipal corporation for injuries suffered by the plaintiff in slipping or falling on the ice on a public street, it is for the jury to determine whether the ice was formed from water emptied out of a saloon, as claimed by the plaintiff, or from a cause over which the municipality had not control, whether it continued for such time as to be constructive notice to the authorities, or they had actual notice of the condition of the street, and a sufficient time had elapsed to enable them to receive it or protect the public from its dangers, if that could reasonably be done, and other facts reflecting on the question whether the municipality had exercised reasonable care and diligence to keep the highway safe. (Md.) *Magaha v. Hagerstown*, 317.

35. MUNICIPAL CORPORATIONS—Liability of, for Ice on the Public Streets.—An instruction in favor of the plaintiff in an action to recover of a municipal corporation for injuries received by him from slipping on the ice on a public street is properly rejected if it does not leave the jury to determine how the ice was formed—whether from water allowed to be emptied into the street, or merely as the result of cold weather following rain or snow. (Md.) *Magaha v. Hagerstown*, 317.

36. NEGLIGENCE, Contributory, When a Question for the Jury. If it is claimed that the plaintiff was guilty of contributory negligence in crossing a street in the night-time without the aid of lanterns, such negligence cannot be affirmed by the court, but the question must be submitted to the jury. (Md.) *Magaha v. Hagerstown*, 317.

37. PUBLIC STREETS.—It is not Negligence per se for a Pedestrian to Cross from one side of the street to the other in the night-time at any point, unless he has notice of some defect or could discover one by the use of due care. (Md.) *Magaha v. Hagerstown*, 317.

38. MUNICIPAL CORPORATIONS Using Highly Dangerous Agents must exercise care commensurate with the danger to prevent injury to persons and property, and the fact that the agent is used and supervised by the police does not excuse negligence in such use. (Pa. St.) *Herron v. Pittsburg*, 798.

39. NEGLIGENCE—Notice of Danger and Probable Injury.—Where a police-call wire breaks, and, though not in itself dangerous, it is naked and strung on poles close to other wires carrying strong and dangerous currents of electricity, such break is notice that the wire may become dangerous, and imposes on the city the duty of examination. (Pa. St.) *Herron v. Pittsburg*, 798.

40. PUBLIC STREETS.—Injunction is a Proper Remedy to prevent the placing of obstructions in a street or other public way. (Ill.) *Thompson v. Maloney*, 133.

41. MUNICIPAL CORPORATIONS—Streets—Additional Servitude.—An electric street railway is not per se either a public or a private nuisance, nor is it a new servitude imposed upon the land for which the owners of the fee are entitled to compensation or to an injunction to restrain its construction. (Ala.) *Baker v. Selma etc. Ry. Co.*, 42.

42. MUNICIPAL ORDINANCE—When not Validated.—A new charter continuing in force, until repealed, all existing municipal ordinances does not validate ordinances which the municipality had not the power to enact. (Md.) *Bostock v. Sams*, 394.

43. MUNICIPAL CORPORATIONS—Ordinances—When Cannot be Declared Void Because Unreasonable.—Where an ordinance is passed in pursuance of the power expressly conferred by the legislature, and the details of such municipal legislation are prescribed by the legislature, the ordinance cannot be held invalid by the courts as being unreasonable, but when the details of such legislation are not prescribed, an ordinance passed in pursuance of such power must be a reasonable exercise of the authority, or it will be pronounced invalid. (Ill.) Chicago etc. R. R. Co. v. City of Carlinville, 190.

44. MUNICIPAL CORPORATIONS—Presumption in Favor of Ordinances of.—The presumption is in favor of the validity and reasonableness of an ordinance, and it is therefore incumbent on one who claims it to be invalid to show wherein its unreasonableness consists. It should be manifest that the discretion imposed in the municipal authorities has been abused by exercising the power in an arbitrary manner. (Ill.) Chicago etc. R. R. Co. v. City of Carlinville, 190.

45. MUNICIPAL ORDINANCES—When Valid in Part Though Void in Part.—A municipal ordinance containing a provision which is invalid because of want of power to enact it, may be enforced as to its other provisions which can be given full effect without granting effect to the invalid parts. (Md.) Bostock v. Sams, 394.

46. MUNICIPAL CORPORATIONS—Injunction at Instance of Taxpayers.—Municipal authorities may be enjoined at the suit of a taxpayer from issuing illegal warrants or scrip, misappropriating public funds, creating improper debts, or abusing corporate powers. (Ala.) Inge v. Board of Public Works, 20.

47. MUNICIPAL CORPORATIONS—Estoppel.—The doctrine of estoppel in pais cannot ordinarily be invoked to defeat a municipality in the prosecution of its public affairs because of an error or mistake of one of its agents or officers which has been relied upon by a third person to his detriment. Such doctrine can be appealed to effectively, as against a municipality, only when it is acting in its private, as contradistinguished from its public or governmental capacity. (Neb.) Philadelphia Mortgage etc. Co. v. City of Omaha, 442.

Note.

Municipal Corporations, contagious disease, liability for acts of officers in exposing persons to, 848, 849.

See Building Regulations; Dedication.

MURDER.

See Homicide.

NEGLIGENCE.

1. NEGLIGENCE is the Absence of Care Under the Circumstances. The more imminent the danger the greater the care should be exercised in its presence. (Pa. St.) Kinter v. Pennsylvania R. R. Co., 795.

2. NEGLIGENCE—Damages for.—To recover for negligence the damages must be the natural and proximate result of the negligence complained of, and not a remote and conjectural one. (Neb.) Fiala v. Ainsworth, 420.

3. NEGLIGENCE—Control of Offending Object.—When one is to be charged because of the ownership or construction of an object

which causes damage by some defect, commonly the liability is held to end when the control of the object is changed. (Kan.) *Missouri etc. Ry. Co. v. Merrill*, 287.

4. **NEGLIGENCE** must be Proved either by testimony directly establishing the fact, or by proof of facts from which such negligence reasonably follows and must be presumed. (N. H.) *Hughes v. Boston etc. R. R.* 518.

5. **PRACTICE**—Negligence, Contributory, Mode of Presenting.—Where the defendant claims that the plaintiff was guilty of contributory negligence, the court should be asked to rule or instruct specifically upon that subject. The question is not presented by a general instruction to the effect that the plaintiff has offered no evidence sufficient to entitle him to recover. (Md.) *Magaha v. Hagerstown*, 317.

6. **NEGLIGENCE**, Contributory, What is not.—The law requires of every person the prudence of a prudent man, but a prudent man may be guilty of inattention or failure to think of a probable danger to which he is exposed. Circumstances may excuse whenever the jury may reasonably say that a man placed as he was might be guilty of forgetfulness or inattention without losing the right to be called a prudent man. (Vt.) *Kilpatrick v. Grand Trunk Ry. Co.*, 887.

7. **NEGLIGENCE**—Contributory—When a Question for the Jury. Whether a father who, seeing on the sidewalk a wire, avoids stepping on it, apprehending that it may be dangerous, should have returned to his house close by and warned his son, is a question for the jury in an action brought by the father and son to recover because of injuries received by the latter by coming in contact with such wire, and cannot be declared to be contributory negligence by the court as a matter of law. (Pa. St.) *Herron v. Pittsburgh*, 798.

See Death; Railroads.

Note.

Negligence, in exposing persons to contagious and infectious diseases, 841-852.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

Note.

Newspapers, contracts between proprietors of not to compete for public printing, 909.

contracts between proprietors of to pay commissions on public advertising, 909.

contracts for political support of are void as against public policy, 905.

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contracts of, to insert matter of advertisement in the editorial columns, 907.

contracts with news agencies, when against public policy, 909, 911.

libel contracts to indemnify for publishing, 908.

libel upon by charging the selling of influence of to corporations, 907.

moral duties of, 907.

Sunday papers, contracts for advertising in, 911, 912.

NEW TRIAL.

THE GRANTING OF A NEW TRIAL Wipes Out the Previous Adjudication, and the case must proceed *de novo*, and, on the second trial, the court or jury may award damages in excess of those allowed on the first. (Vt.) *Kilpatrick v. Grand Trunk Ry. Co.*, 887.

NUISANCES.

See **Explosives**.

OATHS.

See **Courts**, 2.

OFFICE.

See **Injunctions**, 4.

OFFICERS.

See **Injunctions**, 4; **Municipal Corporations**.

OUSTER.

OUSTER is a Question of Fact to be determined from the evidence. (Neb.) *Beall v. McMenemy*, 427.

PARENT AND CHILD.

PARENT AND CHILD.—A Father, if of Sufficient Ability, is bound to maintain his infant children. (Va.) *National Valley Bank v. Hancock*, 933.

See **Adaption**.

PARTITION.

1. PARTITION.—One Out of Possession cannot maintain partition against his cotenants in possession, if the petition contains no demand for possession. (Kan.) *Denton v. Fyfe*, 272.

2. PARTITION—Description in Decree of.—For the purpose of sustaining a decree in probate partitioning real property, it is proper to look to the inventory and the report of the commissioners. If, from all these documents, it appears that the property is two lots in a designated town, which were owned by T. and his wife as community property, the description is sufficient if other evidence shows what lots were so owned. (Tex.) *Taffinder v. Marrell*, 814.

3. PARTITION—Parties.—In an Action to Partition a Portion of a joint estate and adjust the liens thereon, brought by a grantee of one of the co-owners, the defendants may, by a cross-demand for affirmative relief, have drawn into the controversy all the joint estate and all parties in interest therein, and have the entire matter adjusted in one litigation. (Kan.) *Hazen v. Webb*, 276.

4. PARTITION—Sale of Part of Property.—In an action to partition lots encumbered by specific, overlapping liens, it is proper to order a sale of the property in satisfaction of the liens established,

in accordance with the priority of the liens thereon, and a partition of the remainder, when in no other way can the interests of the lienors and joint owners be protected. (Kan.) *Hazen v. Webb*, 276.

Note.

Partition, jury trial in suits for, 275.

person not in possession cannot maintain suit for, 275.

PARTY-WALLS.

1. **PARTY-WALL—Right to Increase Height Of.**—Where there is an implied grant of an easement of a party-wall, there is included the right to increase the height of the wall and make such other changes as the owner of the dominant tenement may find to his advantage. (Pa. St.) *Bright v. Allan*, 769.

2. **ESTOPPEL.—If the Truth is Known to Both Parties**, or if they have equal means of knowledge, neither can be estopped. Hence if the conveyance under which one claims title shows that a party-wall is on the land of the adjacent proprietor, the former cannot acquire any right by estoppel to maintain an addition or extension in height of such wall, on the ground of the failure to make any protest during its construction. (Pa. St.) *Bright v. Allan*, 769.

3. **ESTOPPEL to Object to the Building up and Heightening of a Wall.**—Where a building extends wholly on one's own premises, and another has no right to use it as a party-wall or otherwise, the former is not estopped from complaining that the latter has increased its height, nor from enjoining the maintenance of such increase, by the fact that he failed to object while the adding of the wall was in progress, if there is no evidence to show that he had knowledge of the work, except testimony that he might have discovered it by going upon the roof of the house and looking down. (Pa. St.) *Bright v. Allan*, 769.

4. **MANDATORY INJUNCTION Should Issue Against the Maintenance** of an extension or addition to the height of a wall constructed by the defendant on the wall existing on the lands of the complainant. (Pa. St.) *Bright v. Allan*, 769.

PASSENGERS.

See Carriers.

PERJURY.

PERJURY—Defense That Person Administering Oath on the Trial was not Authorized to do so.—If, during the progress of a trial before a court of competent jurisdiction, an oath is administered by a person then acting as a deputy clerk, it is not material that he is neither an officer *de jure* nor *de facto*, if his act takes place in the presence of the court, and apparently by its sanction. (Ohio) *State v. Townley*, 636.

PERPETUITIES.

PERPETUITIES.—A Will of personal and real property, working an equitable conversion of the latter, and directing the executor to pay the income of the estate to the daughter of the testator for life and after her death to her issue until the youngest attains the age of twenty-one, then to divide the estate among the issue,

but in case none of such issue reaches such age, to distribute the estate among certain other persons, is void, save as to the provision for the daughter, because it creates a suspension of the absolute ownership of personal property for more than two lives in being at the testator's death. (N. Y.) *Schlereth v. Schlereth*, 616.

PHYSICIANS AND SURGEONS.

1. PHYSICIANS AND SURGEONS Assume to Exercise the Ordinary Skill and Care of Their Profession in the light of modern advancement and learning on the subject, and become liable for injuries resulting from their failure to do so. (Ohio) *Gillette v. Tucker*, 639.

2. PHYSICIANS AND SURGEONS Must, After Performing an Operation, exercise the same care and skill in the subsequent necessary treatment as in performing the operation, unless the terms of employment otherwise limit the services, or the patient gives notice that he cannot or will not afford the subsequent treatment. (Ohio) *Gillette v. Tucker*, 639.

3. STATUTE OF LIMITATIONS in Actions Against Physicians and Surgeons for Malpractice, When Commences to Run.—In an action against a physician and surgeon for malpractice, consisting of negligently leaving a sponge in the abdomen of the plaintiff after performing an operation, where it remained for many months, and until after the relation of patient and surgeon ceased, the statute of limitations does not commence to run in favor of the surgeon until the termination of such relation, because, until that time, it was his constant duty to remove such sponge. (Ohio) *Gillette v. Tucker*, 639.

Note.

Physicians and Surgeons, burden of proof in actions for malpractice, 665.

cures are not impliedly warranted by, 659.

diligence which they must exercise, 658.

duty of on consenting to treat a patient, 659.

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duty to continue treatment, 666.

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liability of, for causing the spread of contagious and infectious diseases, 844, 845.

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liability of, does not extend to the acts of others, 665.

liability of, for errors of judgment, 659.

liability of, for following the judgment of a patient 664.

liability of, for neglect of partner, 666.

liability of, for negligence does not exist until there is an injury, 658.

liability of, for negligence, in reporting persons to be inflicted with loathsome diseases, 669.

liability of, for negligence of other physicians whom they recommend, 666.

liability of, for negligence whereby a disease is communicated to others, 668.

liability of, for refusal to treat patient, 666.

liability of, for want of knowledge and skill and for negligence, 658.

Physicians and Surgeons, liability of, persons holding themselves out to be when they are not, 668.
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 locality or place of practice, whether has a bearing on the skill impliedly stipulated for, 660.
 medical science, duties of, are determined by the present state of, 660.
 medicine, school of, right to have skill and duties determined by, 661.
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 operations, duty of to continue treatment and care after, 667.
 right of to refuse to treat persons who apply to, 666.
 specialist, skill required of, 662, 665.
 tests of liability of, 658.

PLEADING.

1. CRIMINAL LAW—Bill of Particulars, When Unnecessary.—Under an indictment charging the defendant with obtaining money from a person specified by means and by use of the confidence game, he is not entitled to a bill of particulars. (Ill.) *Du Bois v. People*, 183.

2. CRIMINAL TRIALS.—Whether the Prosecution Shall be Ruled to Furnish a Bill of Particulars is a matter within the sound legal discretion of the court. (Ill.) *Du Bois v. People*, 183.

See Equity.

PRESCRIPTION.

See Adverse Possession.

PRINCIPAL AND AGENT.

1. PRINCIPAL AND AGENT.—A person dealing with an agent takes the risk as to the extent of his authority, and is bound to inquire into it. (Ill.) *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 113.

2. PRINCIPAL AND AGENT—Acts of Recognition—Who May not Rely Upon.—Though authority to draw, accept, and indorse bills may be presumed from acts of recognition in former instances, yet those acts must be known to the party setting them up. (Ill.) *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 113.

3. AN AGENT of an Undisclosed Principal is Liable for Negligence in the same manner, and to the same extent as if he were the principal in interest. (Ill.) *Morris & Co. v. Malone*, 180.

4. PRINCIPAL AND AGENT.—Authority to Collect Debts and Give Discharges Carries no Implication of Authority to indorse a negotiable note. (Ill.) *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 113.

5. PRINCIPAL AND AGENT.—Authority to Indorse Commercial Paper can be Implied Only when the agent is unable to perform the duties of his agency without the exercise of such authority. In other

words, the power of an agent to indorse commercial paper for his principal must be a necessary implication from the express authority conferred upon him. (Ill.) *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 113.

6. **PRINCIPAL AND AGENT—Burden of Proof.**—When a check purports to be indorsed by one as agent of the payee, the burden of proof is on the holder to show authority to make the indorsement. (Ill.) *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 113.

7. **NEGOTIABLE PAPER—Agent—Implied Authority of to Indorse.**—An agent having general authority to manage his principal's business has by virtue of his employment no implied authority to bind his principal by making, accepting, or indorsing negotiable paper. (Ill.) *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 113,

See *Frauds, Statute of*.

PRINCIPAL AND SURETY.

1. **BOND—Delivery and Acceptance.**—If the bond of an assistant bank cashier is delivered to the cashier of the bank, who is one of its directors, and such assistant enters upon the duties of his office under such bond, which is retained by one of the directors of the bank, the bond is sufficiently delivered and accepted, though no acceptance is shown by the minutes of the bank. (Neb.) *Fiala v. Ainsworth*, 420.

2. **BOND OF BANK CASHIER.**—A condition in the bond of a cashier or assistant cashier of a bank that he "will honestly, faithfully and efficiently discharge the duties of such position," not only guarantees his personal honesty, but also his competency, efficiency, and diligence in the discharge of his duties, (Neb.) *Fiala v. Ainsworth*, 420.

See *Guardian and Ward*, 5-7.

PROBATE PROCEEDINGS.

See *Executors and Administrators*.

PROCESS.

See *Appearance*.

PROHIBITION.

PROHIBITION Against Enforcing an Injunction.—If a court of equity grants a mandatory injunction to require a county board to admit complainant as a member thereof, it acts beyond its jurisdiction and a writ of prohibition should issue to prevent further action on the part of such court. (Colo.) *People v. District Court of Lake Co.*, 61.

PUBLIC CONTRACTS.

See *Municipal Corporations*.

Note.

Public Officers, contagious diseases, liability for exposing persons to, 848.

Riparian Owners. See *Water*.

QUARANTINE.

See Animals; Contagious Diseases; Constitutional Law, 9.

QUIETING TITLE.

1, 2. **A BILL to Quiet or Remove a Cloud from the Title to Real Property** can be maintained only when the complainant is in possession, or the lands are unimproved and unoccupied. (Ill.) Clay v. Hammond, 146.

3. **EQUITY JURISDICTION in Case of Fraud.**—Although There is a Remedy at Law where a conveyance has been obtained by fraud, equity will take jurisdiction to set it aside or to remove it as a cloud upon complainant's title, whether he is in possession of the premises or not. (Ill.) Clay v. Hammond, 146.

4. **IN A SUIT to Set Aside a Deed as a Cloud Upon Complainant's Title**, he need not be in possession of the premises if his cause for relief is founded upon fraud. (Ill.) Clay v. Hammond, 146.

QUO WARRANTO.

See Municipal Corporations, 3-5.

RAILROADS.

1. **THE DUTY OF A RAILWAY Company to Inspect the Cars of Other Roads** received by it is enjoined by law, and its dereliction of duty, in the event of an injury to its employé from such cars, is the proximate cause of the hurt, and the negligence of the company turning over the unsafe cars is the remote cause. (Kan.) Missouri etc. Ry. Co. v. Merrill, 287.

2. **A RAILWAY Company Which Delivers a Defective Car to a connecting carrier** is not liable for injuries sustained by an employé of the latter by reason of such defect, after the receiving company has inspected the car and taken it in charge for transportation over its line. (Kan.) Missouri etc. Ry. Co. v. Merrill, 287.

3. **NEGLIGENCE—Railways—Stop, Look, Listen.**—One about to cross a railway track with a team must stop, look, and listen at a place where he can have a view of the tracks which will enable him to see approaching trains, and must, if necessary, get out and lead his horses. Failing to do so, he is guilty of contributory negligence, and cannot recover if, because of such failure, he is injured. (Pa. St.) Kinter v. Pennsylvania R. R. Co., 795.

4. **RAILROADS—Trespassers.**—If a railway company conducts its lawful business in a legal and proper manner, it is not liable to one who is injured, not by its acts, but by his own intermeddling with railroad machinery upon railroad land where the presence of the person injured is without right. (N. H.) Hughes v. Boston etc. R. R., 518.

5. **RAILROADS—Infant Trespassers.**—A railroad company is not in fault in not keeping its right of way clear of obstructions which may render the place dangerous to infant trespassers. (N. H.) Hughes v. Boston etc. R. R., 518.

6. **RAILROADS—Infant Trespassers.**—A railroad company is under no obligation to warn or protect infant trespassers. (N. H.) Hughes v. Boston etc. R. R., 518.

7. RAILROADS—Infant Trespassers.—Invitation to an infant trespasser to go upon railroad premises cannot be inferred from the fact that other persons go there without objection. (N. H.) *Hughes v. Boston etc. R. R.*, 518.

8. RAILROADS—Infant Trespassers—Use of Torpedoes.—The facts that a railroad torpedo was found upon the railroad right of way beside the track some distance from a crossing or station and that trainmen were required by the rules of the road to be supplied with torpedoes and were directed how to use them as signals furnish no evidence of an intentional or wanton desire to inflict an injury to an intermeddling infant trespasser. (N. H.) *Hughes v. Boston etc. R. R.*, 518.

9. RAILWAY CORPORATIONS—Duty of to Guard Their Employees from Danger.—Whether, when guards were placed in a railway station to catch and arrest burglars, it was the duty of the corporation to give such instructions to the guards as would protect other of its servants against danger in going to such station, and whether such other servants should have been warned of the presence of such danger, are questions which should be submitted to the jury. (Tex.) *Lipscomb v. Houston etc. Ry. Co.*, 804.

10. RAILWAY CORPORATIONS—Knowledge of Station Agent—When Imputed to.—If a station agent places guards in a station to watch for and to catch and arrest burglars, his knowledge that they are so placed and of the purpose is the knowledge of the corporation, whether the guards are to be deemed its servants or not. (Tex.) *Lipscomb v. Houston etc. Ry. Co.*, 804.

11. RAILWAY CORPORATIONS—Liability of for the Killing of a Person Supposed to be a Burglar.—If a person is instructed to watch a station and catch burglars, this involves the exercise of a discretion to distinguish burglars from innocent persons, and, in making an arrest, to determine the degree of force called for by the circumstances. If, through want of proper care, he mistakes an innocent man for a burglar, and uses a degree of force not justified by the situation, his act may be deemed a negligent exercise of the authority derived from the master, who may be held liable if such innocent person is killed. (Tex.) *Lipscomb v. Houston etc. Ry. Co.*, 804.

12. MASTER AND SERVANT—Assumption of Risk, Rule of, When Inapplicable.—When a statute forbids the maintaining of a ladder outside of a car and creates a liability in favor of employees injured thereby, the ordinary doctrine of the assumption of risks does not apply as against him. (Vt.) *Kilpatrick v. Grand Trunk Ry. Co.*, 887.

13. MASTER AND SERVANT—Power of Servant to Delegate His Authority.—The authority of an employé of a railway corporation to act for it in guarding its depot and property does not involve the authority to employ for it other servants and substitute them in his place, and where such authority is claimed to have existed, it should be proved as a fact. (Tex.) *Lipscomb v. Houston etc. Ry. Co.*, 804.

14. NEGLIGENCE, Contributory, When a Question for the Jury. Whether the plaintiff was guilty of contributory negligence in using a side ladder on a car in a space where he might be knocked therefrom by a post near the track, the position of which he knew, is a question for the jury, if it appears that he was placed in a perilous position, and did not think of it at the time. (Vt.) *Kilpatrick v. Grand Trunk Ry. Co.*, 887.

15. NEGLIGENCE in Maintaining a Railway Car Contrary to the Statute.—To maintain a ladder at the side of a railway car, instead of at the end or inside, as required by statute, is negligence in law. (Vt.) Kilpatrick v. Grand Trunk Ry. Co., 887.

16. NEGLIGENCE—Proximate Cause.—A court does not err in refusing to hold as a matter of law that a side ladder on a railway car was not the proximate cause of the plaintiff's injury, when such ladder was maintained in defiance of a statute, and the plaintiff, while in the employ of the defendant, was knocked from such ladder by a post near enough to strike him. The accident was due as much to the position of the ladder as to the fact that the defendant's employé was thereon. (Vt.) Kilpatrick v. Grand Trunk Ry. Co., 887.

RAILROADS.

See Explosives; Municipal Corporations, 22-27; Street Railways.

RAPE.

1. RAPE—Accomplice—Female Under Age of Consent.—Under a statute making guilty of rape a man over eighteen years of age who carnally knows a female under the age of sixteen years with her consent, she cannot, in law, be deemed an accomplice in the crime, and it is error to instruct that she is such or that her testimony should be treated as that of an accomplice. (Ohio) State v. Tuttle, 689.

2. RAPE—Corroboration—Evidence of Mere Opportunity.—The existence of marks and bruises on the genital organs of the prosecutrix for rape, and her complaint, not so recently made as to form part of the res gestae, are not enough to make her evidence "corroborated by other evidence tending to connect defendant with commission of the offense," as required by statute. (Iowa) State v. Wheeler, 236.

See Witnesses, 3.

RES GESTAE.

See Assault.

RES JUDICATA.

See Judgments, 10-18; Mines and Minerals, 3.

SALES.

1. SALES—Misunderstanding as to Mode of Payment—Duty of Payment.—If goods are sold and delivered upon a mutual misunderstanding as to the mode of payment, the fact of a benefit received from such purchase is insufficient to establish the legal duty to pay in cash in the absence of a showing of a contract in fact, express or implied, or by estoppel. (N. H.) Concord Coal Co. v. Ferrin, 496.

2. SALES—Misunderstanding as to Mode of Payment—Estoppel. If goods are sold and delivered upon a mutual misunderstanding as to the mode of payment, the question as to whether the purchaser is estopped to set up his understanding of the contract, by the facts attending the delivery of the goods, is one of fact, and a general verdict in his favor is a finding of his freedom from fault and the absence of an estoppel against him. (N. H.) Concord Coal Co. v. Ferrin, 496.

3. **SALES OF SEED—Warranty—Damages.**—If seed is sold with a warranty that it is of a certain kind and quantity, and the buyer discovers its inferiority before planting it, he may retain it and recover as damages the difference between the purchase price of the seed as warranted and the market price of the seed actually received. (Neb.) *Dunn v. Bushnell*, 474.

4. **SALES OF SEED—Warranty—Measure of Damage.**—If seed sold with a warranty that it is of a certain kind and quality proves inferior to the warranty, and is planted by the buyer without knowledge of its inferiority, the value of a crop such as would have been produced by seed as warranted, deducting the expense of raising such crop and the value of the one in fact raised, is the proper measure of the damage for the reach of the warranty. (Neb.) *Dunn v. Bushnell*, 474.

5. **SALES—Conditional Which can be Enforced Against Mortgagees.**—If personal property is sold subject to the condition that the title shall not pass until the full payment of the purchase price, as evidenced by certain promissory notes, and such property is intended to be and is sent to another state, whose statutes declare that all conditions and reservations in a contract for the sale of personal property, accompanied by immediate delivery, shall be void as against subsequent mortgagees in good faith, and, as to them, shall be deemed absolute unless the contract, or a copy thereof, is filed in the office of the town clerk of the town where the vendee resides, or if a nonresident, of the town or city where the property is situated at the execution of the agreement, a mortgagee in good faith in the state to which the property is sent, and where it is installed in and becomes part of a manufacturing plant, is entitled to treat the sale as absolute, and its conditions cannot be enforced against him. (Pa. St.) *Schmaltz v. York Mfg. Co.*, 782.

6. **SALES—Change of Possession—Attaching Creditors.**—It is only when alleged personalty of a vendor and debtor is apparently in the open, visible, and exclusive possession of a third person that an attaching creditor of the vendor is put upon inquiry as to the title. (N. H.) *Baldwin v. Thayer*, 510.

7. **SALES—Change of Possession—Conflict of Laws.**—The question whether a sale of personalty is accompanied by such change of possession as to render the transaction valid against attaching creditors of the vendor is to be determined by the law of the state where the property is situated and the attachment is made. (N. H.) *Baldwin v. Thayer*, 510.

8. **SALES—Change of Possession.**—If personalty is allowed to remain in the possession of the vendor without any apparent ownership in the vendee, the act of the former in taking part of the goods to a railway station, requesting the railway company to provide a car for the use of the vendee and to issue a shipping receipt for the goods in his name, while the car is loaded by the vendor's servants, is not such a change of possession or notice of change of ownership as will render the sale valid as against a subsequent attaching creditor of the vendor. (N. H.) *Baldwin v. Thayer*, 510.

9. **SALES—Change of Possession.**—Notice of the sale of personalty without change of possession does not affect the claim of an attaching creditor of the vendor thereto. (N. H.) *Baldwin v. Thayer*, 510.

10. **SALES—Change of Possession.**—Personal property sold and put upon railroad premises for shipment is not thus placed in the constructive possession of the vendee, so that it cannot be reached

by the vendor's creditors unless he has parted with all control and custody of it and the railway company has become a bailee in relation thereto. (N. H.) Baldwin v. Thayer, 510.

11. **SALES**—Change of Possession.—To render a sale of personal property valid as against the vendor's subsequent attaching creditors, there must be a change of possession of the property from the vendor to the vendee, and such change must be exclusive and apparent. (N. H.) Baldwin v. Thayer, 510.

SEIZURE AND SEARCHES.

See Gambling.

SIDEWALKS.

See Municipal Corporations, 27-29.

SMALLPOX.

See Contagious Diseases.

SPENDTHRIFT TRUSTS.

See Trusts, 6-9.

STARE DECISIS.

See Courts, 4.

STATUTE OF FRAUDS.

See Frauds, Statute of.

STATUTES.

1. **STATUTE**—Construction of by Public Officers.—The fact that a statute had been construed by successive secretaries of state as authorizing the formation of corporations for two or more purposes, and had been amended after such construction without change in this respect, is not of controlling effect, and does not require the courts to adopt such construction. (Tex.) Ramsey v. Tod, 875.

2. **CONSTITUTIONAL LAW**—Construction of Statute—Judicial Knowledge.—In construing a statute courts may take notice of events which are generally known, and matters of common knowledge within the limits of their jurisdiction. (Neb.) Redell v. Moores, 431.

3. **CONSTITUTIONAL LAW**—Construction of Statute—Judicial Notice.—In construing a statute courts are authorized to collect the intention of the legislature from the occasion and necessity of the law, from the mischief felt and the objects and remedy in view; and they may, with propriety, recur to the history of the times when the statute was passed to ascertain the reason, as well as the meaning, of particular provisions in it. (Neb.) Redell v. Moores, 431.

STREET RAILWAYS.

1. **STREET RAILWAYS**—Construction—Damages—Remedy.—An abutting property owner who suffers damage by the improper construction of an electric street railway or by its negligent or un-

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skillful operation, has an adequate remedy at law. (Ala.) *Baker v. Selma etc. Ry. Co.*, 42.

2. STREET RAILWAYS—Right to Enjoin Construction or Operation of.—To entitle an abutting property owner to an injunction against the construction and operation of an electric street railway, he must aver and prove that it will constitute a nuisance in fact, and that he will suffer special injury different in kind from that sustained by the general public. (Ala.) *Baker v. Selma etc. Ry. Co.*, 42.

See Municipal Corporations, 41.

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Streets, conveyance of property as abutting upon, 145.

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dedication of, difference between statutory and common law, 145.

See Boundaries; Municipal Corporations.

SUBROGATION.

SUBROGATION.—Among Wrongdoers, equity will not enforce subrogation. (N. Y.) *Gilbert v. Finch*, 623.

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Sunday, contracts for advertising upon, 911, 912.

TAXATION.

1. TAXATION—Injunction—Collection of Taxes.—An injunction does not lie to restrain the collection of taxes unless the assessment is void or levied for an illegal or unauthorized purpose. (Neb.) *Philadelphia Mortgage etc. Co. v. City of Omaha*, 442.

2. TAXATION—Special Assessments—Charge on Property.—Taxes levied on land for general revenue purposes, or by way of special assessment for benefits received by local improvements, are not debts, in the ordinary meaning of the word, against the owner of the property, to be enforced as a personal liability, but a charge against the real estate assessed, to be enforced and collected by a sale of the property liable for the taxes so levied and assessed. (Neb.) *Philadelphia Mortgage etc. Co. v. City of Omaha*, 442.

See Municipal Corporations, 46.

TELEGRAPH COMPANIES.

1. TELEGRAPH CORPORATIONS—Delivery of Message to Clerk of Hotel.—The relation of hotel-keeper and lodger and boarder does not create any authority in the former or his clerk to receive telegrams addressed to the latter, and a delivery to either does not satisfy the obligation of the corporation to deliver the message to the addressee, nor relieve it from a claim for damages due to its failure to make a proper delivery. (Tex.) *Western Union Tel. Co. v. Cobb*, 862.

2. TELEGRAPH CORPORATIONS—Domestic Messages, What are, When Transmitted Over Lines Partly in Another State.—Where the intermediate and terminal points are in the same state, and a telegram is transmitted over the lines of the same corporation, and concerns only citizens of that state, it is a domestic message, though

the line passes in part over territory of another state in which the corporation has established a relay office. (Va.) *Western Union Tel. Co. v. Reynolds*, 971.

3. **INTERSTATE COMMERCE**—Telegraph Corporations.—A contract by a telegraph corporation made with a citizen of this state to transmit a telegram from one point to another, both within the state, is not a part of interstate commerce, though in the process of transmission the telegram is sent to a point without the state, to be thence transmitted to its point of destination. (Va.) *Western Union Tel. Co. v. Reynolds*, 971.

4. **TELEGRAPH CORPORATIONS**—Conflict of Laws.—Where a telegraph corporation contracts to transmit a message from one point to another, both in this state, it is not material that in the transmission the message is sent to a point without the state, where a relay office has been established, whence it is transmitted to the point of destination, and the error or neglect in transmission occurs in that office. The contract is to be deemed a contract of this state, and the rights and remedies of the parties under it are controlled exclusively by its laws. (Va.) *Western Union Tel. Co. v. Reynolds*, 971.

5. **TELEGRAPH CORPORATIONS**—Damages for Mental Anguish, Whether Recoverable Under Code Provision Giving a Right of Action for the Violation of a Statute.—Though one statute makes it the duty of a telegraph corporation to deliver and transmit messages, and provides a penalty for not delivering them as soon as practicable, and another declares that any person injured by the violation of a statute may recover the damages he may sustain therefrom, mental anguish cannot be recovered as damages for the failure to deliver a message where there has been no injury to the person or estate of the plaintiff. (Va.) *Connelly v. Western Union Tel. Co.*, 919.

6. **TELEGRAPH CORPORATIONS**—Damages for Mental Suffering cannot be Recovered in an action against a telegraph corporation for its delay in delivering, or its failure to deliver, a message independent of any injury to person or estate, though the corporation is advised of the character of the message. (Va.) *Connelly v. Western Union Tel. Co.*, 919.

7. **TELEGRAPH CORPORATIONS**—Mental Anguish—Statute, When does not Create a Right of Action for.—A statute providing that telegraph corporations shall be liable for special damages occasioned in receiving, transmitting, or delivering dispatches, and that grief and mental anguish occasioned thereby may be considered by the jury in determining the quantum of damages, does not confer any right to recover for mental suffering or anguish where the right does not otherwise exist. The whole statute is substantially declaratory of the pre-existing law. (Va.) *Connelly v. Western Union Tel. Co.*, 919.

8. **TELEGRAPH CORPORATIONS**—Penal Amercement of.—The penalty imposed by the code of Virginia for failure to promptly deliver telegrams is not a penal amercement. (Va.) *Western Union Tel. Co. v. Reynolds*, 971.

TENANCY IN COMMON.

1. **COTENANCY**—Entry, Ouster.—The rule that the entry of one cotenant is the entry of all has no application when there has been an actual ouster of the cotenants, or some act equivalent thereto. (Neb.) *Beall v. McMenemy*, 427.

2. **COTENANCY—Ouster.**—A sale of land by one cotenant while in sole possession, followed by the exclusive possession of his grantee for fourteen years, constitutes an ouster of the other cotenant, and completes the bar of the statute of limitations against him. (Neb.) *Beall v. McManamy*, 427.

TORTS.

JOINT TORT-FEASORS—Release of One.—If a release of one or more joint tort-feasors contains no reservation, it operates to discharge all; but if the instrument expressly reserves the right to pursue the others, it is not technically a release, but a covenant not to sue, and they are not discharged. (N. Y.) *Gilbert v. Finch*, 623.

TRADING STAMPS.

See Lotteries.

TRESPASS.

1. **TRESPASS—Force to Repel.**—A landowner may use all reasonable and necessary force to expel a trespasser from his premises. (Iowa) *Hannabalsen v. Sessions*, 250.

2. **TRESPASS—What Constitutes.**—A person who extends his arm over a division fence into the premises of another is a trespasser, though his body remains on his side of the fence. (Iowa) *Hannabalsen v. Sessions*, 250.

3. **TRESPASS—What is not.**—It is not a trespass for one of two adjoining owners to hang his property on the boundary or division fence between them, although such fence is erected entirely by the other owner. (Iowa) *Hannabalsen v. Sessions*, 250.

See Trever and Conversion.

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TRIAL.

1. **JURY TRIAL—Argument of Counsel.**—If counsel pursues a line of argument, which, being objected to, and by the court declared improper, is withdrawn, no ground for exception exists in favor of

The objecting litigant. (Vt.) Kilpatrick v. Grand Trunk Ry. Co., 887.

2. JURY TRIAL—Argument of Counsel Referring to Plaintiff's Supposed Duty.—Where plaintiff was suing to be compensated for injury from the use of a ladder on the side of a car, such use being prohibited by statute, and the defendant claims that he was guilty of contributory negligence, his counsel has the right to argue to the jury that he was doing what the defendant reasonably expected of him. (Vt.) Kilpatrick v. Grand Trunk Ry. Co., 887.

3. TRIAL—Instructions.—If the principles announced in refused instructions are fairly and fully embodied in the instructions given, no error is committed. (Neb.) Dunn v. Bushnell, 474.

4. TRIAL—Instructions submitting to the jury an inquiry of fact concerning which there is no evidence, constitute reversible errors. (Neb.) McCormick Harvesting Machine Co. v. Willan, 449.

5. JURY TRIAL—Waiver of Right to have Question Submitted. Where the defendant asks the court to rule, as a matter of law, that a side ladder maintained on one of its cars in defiance of the law was not the proximate cause of an injury, and does not ask, and evidently does not desire, to have the question submitted to the jury, it cannot afterward claim that the question was one of fact which should have been so submitted (Vt.) Kilpatrick v. Grand Trunk Ry. Co., 887.

TROVER AND CONVERSION.

TROVER—Measure of Damages.—In trover to recover for the mining and conversion of coal on the land of another, where neither the trespass nor the conversion is willful or intentional, the measure of damages is the value of the coal as it lay in the mine immediately after its severance from the realty, with no deduction for the value of the defendant's labor in effecting the severance. (Ala.) Ivy Coal etc. Co. v. Alabama Coal etc. Co., 46.

TRUST DEEDS.

See Trusts.

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ratification of acts done by agents, 616.

sales made by delegation of authority of, are void, 615.

TRUSTS.

1. TRUST DEEDS—Misdescribing Notes Secured Thereby.—A trustee's sale will not be declared void because the deed under which it was made misdescribed the note in respect to its date, time of payment, and times of payment of interest coupons, where the evidence showed that but one note was executed by the grantor of the trust deed to the beneficiary named therein. It is not necessary in such a case that the trust conveyance be reformed by a decree in equity before the trustee can exercise the power conferred. (Tex.) Thompson v. Cobb, 820.

2. TRUSTEES' SALES—Days on Which may be Made.—A trust deed to secure the payment of a debt authorizing the trustees, on default, to make sale within lawful hours, does not refer to the

statute prescribing the days on which execution sales may be made. Hence a sale thereunder cannot be held invalid because made on a day not authorized for execution sales. The provision must be construed merely as prohibiting the making of a sale at such an unusual or unreasonable hour of the day as might cause a sacrifice of the property. (Tex.) *Thompson v. Cobb*, 820.

3. TRUSTEES' SALES—Statutes Respecting are not Retroactive.—A statute prescribing the hours or days on which trustees' sales must be made does not apply to sales under trust deeds executed prior to the enactment. Such a statute cannot be applied to pre-existing deeds without impairing the obligation of the contract. (Tex.) *Thompson v. Cobb*, 820.

4. GIFT to Mother and Children, When Vests in Her Alone.—Under a conveyance to T. in trust for Susanna H. to hold upon a trust to permit her to occupy and enjoy the lands conveyed, and the rents, issues and profits thereof to take for herself and her children, and under a conveyance to have and to hold for the benefit of said Susanna and her children, and to permit her to occupy the land and use its rents and profits for the support and maintenance of herself and family, she takes an estate in fee in which her children have no interest. They are mentioned only to show the motive of the gift. (Va.) *Tyack v. Berkeley*, 963.

5. INFANT—Right to Maintain Out of Trust Fund.—A trustee cannot apply any part of the infant's estate to its maintenance without an order of court, unless the property has been given to the infant with a direction for its maintenance (Va.) *National Valley Bank v. Hancock*, 933.

6. SPENDTHRIFT TRUST—Discretion of Trustee, When does not Prevent Creditors from Reaching Funds of.—Where property is the subject of a spendthrift trust, the fact that a trustee has a discretion to apply so much of the income as may be necessary for the support of the beneficiary and for other purposes does not remove the funds from a bill for the benefit of creditors, if the trustee has no right to exclude the beneficiary from the benefit of the trust. (Va.) *Hutchinson v. Maxwell*, 944.

7. SPENDTHRIFT TRUST.—If property is given to be held in trust for the benefit of the beneficiary and to pay the income to him from time to time, with a condition that it shall not be subject to execution, this condition is void, if the statutes of the state declare that estates of every kind held or possessed in trust shall be subject to the debts and charges of the persons to whose use and benefit they are so held. (Va.) *Hutchinson v. Maxwell*, 944.

8. SPENDTHRIFT TRUST—Interest of the Beneficiary, When Subject to Creditors' Bills.—When a deed of gift conveys property to be held in trust as follows: (1) Certain horses for the use and benefit of the cestui que trust, with power in the trustees to sell and dispose of the same in accordance with and for the purposes of the trust, and (2) certain real property with power, out of the rents and profits, to apply them in the discretion of the trustees to the comfortable support and maintenance of the beneficiary, paying, from time to time or from week to week, only so much as may seem proper, and, as to any residue not expended for such purpose, that the trustee should invest it along with the capital or principal sum, and upon the death of the beneficiary, that the property remaining shall go to such person as he may appoint, and on default of the appointment, to his heirs at law, his creditors may by suit in equity reach and compel the payment to them of any sum which he could have

claimed should be applied to his benefit, though the deed creating the trust declares that it shall not be subjected to the demands of creditors. (Va.) *Hutchinson v. Maxwell*, 944.

9. SPENDTHRIFT TRUSTS—Validity of and When Created.—A devise or bequest of property upon the trust or confidence that the trustee will, during the life of the cestui que trust, pay the income as it accrues, and not by way of anticipation, to him, for the support of himself and his family, without any power on his part to charge, encumber, or anticipate such income, creates a spendthrift trust which is valid, and his creditors cannot reach his income or interest. (Md.) *Jackson Square Loan etc. Assn. v. Bartlett*, 416.

10. TRUST FUNDS—Creditors of Trustee, When may Object to Restoration of.—If one to whom trust property has been devised for the support and maintenance of his wife and children used the income for such support, though himself able to support them out of his own means, he will not, as against his creditors, be subsequently allowed to expend upon the property a sum equal to that which he has so used, not for the protection of the trust from loss, but to augment it by the capitalizing of the rents derived from it. (Va.) *National Valley Bank v. Hancock*, 933.

11. TRUSTS.—The Statute of Limitations begins to run against the right of an heir to enforce a constructive trust in favor of his ancestor at the same time that it begins to run against the ancestor. (Ala.) *Lide v. Park*, 17.

12. TRUSTS—Limitations.—The right to enforce a constructive trust is barred in two years, unless there are special circumstances justifying greater delay. A delay of twenty years in beginning the action constitutes gross laches. (Ala.) *Lide v. Park*, 17.

VENDOR AND VENDEE.

FRAUD—Vendor and Purchaser.—In the absence of peculiar circumstances calling for disclosures, as where some confidential or fiduciary relation exists between the parties, a purchaser, though having superior judgment of values, does not commit fraud merely by purchasing without disclosing his knowledge of value. (Ala.) *Pratt Land etc. Co v. McClain*, 85.

See *Frauds, Statute of*, 4-5; *Insurance*, 12, 13.

VENUE.

CHANGE OF VENUE.—The Jurisdiction of a Court taking a cause by change of venue is precisely the same as would have obtained in the court from which the venue is changed. (Kan.) *Hazen v. Webb*, 276.

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VICE-PRINCIPAL.

See *Master and Servant*, 12-15.

WATERS AND WATERCOURSES.

1. WATER—Privity Between Company and Land Owners.—Where claimants of water rights organize a corporation for the

purpose of constructing and managing a ditch to divert and carry such water, so that it may reach and be used on their lands, there is such privity created between the corporation and such claimants that it may defend on their behalf and assert such defenses as might be made by them. (Or.) Oregon Construction Co. v. Allen Ditch Co., 701.

2. **WATER.**—An Adverse Holding of Land and of an Easement Constituting the Use of Water are exactly parallel, so far as the similarity of the property will admit. (Or.) Oregon Construction Co. v. Allen Ditch Co., 701.

3. **WATER.**—An Adverse Holding of Water is not Interrupted by the fact that a riparian owner objects to taking it out of the river, if no attention is paid to his objection, and its use continues as before. (Or.) Oregon Construction Co. v. Allen Ditch Co., 701.

4. **WATER.**—Loss of Riparian Owner's Right to by Prescription.—By the appropriation and use of water, the right of a riparian owner to have it flow in the stream undiminished in quantity may be lost. (Or.) Oregon Construction Co. v. Allen Ditch Co., 701.

5. **WATER.**—Prescriptive Right to—From What Date Statute in Favor of Commences.—If there is an actual diversion of water, followed within a reasonable time by application and actual use, this is sufficient to set the statute of limitations in motion as of the date of the original appropriation or diversion (Or.) Oregon Construction Co. v. Allen Ditch Co., 701.

6. **WATER.**—Prescriptive Right to the Use of—Statute of Limitations—When Commences to Run.—Though a statutory appropriation is not necessary to prescription, it has, for the one who seeks to acquire by prescription, this advantage: it gives to the prior claimant notice that the user is adverse, and under claim of right, and sets the statute of limitations in motion. (Or.) Oregon Construction Co. v. Allen Ditch Co., 701.

7. **WATER.**—Prescriptive Title.—The Adverse Use of Water is not Interrupted by the building of a ditch by other claimants through which the water is permitted to flow for a time, if the first claimants do not recognize any rights of the builders of the second ditch and take and use the water in defiance of their claims. (Or.) Oregon Construction Co. v. Allen Ditch Co., 701.

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WILLS.

GIFT to Mother and Children, When Vests All with an Estate. A bequest to testator's "wife and our sweet little children" creates a joint estate in the mother and children. (Va.) *Fitzpatrick v. Fitzpatrick*, 976.

See Perpetuities.

WITNESSES.

1. WITNESS—Disqualification of for Interest.—A member of a beneficial association is interested in the result of a suit to recover from it an assessment of a benefit certificate, and is therefore disqualified from testifying against a plaintiff suing as administrator under a statute prohibiting every person from testifying in a suit

against an administrator who is interested in the result of the suit. (Ill.) *Cronin v. Supreme Council*, 127.

2. **WITNESS—Impeaching.**—Whether or not, on a trial for murder, a witness is sufficiently impeached by the evidence offered for that purpose is a question for the jury. (Ill.) *Carle v. People*, 208.

3. **JURY TRIAL—Instructions Concerning Witnesses Testifying in a Prosecution for Rape.**—In a prosecution for rape in having carnal knowledge of a girl less than sixteen years of age with her consent, it is error to instruct the jury that the experience of courts warrants them to scan with caution and view with suspicion the testimony of abandoned women, and that the conduct of such women is often incomprehensible when tested by the standard applied to the generality of mankind, and that if any such has testified, the jury should be cautious in relying upon her evidence. (Ohio) *State v. Tuttle*, 689.

4. **JURY TRIAL—Instructions Stating the Experience of the Court Respecting the Credibility of Witness.**—Courts may not impose their own experience on the jury in determining the credibility of witnesses. (Ohio) *State v. Tuttle*, 689.

See Criminal Law, 5-9.

WRIT OF ASSISTANCE.

See Assistance, Writ of.

Nota.

Writs of Assistance. See Assistance.

